ANNOTATIONS INCLUDE 174 N. C.

NORTH CAROLINA REPORTS

VOL. 122

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1898

REPORTED BY
ROBERT T. GRAY

ANNOTATED BY
WALTER CLARK
(2 ANNO. ED.)

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FEBRUARY TERM, 1898

W. B. SANDERLIN v. E. W. SANDERLIN ET AL.

(Decided 22 February, 1898.)

Married Woman—Incapacity of Married Woman to Contract Without Written Assent of Husband.

1. A married woman is incapable of making a contract affecting her separate estate except in the cases specifically excepted in section 1826 of The Code and in those mentioned in sections 1828, 1831, 1832, and 1836 of The Code, unless by the written assent of her husband.
2. Except in the cases mentioned in sections 1826, 1828, 1831, 1832, and 1836 of The Code, a married woman can make no contract for which her separate estate will be liable, even with the written assent of her husband, unless she expressly or by necessary implication charges her separate estate with the payment of the obligation.
3. Where a married woman, without the written consent of her husband, employed, at an agreed salary, an overseer for her farm (her separate estate), upon the income from which she and her family were not dependent, no action will lie against the wife for such salary.

APPEAL from *Bryan, J.*, at Spring Term, 1897, of CAMDEN, on complaint and demurrer, the tenor of which is set out in the opinion of the Court. The demurrer was sustained and plaintiff appealed. (2)

J. H. Sawyer and L. L. Smith for plaintiff (appellant).
E. F. Aydlett for defendant.

DOUGLAS, J. This is an action brought to recover a balance alleged to be due to the plaintiff from the *feme* defendant, E. W. Sanderlin, who is the wife of the co-defendant, G. W. Sanderlin. The complaint alleges among other things that the *feme* defendant employed the plaintiff at a salary of $400 per annum as overseer upon a farm which was her separate property, and that upon a settlement made between the plaintiff and G. W. Sanderlin, as agent for his wife, a balance was found to be due the plaintiff for which he had brought this action. Upon the cause coming on to be heard, the *feme* defendant demurred to the complaint, for that the complaint did not state facts sufficient to constitute a cause of action. The Court sustained the demurrer and rendered judgment dismissing the action. In this we see no error.

Section 1826 of The Code is as follows: "No woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of her family, or such as may be necessary in order to pay her debts existing before marriage, without the *written* consent of her husband, unless she be a free trader as hereinafter allowed." This was the act of 1871-72, ch. 193, sec. 17.

At common law the contract of a married woman was void, but it was held in equity that she might have an estate settled to her separate
(3) use, and, that although she had no power to bind herself personally, she might with the concurrence of the trustee specifically charge her separate estate, and the courts of equity would enforce the charge against the property. But her contract, in order to create a charge must refer expressly, or by *necessary* implication, to the separate estate as a means of payment, this being in the nature of an appointment or appropriation. *Knox v. Jordan,* 58 N. C., 175; *Frazier v. Brownlow,* 38 N. C., 237. Since the adoption of the Constitution of 1868, she has or can have the legal as well as the equitable estate, but this of itself does not give her the unrestricted disposition of her property. Its only effect was to do away with the necessary concurrence of the trustee by vesting in her the legal title. Her common law disabilities still continued. The act of 1871-72, now sec. 1826 of The Code, is restrictive, and not enabling. Its effect is to require the written consent of the husband, instead of the trustee, in all cases not specifically excepted. This consent of the husband does not give validity to all contracts, but simply to such as before the statute she might have made without his consent. *Pippen v. Wesson,* 74 N. C., 437; *Huntley v. Whitner,* 77 N. C., 392; *Arrington v. Bell,* 94 N. C., 247; *Rountree v. Gay,* 74 N. C., 447; *Hall v. Short,* 81 N. C., 273; *Dougherty v. Sprinkle,* 88 N. C., 300; *Flaum v. Wallace,* 103 N. C., 296, 304. In *Farthing v. Shields,* 106 N. C., 289, quoted and approved in *Wilcox v. Arnold,* 116 N. C., 708, this Court

said: "It is well settled by the uniform decisions of this Court that, except in cases mentioned in the Code, sections 1828, 1831, 1832, 1836, a *feme* covert is, at law, incapable of making any executory contract whatever. Accordingly it has been determined that The Code, section 1826, requiring the written consent of the husband in order to affect her real or personal estate, did not confer upon her (even when such written consent was given or when the liability was for her personal (4) expenses, etc.), the power to make a *legal* contract. Its object was to require the written consent of her husband in order to charge in *equity* her statutory separate estate, on the same principle which requires the consent of the trustee when the separate estate is created by deed of settlement." In the case at bar, there is no allegation that the contract was made with the written consent of the husband, and in fact it does not appear that there was any written contract at all; nor is it alleged that the wife was in any way dependent upon the income from the plantation for the necessary support of herself and family. On the contrary, it states that the husband holds a position under the government of the United States and that the wife resides with him. The case is therefore clearly distinguishable from that of *Bazemore v. Mountain,* 121 N. C., 59, which, while receiving the full approval of the Court, carries the doctrine in that direction as far as we feel at liberty to go. In the words of *Chief Justice Smith* in *Clark v. Hay,* 98 N. C., 421, 425, "A wider latitude of construction would take away the protection which the law gives to women under the disability of marriage, and imperil their estates."

The *feme* defendant is entitled to the just protection given to her by law, and the judgment is therefore

Affirmed.

FAIRCLOTH, C. J., did not sit on the hearing of this appeal.

Cited: Weathers v. Borders, 124 N. C., 619; *S. v. Robinson,* 143 N. C., 623.

(5)

H. B. MAYO v. COMMISSIONERS OF TOWN OF WASHINGTON.

(Decided 8 March, 1898.)

Injunction—Pleading—Admissions—Practice—Municipal Corporations —Necessary Expenses—Electric Light Plants—Constitutional Law.

1. Where, in an action to enjoin the erection by a city of an electric light plant, the complaint does not charge that such plant is a necessary municipal expense, an allegation to that effect in the answer is not an admission of such fact, and, even if it should be so considered, it would be an admission of a conclusion of law merely, and not a fact, and would not be binding on the court.
2. On appeal from an order granting or refusing an injunction, this Court can review the facts.
3. Where a rehearing is granted on one ground but refused on another, the original decision as to the latter is binding as a precedent.
4. Where a town has, by its charter, no express power, it has only such powers as necessarily pertain to or arise from the fact that it is a municipal corporation, and can do those things only that are indispensable to its existence and government.
5. To enable a municipal corporation to borrow money or loan its credit for any purpose, except for its necessary expenses, there must be an act of Assembly passed and ratified, as required by the Constitution, authorizing it to submit the proposition to the people, followed by an actual submission to and ratification by a majority of the qualified voters.
6. The erection and operation of an electric light plant for lighting the streets of a town is not a "necessary expense" within the meaning of section 7, Article VII of the State Constitution. (CLARK, J., dissents.)
7. A municipal corporation, having general powers only, cannot issue bonds for the erection of an electric light plant for lighting its streets without legislative authority to submit the question to its qualified voters and a ratification by a majority of such voters. (CLARK, J., dissents.)

ACTION brought at Fall Term, 1897, of BEAUFORT to enjoin the issue of bonds of the town of Washington for the erection of an electric light plant, and heard before *Brown, J.*, at Chambers in Washington, N. C., on 4 September, 1897. His Honor refused the injunction and (6) plaintiff appealed.

No counsel for plaintiff (appellant).
Chas. F. Warren for defendant.

FURCHES, J. The defendant is a municipal corporation containing a population of about 5,000 inhabitants. By its charter it was given the general powers incident to such corporations in the following words:

That the commissioners of the town of Washington (naming them) and their successors in office "be and they are hereby created a corporation and a body politic under the name and title of the Commissioners of the Town of Washington, with full power to make by-laws not inconsistent with the Constitution of the State or of the United States; to contract and be contracted with, to sue and be sued, to plead and be impleaded, by that name and title; and they are hereby invested with all other powers and rights necessary or usually appertaining to municipal corporations." Pr. Laws 1846-47, ch. 199, sec. 1.

The defendant has undertaken under this corporate power to buy, erect and operate an electric light plant for the purpose of lighting the public streets of the town of Washington at a cost of twenty thousand dollars, and to issue coupon bonds therefor, not to run more than thirty years and not to bear interest at a greater rate than 6 per cent per annum.

The plaintiff, a citizen and taxpayer of the defendant town, for himself and in behalf of other citizens and taxpayers, denies the right of the defendant to create this bonded debt for the purposes proposed, and thus to burden the citizens and taxpayers of the town of Washington.

This action is brought for the purpose of restraining and perpetually enjoining the defendant from creating such debt and from issuing said bonds. Upon the hearing below the Court refused to (7) issue the injunction prayed for and the plaintiff appealed.

The appeal was not argued orally in this Court. But we find a signed agreement of counsel asking that it be heard on printed briefs, in which it is stated that the plaintiff's counsel does not wish to file any brief, and has not done so. This is to be regretted, as the appeal involves the consideration of a most important question of constitutional law. But the well-considered brief of defendant's counsel treats the case fairly, and contends that there is but one question of law involved, and that is, the constitutionality of the proposed indebtedness and issue of bonds. And that depends upon one question of fact—*is it one of the necessary expenses of the town?*

The defendant contends that the case, as it is constituted in this Court, does not involve the question as to whether the defendant could furnish incandescent lights to its individual citizens for pay, and, if this Court should sustain the order of the Court below, that this question would still remain undecided. This seems to us a little like hedging, as we know of no electric light plant in the State that does not sell incandescent lights to private parties; and we can hardly believe that the defendant would wish to go to this expense in erecting and operating an electric light plant in the town of Washington without this means of

defraying a part of the expense of operating the same. But as the defendant contends that it does not involve that question, we will treat it in that way.

We agree with the defendant's counsel that there is but one question of law involved, and that is the power of the defendant to make
(8) the debt and issue the bonds; and this depends upon the fact whether an electric light plant, costing twenty thousand dollars, is one of the necessary expenses of the town government? The defendant contends that it is, and cites several cases as sustaining this contention.

Tucker v. Raleigh, 75 N. C., 267, is cited for two purposes: to prove that electric lights are a necessary expense, and that the admission of this fact by the defendant is binding on the Court. In our opinion it sustains neither contention. In that case, the facts admitted were that the debt sued on was money due for work, performed on the streets, cleaning out wells, and the like. The Court said these facts being admitted, we, as a matter of law, hold that the debt was for necessary expenses. In the case under consideration there is no dispute about facts. They are alleged by the plaintiff and admitted by the defendant, as they were in *Tucker v. Raleigh.* And the defendant says in its answer that these facts show, that to buy, establish and operate this electric light plant is one of the *necessary* expenses of its government. The defendant's contention cannot be sustained for two reasons, first, It is not an admission of the defendant that it is a necessary expense, but an *allegation* that it is. It is not alleged by the plaintiff, that it is a necessary expense, and not being alleged it cannot be an admission.

But if the plaintiff had admitted that this debt, if created, would be for a necessary expense, it would be an agreement as to a result, a conclusion, and not a fact, and the Court would not be bound by the admission. But, as this is an application for an injunction, this Court has the right to review the Court below on the facts. *Jones v.*
(9) *Boyd,* 80 N. C., 258.

Brodnax v. Groom, 64 N. C., 244, is cited by the defendant as sustaining his contention. But in our opinion it does not. The subject of litigation in that case was to enjoin the collection of taxes levied under a special act of the Legislature to build and repair bridges. There was no dispute but what the act authorized the levy, and the only question involved was as to whether it was constitutional or not, as the question was not submitted to a vote of the people. This fact, that it was not submitted to a vote of the people, made the constitutional question hinge upon the question as to whether building and repairing bridges was one of the necessary expenses of the county government, and the Court held that it was. This is the only analogy that *Brodnax v. Groom*

bears to the case under consideration. And it is so obvious that the building and repairing bridges on the public highways of a county is a part of the necessary public expense of a county, that we do not propose to discuss this question further.

Evans v. Commissioners, 89 N. C., 154, is also cited by the defendant. But it is placed entirely on *Brodnax v. Groom* and decides no more than that case does.

Mauldin v. City Council, 33 S. C., 1, is cited by defendant as sustaining its authority to create the debt and issue the bonds. We do not think it does, but that it sustains the contention of the plaintiff. There is no constitutional restriction in South Carolina as there is in North Carolina, and the right of the defendant in that case depended upon its powers under its charter, and the Court held that it had the power. The opinion is made largely of quotations from *Judge Dillon,* defining general corporate powers. Quoting from *Judge Dillon,* these powers are defined as follows: "Those granted in express words; (10) those necessarily or fairly implied, or incident to the powers expressly granted; those essential to the declared objects and purposes—not simply convenient, but indispensable. Any fairly reasonable doubt concerning the existence of power is resolved by the Courts against the corporation. . . . It is quite certain that such power is not essential to the declared objects and purposes of the corporation, for the city has heretofore been lighted by contract, without owning the gas fixtures." The first part of this quotation down to.....was quoted by the South Carolina Court from *Judge Dillon,* and from there down is a part of the comment of the South Carolina Court. As there was no constitutional restriction of the corporate power in South Carolina, it depended on their general corporate power to contract. They were not restricted as the defendant is. In South Carolina the power of the defendant to lend the credit of the town and to issue bonds was not restricted to the *necessary* expenses of the corporation.

In the charter of the defendant, there are no express powers. It therefore has only such powers as necessarily pertain or arise from the fact that it is a municipal corporation, and, therefore falls under the third division of Judge Dillon's definition, which he says does not mean simply "convenient, but indispensable." And "any fair reasonable doubt concerning the existence of power is resolved by the courts against the corporation." This case was called to our attention by the defendant as sustaining its position.

Lott v. Mayor, 84 Ga., 681, is cited by the defendant. This case expressly states that it does not decide any constitutional question. The case bears a very slight analogy to ours, if it has any at all. That case is where the town of Waycross contracted with a company (11)

to furnish it with a certain number of electric lights at an agreed price per annum. The action was brought to enjoin the enforcement of this contract, for the reason that it was not submitted to a vote of the people. The Court held that this did not involve any constitutional question; that, if the contract was a reasonable one and the annual rental was kept paid, the constitutional question might never arise. There is very little discussion of the case by the Court, and we do not know what the constitutional provisions of Georgia are. But the case nowhere shows that the question of *necessary* expense was presented or considered by the Court.

Crawfordsville v. Braden, 130 Ind., 149, is also cited by defendant as sustaining its contention. But we do not think it does. There are no constitutional restrictions in the State of Indiana, as there are in North Carolina. The power of the defendant in that case depended entirely upon the powers contained in its charter and the case is not put upon the ground of necessity, but upon the ground of *convenience* and *benefit.* But it may be observed that the reasoning of the Supreme Court of Indiana places the power as to waterworks and electric plants on the same footing, and we do not see how they can well be distinguished.

This is a new question in North Carolina so far as the right of a municipality to establish and operate an electric light plant is concerned, without submitting the question to the people for their approval. But it is not new in principle. We have many opinions construing sec. 7, Art. VII, of the Constitution. We also have many opinions defining the powers of municipal corporations. From these it seems that we ought to be able to arrive at a proper conclusion as
(12) to the law governing this case.

There is no special act of the Legislature authorizing the levy of a tax, as there was in *Brodnax v. Groom.* Nor is there any express power contained in the charter to do so. So, the defendant's right to erect and operate an electric plant and to create a debt and issue bonds, depends upon the general powers vested in the defendant as a municipal corporation.

Every municipality in this State is subject to the provisions of sec. 7, Art. VII, of the Constitution, and it does not matter what powers it has under its charter, if they are in conflict with the provision of the Constitution, they are void. To enable a municipal corporation to borrow money or to loan its credit for any purpose, except for the necessary expenses of the corporation, there must be an act of Assembly passed and ratified as required by the Constitution authorizing it to submit the proposition to the people. *Bank v. Commissioners,* 119 N. C., 214; *Commissioners v. Snuggs,* 121 N. C., 394, and the question must then be submitted to and ratified by a majority of qualified voters thereof. It

requires both the authority to submit the proposition, and the ratification by a majority of the qualified voters to warrant the creation of the debt and the issue of the bonds. *R. R. v. Commissioners,* 116 N. C., 563. If the people want it, why not get it in this constitutional way?

This brings us to the final consideration of the question as to whether the purchase of an electric light plant for the town of Washington at the price of $20,000, simply to light its streets, is one of the *necessary* expenses pertaining to its government, and it seems to us that the authorities cited by defendant's counsel show that it is not.

We have seen that the power to establish electric light plants (13) and waterworks plants stand on substantially the same footing. If we consider this to be so (and we are not able to see why they do not) we have at least one direct decision which holds that it is not one of the necessary expenses of a city government. *Charlotte v. Shepard,* 120 N. C., 411. In the defendant's brief this case is treated as *obiter.* But that is not so. It was claimed on the argument in *Charlotte v. Shepard,* that this was one of the necessary expenses of the corporation, and that the plaintiff had the power, without any act of the Legislature or submission of the question to the people, to make this debt and to issue bonds. And this is the second ground of error assigned in the plaintiff's petition for a rehearing. While a rehearing was granted as to the other assignments of error, it was denied as to this ground. This decision was made by a full bench and a unanimous Court, and is entitled to the same weight, as a precedent, that any other opinion of this Court is entitled to.

While we have no case before this Court as to the power to erect and operate an electric light plant by a municipality, we find that it has been presented in other States, and considered and decided upon the very point involved in this case, that is whether it is one of the necessary expenses of the corporate government. In *Spaulding v. Peabody,* 153 Mass., 129, decided in 1892, we find a very full and satisfactory discussion of the subject. There, the town of Peabody proposed to erect an electric plant at a cost of $30,000, to light the streets, and for other purposes. The Court discussed both aspects of the question, and held that the defendant had no power to incur the expense of erecting such plant for the purpose of lighting streets or for other purposes. The opinion is delivered by *Chief Justice Field* and concurred in by all the judges. In the discussion of the case the Court say that "it has been uniformly (14) held that cities and towns are under no obligation to light their streets for the purpose of making them safe and convenient for travel," citing *Sparhawk v. Salem,* 1 Allen, 30; *Tyson v. Booth,* 100 Mass., 258; *Randall v. R. R.,* 106 Mass., 276. This opinion further says "that all the power a municipal corporation has to tax is derived from the Legis-

lature by express grant or necessary implication" and where the Legislature has the right to grant the necessary powers, the implied powers are strictly construed." "That the exceptions to this rule are few, and being such as a town clock, hay scales, pumps, reservoirs, etc. These obtain by reason of ancient custom, and are not to be extended." The opinion further states that it was contended "that, if the town of Peabody could erect street lamps, it could maintain them by any appropriate means, and that to furnish them by means of such electric plant was one of the proper means of doing so." The rule as laid down by the Massachusetts Court is "that where there is any considerable amount of money to be expended, it must be under legislative authority." This is, as we interpret it, any unusually large amount for that municipality. And the Court say that "it cannot be said that the erection of such works as are contemplated . . . in this case, is in any strict sense necessary in order to enable the town of Peabody to light its streets." This case decides the very point upon which our case turns—that it is not a *necessary* expense of a corporation to light its streets with electric lights, and therefore not *necessary* to incur the debt of $20,000, and to issue the bonds.

To draw the line of demarcation between what are and what are not *necessary* expenses to be borne by a municipal corporation,
(15) would be attended with difficulty. It is not necessary that we should attempt to do so in this case, and we do not attempt to draw the line. There are some things clearly within the line of power and it is the duty of the corporate authorities to provide for them—such as courthouses and jails, as in *Vaughn v. Commissioners,* 117 N. C., 429, or public highways and public bridges, as in *Brodnax v. Groom, supra.*

There are others that are clearly outside the line of necessary expenses, such as appropriations to build railroads, cotton factories, to build and operate electric street car lines, etc. These the municipality would have no right to pledge the faith and credit of a town or city to build, without first obtaining authority from the Legislature, and from the popular vote.

The erection of electric light plants and waterworks plants may not be so far outside the line of power as some of the things mentioned. But we are of the decided opinion that they are outside.

The claim of power upon the plea of necessity must stop somewhere. The restrictions contained in the Constitution were not intended to be meaningless. If they had not been for a purpose, they would not have been put into the Constitution. In our opinion this provision of the Constitution was wisely put into that instrument for a most beneficent purpose, and it must be judicially sustained and enforced by the Courts.

Suppose we hold it to be within the corporate power to buy and operate electric light plants on a pledging of the faith and credit of the town; how long will it be until it will be claimed that electric street cars are *necessary* for the business, progress and convenience of the town? And, if we grant this claim of *necessity,* how will we resist that? What grounds have we to distinguish one from the other? If (16) we sustain the plea of necessity for street cars, what is there to prevent the same claim of *necessity* to the growth, prosperity and convenience of the people of a town, to which there is no railroad, from pledging the faith and credit of the town to build a railroad? Especially so, if we allow the claim or admission of the corporate authorities to settle the question of necessity, as is claimed that they should do in this case. It is heard every day, in towns of much size, that a street railway is necessary to the growth and prosperity of the town; and, in towns that have no railroad, to hear it said 'that a railroad to this place is a *necessity.*' And it is contended for the defendant in this case that, if such town should make a subscription and issue bonds, or should propose to do so, and when suits should be brought to enjoin it from so doing, if the town alleged it was a *necessary* expense, it is to be taken as conclusive evidence that such street car or railroad is one of the necessary expenses of the municipality, and that the Court is bound by this claim or admission. If this be so, every town in the State would soon have railroads running to it, and a line of electric street cars, based upon the pledged faith and credit of the town. This cannot be the law.

Smith v. Goldsboro, 121 N. C., 350, was cited for defendant, but it is not in point. The question of establishing electric lights was not involved in that case. The only question involved was the right of the city to use the streets, in a territory lately added to the city by extending its corporate boundary. It was to give the same benefits and the same protection to the citizens of the new territory that the citizens of the old territory had.

The Constitution must be observed and enforced. There is error. The judgment for the Court below is reversed and the injunction as prayed for must be granted. (17)

Reversed.

CLARK, J., dissenting. It would seem that these propositions are established and settled in North Carolina: (1) That it is the duty of the town commissioners to light the town (*Smith v. Goldsboro,* 121 N. C., 350), and hence it follows that the cost of such lighting is a necessary expense; (2) That it is "for the Courts to determine what class of expenditures fall within the definition of necessary expenses of

a municipal corporation," and that when an expenditure falls within that class, the Courts "have no authority to control the exercise of the discretionary power vested in the commissioners" either as to the manner of exercising that discretion or the reasonable limit of cost. *Vaughan v. Commissioners,* 117 N. C., 429, citing *Brodnax v. Groom,* 64 N. C., 244, and *Satterthwaite v. Commissioners,* 76 N. C., 153; *Evans v. Commissioners,* 89 N. C., 154; *Cromartie v. Commissioners,* 87 N. C., 134; (3) That for such "necessary expenses" the commissioners are not prohibited by section 7, Art. VII, from creating a debt without the approval of a majority of the qualified voters. *Tucker v. Raleigh,* 75 N. C., 267; *Wilson v. Charlotte,* 74 N. C., 748.

The Code, section 3800, authorizes town commissioners, *inter alia,* to "lay taxes for *municipal purposes* on all persons, property, privileges and subjects within the corporate limits, which are liable to taxation for State and county purposes," and section 3821 recognizes that municipal corporations may contract debts for such purposes and provides for their payment.

On 2 August, 1897, the commissioners of the town of Washington adopted the following order: "Whereas the present method of
(18) illuminating the town of Washington by the use of gasoline lamps is entirely inadequate, and does not sufficiently and properly light the said town, and subjects the citizens and others to great inconvenience, as well as to danger and risk, and also involves great expense to the taxpayers of the town, considering the character of the light furnished; and whereas, the population of the said town is now more than five thousand, and is rapidly increasing, and the lack of proper and sufficient light is detrimental to the business of the town, and an obstacle to its advancement and progress; and whereas, the board of commissioners of the town of Washington, after a careful consideration and examination of the different methods and systems of lighting the town, are of opinion that the best, most effective and cheapest method is an electric light plant, to be purchased, owned and operated by the corporate authorities of the town of Washington, and the said commissioners declare that the same is a public necessity. Therefore be it

"*Resolved,* That an electric light plant be purchased by the town of Washington for the purpose of illuminating said town, and erected, established and operated therein by the corporate authorities of the said town, at a cost for the purchase and erection of said plant not exceeding $20,000. That to pay for the purchase and erection of the said electric plant, bonds of the town of Washington shall be issued and sold to the best advantage. That the said bonds shall bear a rate of interest not exceeding six per centum per annum, payable annually, or

semi-annually, as may be agreed with the purchasers. That the said bonds shall be in denominations of $500 and $1,000, and shall run for a period not exceeding thirty years. That the said bonds shall be executed by the mayor of the town of Washington and counter- (19) signed by the clerk of the board of commissioners, and the corporate seal thereto affixed."

This was an action by a taxpayer to restrain the creation of this debt and the issuance of the bonds. The judge below, himself a citizen of the town of Washington, and acquainted with its needs, refused the injunction and the plaintiff appealed.

There is no statute specifically granting to the defendant the power to purchase and operate an electric light plant, and issue bonds therefor, and the proposition to purchase said plant and issue bonds has never been submitted to a vote of the qualified electors of said town.

The Constitution, Art. VII, sec. 7, provides: "No county, city, town, or other municipal corporation, shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any of the officers of the same, *except for the necessary expenses thereof,* unless by a vote of the majority of the qualified voters therein."

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident* to the declared powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable." Dillon Mun. Corp., sec. 89 (4 Ed.). As the proposition to contract this debt has never been submitted to a vote of the qualified electors of the town and there is no specific grant of power to contract it, the question arises, is it for a "necessary expense" of the town within the meaning of the Constitution, Art. VII, sec. 7? This is the sole question to be de- (20) cided. The power of the commissioners of the town to manufacture gas or electricity, to sell the same to the citizens, is not presented in the case and does not arise upon the facts. The resolution adopted by the defendant recites that "the present method of illuminating the town of Washington by the use of gasoline lamps is entirely inadequate, and does not sufficiently and properly light the said town, and subjects the citizens and others to great inconvenience, as well as to danger and risk, and also involves great expense to the taxpayers of the town, considering the character of the light furnished." It further recites that "after a careful consideration and examination of the different methods and systems of *lighting the town,* the commissioners are of the opinion that the best, most effective and cheapest method is an electric plant to be purchased, owned and operated by the corporate

authorities of the town of Washington." The defendants then resolved, "That an electric light plant be purchased by the town of Washington *for the purpose of illuminating the said town.*" The question presented is the power of the defendants to contract a debt to purchase an electric light plant for the purpose of lighting public buildings and streets of the said town—a strictly public purpose.

Art. VII, sec. 7, of the Constitution, in reference to the power of the counties to contract debt, pledge faith, loan credit, or levy and collect taxes for "necessary expenses" has been frequently construed by this Court. There would seem to be no distinction between counties and towns, as the section of the Constitution applies to both alike.

There would be a difference as to what would be "necessary ex-
(21) penses" of each, due to the different purposes and objects for which the two classes of corporations are created.

Repairing and building bridges are necessary expenses of a county. *Brodnax v. Groom,* 64 N. C., 244; *Satterthwaite v. Commissioners,* 76 N. C., 153; *Evans v. Commissioners, supra; McKethan v. Commissioners,* 92 N. C., 243. Building a courthouse is a necessary expense. *Halcombe v. Commissioners,* 89 N. C., 346; *Vaughan v. Commissioners,* 117 N. C., 429. In *Smith v. New Bern,* 70 N. C., 14, in the able opinion of *Bynum, J.,* it is held, citing *Milne v. Davidson,* 5 La., 410, that the city may without express statute erect public hospitals, and, citing *Livingston v. Pippen,* 31 Ala., 542, and *Rorie v. Cabot,* 28 Ga., 50, bore an artesian well. In *McLin v. New Bern,* 70 N. C., 12, it is held that the town has inherent power, or by reasonable implication from its general power, to build a jail or guardhouse as a public necessity. In *Wilson v. Charlotte, supra, Rodman, J.,* says, "It would be difficult or impossible to draw a precise line between what are and what are not the necessary expenses of a city." He likens it roughly to the inquiry as to what are the necessaries which may be charged against an infant, a question whose determination largely depends upon his means, condition in life and surroundings. While the analogy is not exact, it is sufficiently so.

Nothing can be more conducive to the comfort, convenience and safety of the dwellers in cities and towns than well-lighted streets, market halls and other public buildings, or more effective to prevent or detect vice and crime. If it be conceded that it is the duty of a city or town to light its streets and public buildings at all, then why not provide the best method of illumination it can afford. If the
(22) defendants could light the town with kerosene lamps or with gasoline and pay the expenses from its taxes, then why could they not provide better light by the use of gas or electricity? It would be merely a difference in the quality of the light furnished, a difference

in degree and not in principle. In *Gas Co. v. Raleigh,* 75 N. C., 274, it was assumed without argument that the purchase of gas for public purposes by the city was a necessary expense, and that the city was bound to pay a debt contracted therefor. "So far as lighting streets, alleys, and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and the financial condition of the corporation. The Court further says, that, the municipal authorities thus possessing the power to light the streets, the power to furnish or procure electricity is carried with the principal power as an auxiliary." Croswell Electricity, section 190, citing *Crawfordsville v. Braden,* 130 Ind., 149; *Mauldin v. Greenville,* 33 S. C., 1; *Lott v. Wayeross,* 84 Ga., 681.

There can be no doubt that the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants and as a check upon immorality. This is forcibly set forth by *Judge Dillon* in his work on Municipal Corporations, as follows: "In a most important particular, however, Rome suffers by comparsion with modern cities. Its public places were *not lighted.* All business closed with day light. The streets at night were dangerous. Property (23) was insecure. No attempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lanterns and torches. . . .

No more forcible illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macaulay, of the state of a great city buried in the darkness of night; and they show how clearly the power to provide for this is *essentially* and *peculiarly* one pertaining to municipal rule and regulation. Nor are these studies, and the facts that they reveal, without practical value to the jurist. They demonstrate that a large and dense collection of human beings occupying a limited area have needs peculiar to themselves, which create the necessity for municipal or local government and regulation, and this, in its turn, the necessity for corporate organization. The body thus organized, as it has duties, so it acquires rights peculiar to itself as distinguished from the nation or State at large." Dillon, *supra* (4 Ed.), section 3a.

Upon this paragraph the Supreme Court of Indiana, in *Crawfordsville v. Braden,* 130 Ind., at p. 157 (14 L. R. A., 268), says: "While *Judge Dillon's* remarks have, of course, special reference to great cities, the difference in that respect between the greater and minor municipal

corporations is a difference in degree and not in kind. Wherever men herd together in villages, towns or cities, will be found more or less of the lawless or vicious; and crime and vice are plants which flourish best in the darkness. So far as lighting the streets, alleys and public places of a municipal corporation is concerned, independently of any statutory power, the municipal authorities have inherent power
(24) to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may in their discretion provide that form of light which is best suited to the wants and financial condition of the corporation." "It is well settled that the discretion of municipal corporations within the sphere of their powers is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused to the oppression of the citizen (citing *Valparaiso v. Gardner,* 97 Ind., 1, 15 A. & E. Enc., 1040). We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light. The only authority cited which holds a contrary doctrine is *Spaulding v. Inhabitants,* 153 Mass., 129. We are, however, unable to recognize the validity of the reasoning in that case. We are unable to see the analogy between the city of Boston, because authorized to light its streets, engaging in whale fishing to procure oil for that purpose or the other supposed cases, and the generation and supply of electricity. Electricity is not a commodity which can be bought in the markets and transported from place to place like oil."

To the same purport of this able opinion are many others, among them, *Linn v. Chambersburg,* 160 Pa., 511, 25 L. R. A., 217 (in which it is said that "it is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age"); *Light Co. v. Jacksonville* (Fla.), 30 L. R. A., 540; *Attorney-General v. Toledo,* 48 Ohio St., 112, 11 L. R. A., 729; *Hequem-*
(25) *burg v. Dunkirk,* 49 Hun., 550; *Smith v. Nashville,* 88 Tenn., 464; *Mitchell v. Negaunee,* 113 Mich., 359; *Publishing Co. Assn. v. The Mayor,* 152 N. Y., 257. In some of these cases there was an act of the Legislature authorizing the purchase or erection of the electric plant, and the last is noteworthy as sustaining an act authorizing the city to construct a street railroad at its own expense, but all of them are in point as recognizing that these purposes are "city purposes," and within the scope of duties for which cities and towns are incorporated.

In this Court at last term it was said by a unanimous Court in *Smith v. Goldsboro,* 121 N. C., 350, at p. 352, that "The city provides for its citizens electric lights and water, *as it is its duty to do* . . . ; the defendant has taken possession of said streets in order that it may perform its duty to its citizens and furnish water and lights to the owners of said lots." And at bottom of p. 353, it is said that "having been taken within the corporate limits of the city of Goldsboro, they are subject to all the burdens and entitled to all the benefits of citizenship. Paying city taxes, they have asked for two of the greatest advantages of the city, water and lights, and this the city was preparing to give them but for the interference of the plaintiff. Such interference is without warrant in law and cannot be sustained upon any principle of equity." This decision is abreast of the times and is simply a recognition of the fact that cities and towns are not incorporated for the primary purposes of government, the protection of person and property, since that could be done by the justices of the peace and constables, as in the country districts, without the expensive machinery of municipal government, but municipalities are in fact not so much for govern- (26) mental purposes as for business needs, such as paving, lights, security against fire, water, sewerage, and the like, which are the necessities of a dense population, and which can be furnished more cheaply and effectively by the representatives of the municipality chosen to administer its common interests, than by subjecting each citizen to the unrestricted demands of organizations of private capital. Lighting being one of those necessities, whether the town shall furnish kerosene, gasoline, gas or electric lights, and if either of the latter, whether it shall procure the lights by paying exorbitant prices to combinations of private capital, or shall procure them at about one-third the cost (as is common knowledge) by the city owning and operating the plants, are matters which must be left to the discretion of the local legislature, elected by the people of the municipality for these very purposes, for the small criminal jurisdiction vested in the mayor as to the violation of town ordinances is purely incidental. In *Brodnax v. Groom,* 64 N. C., 244, *Pearson, C. J.,* said that the discretion of local commissioners over expenditures within the range of what are necessary expenses, could not be supervised by this Court without "erecting a despotism of five men." The same is held in *Wilson v. Charlotte,* 74 N. C., 748, at bottom of p. 759, and reaffirmed in *Satterthwaite v. Beaufort,* 76 N. C., 153. While electric lighting might not have been a necessity years ago, it has become so by general adoption, today, and while it would not be a necessity for a smaller, poorer and less progressive town, even today, it may be indispensable for a larger and wealthier town rapidly increasing in population, and the local board of commis-

sioners may be entrusted with passing upon that question; and
(27) when, as here, their finding that electric lighting is a necessity it is not gainsaid in the pleadings, this Court cannot as a matter of law reverse the judgment below, and hold that it is not a necessity.

In *Charlotte v. Shepard,* 120 N. C., 411, there is a dictum (since it was not necessary to the decision of the case), that "the furnishing water to the people of a city is not in itself a necessary expense in the sense that the city must own and operate a system of waterworks," but there is a wide distinction between that case and this in two essentials at least: there was no finding of the commissioners, asquiesced in by the other party, that as a matter of fact it was a necessity that the city should own waterworks, and secondly, the reference in that case was to the city's owning waterworks, for the purpose of "furnishing water to the people," *i. e.,* to individuals, whereas in the present case the commissioners are establishing the electric light plant for the city itself to light its streets, public buildings and squares, as they are compelled to do. There is no question of furnishing lights to the people as individuals, though if the city plant is established for city purposes, we know of nothing which will forbid its furnishing private citizens. But waterworks are comparatively little used by the city as a corporation except for protection against fire, and it is principally for the purpose of furnishing water to individuals at a moderate rate that municipalities own their own waterworks, and it may be argued, therefore, that waterworks, unlike lighting, are not a necessity, and hence cannot be established until the question of incurring a debt therefor is submitted to the people.

It would seem, however, that city ownership of water as well as lighting plants is a matter vested in the discretion of the city govern-
(28) ment. Light and water, sewerage and sanitation, paving and fire protection are necessities, and are the chief objects to be obtained by municipal organization. Transportation is not necessary, but the right to own and operate street car lines can be conferred on municipalities by legislative action.

There is an unmistakable trend the world over towards municipal ownership of lighting, waterworks, and even (to some extent) street railways. *Judge Dillon* refers to this, and intimates that it is commended by wisdom and sound policy. 2 Dillon, *supra,* section 691, note 1. In Germany, two-thirds of the cities own their electric lighting and car plants, and the proportion is increasing. The same is true of the other countries of continental Europe, there being a great increase in municipal ownership since *Judge Dillon* wrote. In Great Britain and Ireland, 203 cities and towns, being in fact every city of any importance,

save five, own their lighting plants not only for their own corporate uses but for furnishing light to citizens, and the average price of gas furnished to the citizen, with a profit, too, to the municipalities, is fifty-four cents per thousand. In this country, too, a large number of cities own their gas plants. Our neighboring capital, Richmond, Va., which is one of them, has owned its gas plant since 1852, and furnishes gas at $1 per thousand, and shows a large annual profit. A large and increasing number of cities and towns (already over 200) in the United States own their electric lighting plants with the result that the cost to the municipalities, from official reports, is less than one-third of the average cost in cities buying their lights from private companies.

The number of cities in this country owning their waterworks is 1,690 (over one-half) out of a total of 3,196 having water supply, and municipal ownership is steadily increasing. In the fifty (29) largest cities in the Union, nineteen have recently changed from private ownership to municipal ownership, leaving only nine of the fifty which are still dependent for their water supply upon private companies. At the beginning of this century, only seventeen towns in the United States were supplied by waterworks, and only one of them owned its waterworks plant. In Great Britain one-third of the street railways (two-thirds excluding London) are owned by the cities themselves, with the result of lower rates and better accommodations as well as a profit to the municipalities, which have thus been enabled to lower taxation. On the continent of Europe, wherever a city does not own its street railways, they are under city control, which fixes their rates, especially requiring a minimum rate (usually one cent or two cents at most) to be charged the working classes going to and from work, and a division of profits with the city.

New York is among the cities which own the ferries, though at present it leases them out. Thus the concept of a municipality is scarcely governmental at all, except incidentally for the enforcement of its ordinances, but it is in truth a great business agency to supply its people with the prime necessities of a crowded population, light, water, sanitation, clean and well paved streets, and protection against fire.

Indeed, one of the most fruitful causes of inequality of condition and the creation of a few enormously wealthy men at the expense of the general public, has been the great profits made by private ownership of the public franchises of furnishing light, water and transportation to large bodies of men, incorporated into cities and towns. *Judge Dillon, supra,* cites other countries in which light and water are furnished, either altogether or in a majority of cases, by the (30) municipalities. The general movement of the age in which we

live is towards the ownership and operation of these franchises by the people of towns and cities for themselves through the agency of their municipal corporations, as one of the recognized and chief purposes of town and city charters.

The point immediately before us, however, is far short of that, and is fully sustained by the authorities above cited, to wit, that the lighting of streets and public squares and buildings is a necessary expense, and that to procure such lighting the town commissioners, by reasonable implication from their general powers, and without express statutory enactment or popular vote, have a right to establish an electric light plant, just as they can build a guard-house, buy a fire engine, erect a public hospital or bore an artesian well. It would be otherwise, of course, if the corporation undertook to operate a cotton factory or some other enterprise not within the scope of its recognized duty, as lighting the town is universally held to be.

Cited: *Thrift v. Elizabeth City, post,* 34; *Charlotte v. Shepard, post,* 605; *Edgerton v. Water Co.,* 126 N. C., 97; *Glenn v. Wray, ib.,* 732; *Black v. Comrs.,* 129 N. C., 125; *Cotton Mills v. Waxhaw,* 130 N. C., 294; *Wadsworth v. Concord,* 133 N. C., 593, 600; *Wierse v Thomas,* 145 N. C., 268; *Water Co. v. Trustees,* 151 N. C., 175; *Swindell v. Belhaven,* 173 N. C., 4.

Overruled: *Fawcett v. Mt. Airy,* 134 N. C., 130.

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(31)

FRANK THRIFT v. ELIZABETH CITY.

(Decided 26 May, 1898.)

Municipal Corporation — Contraction of Debt — Unusual Tax Levy — Necessary Expenses — Water Works — Invalid Contract — Constitutional Law—Exclusive Privileges—Perpetuities.

1. The establishment, maintenance, or rental of waterworks is not a necessary municipal expense within the meaning of section 7, Article VII of the Constitution, so as to permit the levy of a tax beyond that authorized by the charter, or the incurring a debt for the purpose, without proper legislative authority and the approval of a popular vote.

2. There is no difference between making a contract binding a municipality for a long period of years, requiring the payment of a large yearly sum, and the issuing of bonds of the municipality to run a like period.

3. A contract or ordinance of a city attempting to grant any exclusive privilege for the construction of waterworks, etc., and the exclusive use of its streets, etc., for any purpose, comes within the prohibition against monop-

olies and perpetuities contained in section 31, Article I of the State Constitution, even though such grant is made as an incentive or inducement to the establishment and maintenance of works contributing to the health, comfort, or convenience of the public.

ACTION to enjoin the execution of a contract by the defendant corporation with John Orlando White for a water supply for the town of Elizabeth City, heard on complaint and answer, used as affidavit, before *Brown, J.*, at Fall Term, 1897, of PASQUOTANK. The injunction was made perpetual and defendant appealed.

Shepherd & Busbee for plaintiff.
I. M. Meekins for defendant (appellant).

DOUGLAS, J. This is an action brought to enjoin the Board of (32) Commissioners of Elizabeth City from entering into a contract with defendant White for a water supply for the town and its inhabitants for the term of thirty years.

Sections 1 and 7 of said contract are as follows:

"Section 1. Bt it ordained by the town commissioners of the town of Elizabeth City, that the exclusive privilege be and is hereby granted to the said John Orlando White, his associates or assigns, for a term of thirty years from and after the passage and approval of this ordinance, to construct and maintain waterworks within the corporate limits of the town of Elizabeth City, North Carolina, for supplying said town and its inhabitants with water for public and private uses; and to use the streets, alleys, sidewalks, public grounds, streams and bridges of said town of Elizabeth City embraced within the entire territory of the present corporate limits of the town, and all territory under their jurisdiction, and also whatever other territory and additions may at any time hereafter be annexed to said corporate limits, and become a part and portion thereof, for the purpose of placing, constructing, embedding, laying, taking up and repairing pipes, conduits, mains, buildings, machinery, hydrants and other structures, appliances and other devices, needful and requisite for the supplying, conducting and service of water to said town and its inhabitants."

"Section 7. In consideration of the advantages, conveniences and benefits which may result to said town and its inhabitants from the construction, maintenance and operation of said waterworks and of the water supply hereby secured for public and private uses, and as an incentive and inducement for the said grantee, his associates or assigns, to enter upon the construction of said waterworks, the (33) exclusive franchise and license hereby granted to and vested in the said John Orlando White, his associates or assigns, shall remain in full force and effect for the full term of thirty years from the date

of the completion of said waterworks. And the said town of Elizabeth City does hereby agree to rent of said grantee, his associates or assigns, for the use and purposes hereinafter mentioned, the seventy (70) hydrants hereinbefore mentioned for and during the term of thirty years, beginning at the time of the completion of said waterworks. . . . Said town of Elizabeth City agrees to pay the said John Orlando White, his associates or assigns, rent for the use of said seventy (70) hydrants, the sum of forty dollars each, yearly, or, for the whole seventy hydrants, the sum of $2,800 yearly, which rent shall be paid in equal semi-annual installments on or before the last day of June and December in each and every year during said term."

It is admitted that there is no express statutory authority for such contract, and no legislative authority whatever, other than the section in the town charter authorizing the levy of taxes for general purposes, not to exceed seventy-five cents on the hundred dollars valuation.

The plaintiff contends "that the ordinance in question is a contract by which the defendants pledge the faith and credit of the town within sec. 7, Art. VII of the State Constitution, and that the same is not a necessary expense within the said constitutional provision"; and that no grant of the exclusive use of the streets can be made "without express legislative authority."

The defendants contend that the rental of an adequate water supply is such a necessary expense of the ordinary city government as to
(34) require a submission to a popular vote of the inhabitants.

It is apparently admitted that the rental can be paid from the ordinary tax levy within the limit allowed by the charter.

The Court below rendered the following judgment: "The Court is of the opinion: (1) That waterworks are not a necessary expense within the meaning of the Constitution. (*Shepard v. Charlotte*). (2) That it is beyond the power of the defendants to levy an increased tax for the purposes set out in the pleadings without further legislation approved by a majority of the qualified voters. (3) That it is not within the power of the defendants to bind the corporation for thirty years rental. It is adjudged upon the pleadings that the defendant be perpetually enjoined against proceeding further in the execution of said ordinance, or accepting bond and paying out the revenues of the town under said ordinance, and from levying any tax in furtherance of, or discharge of such obligation growing out of said ordinance, or doing any of the acts or things set out in paragraph ten of the complaint."

We see no error in the judgment. It may now be taken as well settled by this Court that water and lights are not in themselves such necessary expenses of a town as to authorize an unusual levy of tax, or the incurring of a debt without proper legislative authority and the

approval of a popular vote. *Charlotte v. Shepard,* 120 N. C., 411, and *S. c.,* on rehearing at this term; *Mayo v. Commissioners, ante,* 5. In the consideration of this question we see no substantial difference between issuing bonds to run for thirty years, and the making of a binding contract for the same period requiring the town to pay a large yearly sum, which cannot be reduced, but which may be greatly en- (35) larged. In *Mayo v. Commissioners, supra,* it was held that the town of Washington could not issue, without legislative authority and popular ratification, $20,000 of bonds running thirty years and bearing not more than 6 per cent interest; and yet, it is contended that the town of Elizabeth City can, without either such authority or ratification, bind itself for the same period of time to pay an annual rental, which can never be less than 6 per cent on $46,600.

In our opinion both come equally under the same principle of public policy, and within the constitutional prohibitions.

We do not wish to be understood as being opposed to waterworks or electric lights, or any other modern conveniences that may conduce to the growth and development of our towns, or the health and comfort of their inhabitants. Nor is there any inherent objection to towns owning and operating their own waterworks and light plants, whenever it is the will of their people properly expressed under valid legislative authority. The experience of the past has shown the wisdom of the constitutional restrictions; and whether wise or not, it is our duty to enforce them whenever they apply.

There is another fatal defect in the proposed contract, and, as it is presented in the record, we feel called upon to decide it in justice to the contracting parties. It would probably be included in any new contract, and might be relied on as having received the apparent approval of our silent acquiescence. Those provisions of the ordinance granting the *exclusive* privilege to construct and maintain waterworks within the corporate limits of the town, and the *exclusive* use of its streets, alleys, sidewalks, public grounds, streams and bridges, come within the condemnation of sec. 31 of Art. I of the Constitution of this (36) State, which declares that "perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed." A monopoly need not be a perpetuity, nor is a perpetuity necessarily a monopoly; but both, existing either jointly or severally, are within the constitutional prohibition. There can be few if any monopolies more dangerous in their tendencies, and unjust and harmful in their results, than those that pertain to municipal corporations. In the present age of activity in scientific research and wonderful development in mechanical inventions and discoveries, it is highly improbable that any present system will long remain the best. Improved methods and cheaper appli-

ances will result, and yet, the town would deliberately surrender to a private individual its highest attributes of delegated sovereignty, and would place beyond its power for nearly a generation all opportunity of securing for its citizens the benefits and improvements of a progressive age.

It not only would be bound for its annual rental, which would always increase with the extension of its territory and the growth of its population; but its citizens, deprived of every chance of obtaining water from any other source, would be compelled to pay exorbitant charges, or be cut off at the will of the company. The courts might afford relief, but it is the better public policy to encourage competition instead of fostering monopolies, and thus as far as possible avoid the necessity of judicial interference.

All authorities hold that no such exclusive privilege can be granted by a municipal corporation without express legislative authority, and this of itself would settle the case at bar; but we feel compelled to go
(37) further and say that, while the point is not now directly before us, we do not wish to be understood as conceding the power of the Legislature itself to grant such exclusive privileges. In our opinion, they come directly within the meaning of monopolies, as construed in the light of our institutions, the genius of our people and the spirit of our laws. We are not inadvertent to some decisions to the contrary in other jurisdictions, but in all of them, where the power is admitted, it is strictly construed. As was said by *Chief Justice Taney,* in *Charles River Bridge v. Warren Bridge,* 11 Peters, 420, 548: "The continued existence of a government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations." In some of them, as in *Memphis v. Water Co.,* 5 Heisk., 495, 529, the error has apparently arisen from adopting the substance of *Lord Coke's* definition of a *monopoly,* as "an exclusive right granted to a few of something, which was before of common right."

Our theory of government, proceeding directly from the people and resting upon their will, is essentially different, at least in principle, from that of England; and common law maxims and definitions, framed while the judges were still under the spell of the Feudal System, must be construed by us in the light of changed conditions. Under our system of government, all rights and privileges are primarily of common right, unless their restraint becomes necessary for the public good; and municipal corporations are beginning to be considered rather in the light of public agencies.

Section 37 of Art. I of the Constitution, the Declaration of (38) Rights, declares that: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."

We do not mean to say that any citizen has a right to dig up a public street for the purpose of laying water pipes without permission from the city, as this would seriously interfere with its primary use; nor is a municipal corporation compelled to give every one that may apply, authority to establish a system of gas or waterworks, or electric lights. All that the law says is that neither the corporation nor the Legislature shall deprive itself of the power of providing for the future necessities of the people, and thus "disarm themselves of the powers necessary to accomplish the ends of their creation."

We do not regard this as a new principle, but simply as the legitimate result of what has already been said by this Court. *McRee v. R. R.*, 47 N. C., 186, 189; *Simonton v. Lanier*, 71 N. C., 498; *Toll Bridge Co. v. Comrs.*, 81 N. C., 491, 498.

It is stated in the ordinance now under consideration that this exclusive privilege is granted as an "incentive and inducement" for the construction of said waterworks, and it is argued that we should not drive away foreign capital by too strict a legal construction, but should rather encourage its investment in our State. All the encouragement that we can offer is the fullest protection of the law, meted out with evenhanded justice.

But it is said we should be influenced by motives of public (39) policy. Even so, we see no true principle of public policy which requires us to follow the dangerous experiment of sowing the dragon's teeth in the hope of reaping a golden harvest. The judgment is

Affirmed.

Cited: Cotton Mills v. Waxhaw, 130 N. C., 294; *Wadsworth v. Concord*, 133 N. C., 592, 597; *Elizabeth City v. Banks*, 150 N. C., 411; *Water Co. v. Trustees*, 151 N. C., 176; *Swindell v. Belhaven*, 173 N. C., 4.

W. B. RODMAN ET AL. v. TOWN OF WASHINGTON.

(Decided 17 May, 1898.)

Municipal Corporation—Necessary Expenses—Public Schools—Taxation—Constitutionality of Statute.

1. The support of public schools is not a necessary expense of a municipal corporation within the meaning of section 7, Article VII of the State Constitution.

2. The support of public schools not being a necessary expense of a municipal corporation, an act of the General Assembly providing for submission to a popular vote of the question of the levy and collection of a tax upon property and polls within the municipality, in excess of the constitutional limit, for the maintenance of public schools, is void (so far as it relates to such taxation) unless passed with the formalities prescribed by section 14 of Article II of the State Constitution.

ACTION instituted by the plaintiff in the Superior Court of BEAUFORT to restrain the defendants from collecting a tax levied under the provisions of chapter 343, Laws 1897, for the support of graded schools in the town of Washington. A temporary restraining order was granted by *Brown, J.*, on 12 October, 1897, and was by consent transferred to and heard before *Bryan, J.*, at Chambers, in Greenville, N. C., on 13 January, 1898, who rendered judgment restraining the taxes referred to in the affidavit of plaintiff, and defendants appealed. The affidavit, among other things, alleges that the act (chapter 343, Laws 1897, "is unconstitutional and void in so far as the same purports to authorize and empower the commissioners of the town of Washington to
(40) levy a tax for any such purpose as therein set out, for that the said bill was never read three several times in each House of the General Assembly, and never passed three several readings in the Senate, nor were there three several readings in the Senate on three different days, and the yea and nay vote was not taken on the second and third readings of said bill in the Senate and entered on the journal of said Senate."

W. B. Rodman and Shepherd & Busbee for plaintiffs.
John H. Small for defendant (appellant).

FURCHES, J. The plaintiff, a citizen and taxpayer of the town of Washington, brings this action to restrain the defendant from collecting certain taxes levied for school purposes under an act of the General Assembly of North Carolina, being chapter 343, Laws 1897. This act in terms authorizes the defendant to levy and collect a special tax, for

school purposes, over and above the constitutional limitation. And under the provisions of said act the defendant has levied and is proceeding to collect twenty cents on the $100 of taxable property and sixty cents on the taxable polls within the corporate limits of said town. Plaintiff alleges that this tax is unlawful and void and asks that its collection be restrained and enjoined.

Plaintiff puts his claim for this relief upon two grounds: First, that the act under which defendant claims the right to levy and collect this tax is included in the provisions of Art. II, sec. 14, and Art. VII, sec. 7, of the Constitution of this State; that the yeas and nays were not taken and recorded on the journals of the House and Senate upon its passage as required by these sections; and for that reason the act under which defendant claims its authority to levy and collect (41) this tax is unconstitutional and void.

It was not contended on the argument for defendant that the yeas and nays had been taken and entered on the journals as required by Article II, section 14, and Article VII, section 7, of the Constitution. But it was contended that this tax is a part of the necessary expense of the defendant town government, and does not fall under the requirements of Article II, section 14, and Article VII, section 7, of the Constitution.

It not being contended by defendant that the yeas and nays were taken and entered on the journals, upon the passage of this act, providing for the levy and collection of the special tax, which is above the constitutional limitation, it is void, unless it is for the necessary expenses of the defendant. *Bank v. Commissioners,* 119 N. C., 214; *Commissioners v. Snuggs,* 121 N. C., 394; *Charlotte v. Shepard, post,* 602.

We have held that waterworks for the purpose of supplying a town with water was not a necessary expense of the corporation. *Charlotte v. Shepard,* 120 N. C., 411. And we have held at this term that an electric light plant for the purpose of furnishing the town with electric lights was not a necessary part of the corporate expense of a town. *Mayo v. Town of Washington, ante,* 5. And while we are in favor of public education we cannot hold that a tax over and above that provided for and required to be levied and collected by the Constitution, is a necessary corporation expenses in the administration of the defendant corporation.

It therefore follows as a logical deduction from what we have said, that that part of said act, authorizing the levy and collection of this special tax, is unconstitutional and void. (42)

But it does not follow that the other parts and provisions of said act are void, and we do not understand that the learned judge who

tried the case below so decided. *Russell v. Ayer,* 120 N. C., 180; *Gambill v. McCrady,* 75 N. C., 509. The consideration of the constitutional question involved, having determined the result of the action in favor of the plaintiff, we have not considered the other question presented and argued. If there is anything in that question, it is now of no practical importance, as we take it for granted that, if another act is passed to authorize increased taxation in the town of Washington for school purposes, the parties interested in having it passed will see to it that the yeas and nays are properly taken and recorded and that proper provisions will be inserted for holding the election.

The judgment of the Court below is

Affirmed.

Cited: Comrs. v. Call, 123 N. C., 310; *Comrs. v. Payne, ib.,* 487; *Bear v. Comrs.,* 124 N. C., 213; *Greene v. Owen,* 125 N. C., 222; *Edgerton v. Water Co.,* 126 N. C., 96; *Glenn v. Wray, ib.,* 732; *Black v. Comrs.,* 129 N. C., 125; *Debnam v. Chitty,* 131 N. C., 678, 687; *Graves v. Comrs.,* 135 N. C., 52; *Sprague v. Comrs.,* 165 N. C., 604; *Moran v. Comrs.,* 168 N. C., 290; *Stephens v. Charlotte,* 172 N. C., 566.

IN RE AUSBORN ET AL.

(Decided 22 February, 1898.)

Partition—Owelty—Statute of Limitations—Execution—Practice.

1. The Statute of Limitations does not run against a charge upon land for owelty of partition.

2. An execution will not be allowed to issue to satisfy a charge upon land in partition proceedings until the confirmation of the commissioners' report.

MOTION before the Clerk of the Superior Court of WASHINGTON for execution against J. H. Hoff to enforce the payment of a charge
(43) on land in Hoff's possession alleged to have been made against it in favor of a parcel of land allotted to plaintiffs in partition proceeding. The motion was refused by the clerk whose ruling was reversed by *Brown, J.,* at Chambers, and the defendant Hoff appealed.

H. S. Ward for plaintiff.

A. O. Gaylord for J. H. Hoff (appellant).

MONTGOMERY, J. The plaintiffs served a notice on the defendant on 8 November, 1897, that he show cause why *venditioni exponas* should

not issue against a tract of land in his possession to satisfy a charge upon it in favor of the plaintiff. The notice was based upon the following facts alleged: That about the year 1881, in the Probate Court of Washington County, proceedings were begun by the heirs at law of Allen F. Ausborn and the plaintiffs, the latter representing their deceased father who was one of the heirs, to have partition made of a tract of land belonging to the intestate; that, under the proceedings, commissioners were appointed by the Court to make partition of the land; that the commissioners actually made partition between the parties and made report thereof to the Court; that lot No. 2 in the partition fell to the share of the plaintiffs, and lot No. 5 to the share of W. F. and W. C. Ausborn, lot No. 5 being charged with the sum of $88 in favor of lot No. 2; that W. F. and W. C. Ausborn afterwards conveyed their lot to the defendant, the deed recognizing the partition and the grantee promising to pay the charge "if it is lawful to be paid."

The defendant on the return of the notice admitted the facts alleged.

All of the original papers in the cause have been lost except the report of the commissioners. (44)

The defendant contended that the charge could not be enforced against his land because of the bar of the statute of limitations; that no decree was ever made confirming the report of the commissioners, and that the charge passed to the purchaser of lot No. 2, which had been sold by the administrator of the father of the plaintiffs, who was one of the heirs at law of Allen Ausborn at the time of his death. The motion for leave to issue execution was denied by the clerk. On the appeal, his Honor overruled the clerk's action, and ordered the Clerk of the Superior Court to issue the execution. His Honor ruled correctly in holding that the charge was not barred by the statute of limitations. *Walker ex parte*, 107 N. C., 340; *Sutton v. Edwards*, 40 N. C., 425. Indeed, he committed no error in overruling the numerous exceptions of the defendant except in ordering the issuing of the execution by the clerk. There had been no decree of confirmation of the report and hence no execution could be issued in the cause. The plaintiffs might have moved in the cause for a decree of confirmation of the report *nunc pro tunc*, and, upon the entry of the decree, have issued the execution.

We do not see why that course may not yet be pursued.

Error.

Cited: Smith, ex parte, 134 N. C., 497; *Newsome v. Harrell*, 168 N. C., 296.

(45)

NANSEMOND TIMBER COMPANY v. B. G. ROUNTREE ET AL.

(Decided 22 February, 1898.)

Injunction — Voluntary Nonsuit — Practice—Damages.

1. Where a plaintiff takes a voluntary nonsuit, the judgment is a final determination of the matter in issue and, if an injunction has been issued, the defendant can have his damages assessed upon motion in the cause.
2. Upon the dissolution of an injunction and final judgment against the plaintiff, no matters can be heard in the assessment of damages which constituted a defense to the action.
3. On the dissolution of an injunction by which the defendants were enjoined from entering upon the land to cut or remove any timber or commit any trespass thereon, they are entitled to recover as damages the value of timber cut by them before the injunction was served and converted by the plaintiff.
4. One who has been prevented by injunction from prosecuting his business cannot recover for loss of time or employment without showing that he used diligence in attempting to find other employment and failed; and, on the same principle, defendants who were enjoined from removing timber from their lands cannot recover for the expense of feeding their teams which remained idle where there was no evidence that they used diligence in attempting to find employment for such teams.
5. The right of the defendants to recover damages against the plaintiff and his sureties on an undertaking in an injunction, upon the dissolution of the injunction, is, under the provisions of chapter 251, Acts of 1893, limited to the penalty of such undertaking.

ACTION for damages and injunction tried before *Brown, J.,* and a jury, at Fall Term, 1897, of CHOWAN, on the motion of defendants for assessment of damages resulting from the issuance of the restraining order. The plaintiff had theretofore submitted to a nonsuit.

The plaintiff and sureties excepted and appealed.

Shepherd & Busbee for plaintiff (appellant).
Jones & Boykin for defendants.

MONTGOMERY, J. The plaintiff took a nonsuit and at the proper time an issue was submitted to the jury "what damages have the defendants sustained by reason of the wrongful issuing of the injunction in this cause?" In the argument here it was insisted by the plaintiff's counsel that the damages to which the defendants were entitled, if entitled to any, could not be assessed upon a motion in the cause, for the reason that the plaintiff had taken a voluntary nonsuit and that therefore there had been no final determination of the matter in issue. The

proceeding, however, was regular. *R. R. v. Mining Co.,* 117 N. C., 191. In that case the Court said: "If the plaintiffs had taken their nonsuit of their own motion and without appeal, the judg- (48) ment being in that case a final one, the plaintiffs would have been compelled then and there to lodge a motion for the assessment of their damages or else have lost their remedy."

The plaintiff offered in evidence, on the inquiry as to damages, a deed for the purpose of showing title in itself to a tract of land, which was the subject of litigation between the parties, before the bringing of the action. The defendants' objection to the testimony offered was properly sustained. In the judgment of nonsuit there was an order dissolving the injunction, and it seems clear that, after final judgment against the plaintiff and the dissolution of the injunction, no matters should have been heard at the time of the assessment of damages, which constituted a defense to the action. High on Injunction, section 1652.

It appears from the case that at the time the injunction was served, there was on the land a considerable quantity of timber already cut by the defendants, and that the plaintiff after the injunction was served converted the same to its own use. In reference to this timber and its conversion by the plaintiff, the plaintiff requested the Court to instruct the jury that the defendants were not entitled to recover the value of the timber. His Honor refused to give the instruction. We think there was no error in that refusal.

The plaintiff insists that the damages are too remote, that they do not arise necessarily and proximately by reason of the injunction. We do not concur in this view. The injunction order, while it did not in so many words prohibit the defendants from entering upon the land, yet it did deprive them of the right of the possession of both the land and the cut timber. The order was in these words: "In the meantime, the defendants and each of them, their agents and employees, are enjoined and forbidden to enter upon the land de- (49) scribed in the complaint, or to cut or remove any timber or other thing from said land, or to commit any trespass of any kind thereon. They are likewise restrained and forbidden to dispose of, move or secrete any timber or other thing cut from said land, wherever it may now be." The defendants were put to a great disadvantage by reason of the service of the injunction. Any attempt on their part to have had the timber protected by removal to a place of security from pillage or loss by decay, would have subjected them to the pains of contempt proceedings. Under these circumstances, the plaintiff converted the property to its own use and carried it off the premises. Instead of leaving the property to abide the result of the suit, the plaintiff, taking advantage of its position in law held by the force of the injunction pro-

ceedings, deprived the defendants of their property. From the plaintiff's complaint, even, it appears that the defendants have lost this timber by the service of the injunction. The complaint treated as an affidavit, alleged that the defendants were removing the timber, and would remove it all unless enjoined from so doing. This view of the law is taken in *Alexander v. Colcard,* 85 Ill., 323, where the facts are substantially like the facts here. The injunction in our case prevented the defendants from exercising free control of the land and timber during the time the injunction was in force, and they ought to recover such damages as naturally and proximately result from conditions imposed upon them by the service of the injunction.

The plaintiff further requested his Honor to instruct the jury that the defendants were not entitled to recover for the expense of
(50) feeding the teams which remained idle while the injunction was in force. This request was refused. The instruction ought to have been given, for there was no evidence that the defendant had tried to find employment for the hands, and had failed in the effort. It is well settled that one who has been prevented by injunction from prosecuting his business, cannot recover for loss of time or employment without showing that such one used diligence in attempting to find other employment and failed, and we think the same principle is involved here. 2 High Injunction, sec. 1676; 35 Iowa, 420.

His Honor was requested to instruct the jury that the defendants could not recover either of the plaintiff or of the sureties on the undertaking an amount greater than the penalty of the bond. The Court refused the request as to the plaintiff. The whole of the request ought to have been given.

Before the enactment of chapter 251 of the Laws of 1893, no action could be maintained, on account of loss sustained by reason of the issuing of an injunction, by the defendant against the plaintiff unless the plaintiff instituted his action without probable cause; and the same rule was adhered to by this Court, even after the adoption of the Code of Civil Procedure, section 192 (341 of The Code) in *Burnett v. Nicholson,* 79 N. C., 548. In that case it was held that the undertaking which was required by the statute imposed no new liability on the plaintiff, but simply provided an additional security to that which already existed. It was further said in the same case, that "the right of a defendant to sue does not depend solely upon the result of the action, but upon the want of probable cause and of good faith in its prosecution. In this respect, actions in which an injunction may issue stand upon
(51) the same footing as others. There cannot, indeed, be any action in which inconvenience and loss are not sustained by the defendant, but the penalty imposed on the plaintiff is only the payment of

the costs of the suit." Code, sec. 341, was amended by chapter 251, Laws 1893, so as to render the plaintiff and his sureties on the undertaking, required in that section of The Code, liable in damages without proof of malice or want of probable cause in procuring the injunction. There was no allegation of bad faith or want of probable cause alleged or proved on the part of the plaintiff in procuring the injunction in the case before us, and the right of the defendant to recover rests solely on the provisions of the act of 1893; and, by the terms of that act, the damages must be assessed against the plaintiff and its sureties (or either one of them, *Crawford v. Pearson,* 116 N. C., 718) on the undertaking. It is plain, therefore, that the penalty of the bond is the limit of the liability of the plaintiff and its sureties on the undertaking, the proceeding being also in effect a suit upon the undertaking, and there was error in entering a judgment for a greater amount against the plaintiff in the action than $300, the penalty of the bond. The verdict and judgment have made it necessary to pass upon all of the exceptions. There were errors, as we have pointed out.

New trial.

Cited: Olmsted v. Smith, 133 N. C., 585; *Mahoney v. Tyler,* 136 N. C., 43.

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(52)

E. W. RAYMOND v. D. NEWMAN.

(Decided 15 March, 1898.)

Payment, Application of—Statute of Limitations—Trial—Instructions.

1. Where a debtor, who owes the creditor two debts, makes a payment without directing its application, and the creditor makes no application before bringing suit, the law will make the application at the trial.

2. Where, in the trial of an action to recover an alleged debt of $1.116, it appeared that the plaintiff had lent to the defendant $800 in 1892, and $316 in 1893; that both loans had matured more than three years before suit was brought; that the defendant had paid $25 after the statute had run against the $800 loan only, but the application had not been directed by him nor made by the plaintiff, it was not error to refuse an instruction that there was no evidence that the payment was to be applied to either loan, and that plaintiff's claim was barred by the Statute of Limitations, since such request for instruction was based solely on the hypothesis of the existence of both debts and that the court could not apply the payment to either of them.

RAYMOND *v.* NEWMAN.

ACTION tried before *Brown, J.*, and a jury, at Fall Term, 1897, of CHOWAN. The facts appear in the opinion. From a judgment for the plaintiff the defendant appealed.

Battle & Mordecai for plaintiff.
J. H. Sawyer and Shepherd & Busbee for defendant (appellant).

MONTGOMERY, J. The plaintiff in his complaint alleged that in November, 1892, he lent the defendant the sum of $1,116; that in December, 1896, the defendant paid to the plaintiff to be credited on the debt $25. The defendant denied that he borrowed the money from the plaintiff, denied the alleged payment, and pleaded the statute of limitations to the demand of the plaintiff. On the trial, the plaintiff testi-
(53) fied that he lent the defendant $800 in 1892, and $316 in February or March, 1893, and that in the fall of 1895, the defendant paid him $25. The defendant testified that he had never borrowed any money from the plaintiff, and that he did not make the payment of $25. It appears from the plaintiff's testimony that he made no application of the alleged payment to either one of the debts alleged to be due to him by the defendants.

No objection was made by the defendant to any of the evidence offered by the plaintiff, and no exception was made to any part of his Honor's charge to the jury. Two issues were submitted: "(1) Is defendant indebted to plaintiff; if so, in what sum?" "(2) If so, is said cause of action barred by the statute of limitations?"

The defendant requested his Honor to charge "that there was no evidence tending to show that the $25 payment, in 1895, was to be applied either to the $800 loan or the $300 loan, and that the plaintiff's claim is barred by the statute of limitations, and the second issue should be answered 'Yes.'" The request was refused, and the defendant excepted.

The $800 loan, upon the plaintiff's own testimony, was barred by the three years statute of limitations before the $25 was said to have been paid. The plaintiff said on the trial that he lent the money to the defendant in 1892, and that the payment was made in the *fall of* 1895. If he had shown that he had lent the money during or after the *fall of* 1892, then the statutory bar would have arisen between the time of the loan and the time of the alleged payment. But that he did not do. All of that, however, would be immaterial if the defendant had owed the plaintiff only the debt of $800, and the jury had found that the payment of $25 had been made at the time it was alleged to have
(54) been made, because this action was commenced within three years from the time of the alleged payment (within the statutory limit). But the plaintiff alleged that the defendant owed him *another debt* (the $316 loan), which was not, from the allegation of the com-

plaint and the plaintiff's testimony, if believed, barred by the statute of limitations. If the defendant had asked for an instruction to the effect that if the jury should find that the plaintiff lent the defendant $800 in 1892, and $316 in February or March, 1893, and that the $25 had been paid in the *fall of* 1895, then they should find that the statute of limitations was a bar to the $800 debt, and that they should credit the $25 on the $316 debt, the question which the defendant's counsel argued here would have been presented. "All the courts agree that the party paying money may direct to what the application is to be made. If he waives his right, the party receiving may select the object of appropriation. If both are silent, the law will decide." *Jones v. United States.*, 7 Howard, 686. The *law* will decide in North Carolina if the application is not made by the creditor, the debtor having given no direction, before suit brought. *Moss v. Adams,* 39 N. C., 42. But such was not the request of the defendant.

The instruction requested was based on the hypothesis of the existence of both debts, and that neither one was barred by the statute; and that, simply because the creditor had made no application of the payment before suit was brought, therefore the Court could not order the application at the time of the trial to either debt. The instruction asked for was based on the hypothesis that if the $800 debt was barred and the $316 debt not barred by the statute, therefore a payment made without having been applied by the creditor, before action brought, had to be applied to the Court, and had to be applied to the debt (55) not barred. The argument here by the counsel of the defendant was on that line, but the exception as presented in the record did not present that point. There was

No error.

MARGARET E. EVANS v. W. E. CULLENS, SHERIFF, ET AL.

(Decided 22 February, 1898.)

Husband and Wife—Conveyance to Wife of Land Purchased by Husband—Trustee—Superior Court Clerk—Practice.

1. At a sale of land for partition, E. became the purchaser, complied with the terms of sale, and title was ordered to be made to him, but, at his direction and without assignment of the bid, conveyance was made to his wife and registered. Thereafter he claimed no interest in the land. Twenty years afterward the plaintiff extended credit to the husband: *Held*, that, in the absence of fraud or preëxisting indebtedness of the husband, the

wife will not be declared a trustee of the land for her husband so as to subject it or its rents and profits to the payment of debt of a creditor who has notice of the status of the property when he extended credit to the husband.

2. The Court condemns the practice by which a Superior Court clerk appoints himself as commissioner to sell land and confirms his own report of sale.

ACTION to recover possession of a lot of tobacco seized by the defendant Cullens, as sheriff, under an execution against the husband of the plaintiff, tried at Spring Term, 1898, of HERTFORD, before *Norwood J.*

George Cowper and W. D. Pruden for plaintiff.
B. B. Winborne and Shepherd & Busbee for defendants.

(57) FAIRCLOTH, C. J. Action for the value of a crop levied on by the sheriff under an execution in favor of a creditor of the husband in 1895. The land and crop are claimed by the plaintiff wife under a deed dated and registered in 1876. The land was sold for partition, and the husband became the purchaser, and complied with the terms of sale, and title was ordered to be made to the purchaser. The commissioner made the deed to the plaintiff, wife of the purchaser, and they have ever since been in possession of the land, which was managed by the husband.

The defendant's contention is that the husband was the purchaser and paid the money, and that, although the deed was made to the
(58) wife, the husband was the owner and had an equitable estate subject to sale under an execution against him. It does not appear whose money was paid, and the husband testified that he purchased the land for his wife, and claims no legal or equitable interest in either land or the crop. There is no allegation of the fraud or bad faith in any part of the transaction, nor that the husband was in debt in 1876.

If the defendant's theory be adopted, there is no one who can insist that the trust be executed, except the husband, and he declines to do so. If the husband paid his own money, and had title made to his wife, it was a gift to her and no one could complain except a pre-existing creditor of the husband. If the execution creditor, about 20 years after the wife's deed was recorded, gave credit to the husband, he did so with notice of the status of the property, and has no cause to complain. Therefore, the exceptions and distinctions made on the argument cannot avail the defendants.

We think this is a proper case in which to express our disapproval of the procedure in the partition proceedings. The petition was before the clerk or probate judge. He adjudged a sale to be necessary, and

appointed *himself* commissioner to sell. He made sale and reported the sale to himself, confirmed the same, and ordered himself to make title to the purchaser, and did make it. This is not to be commended. What effect it might have upon some state of facts differing from the present, we do not now consider.

Affirmed.

Cited: Thompson v. Coats, 174 N. C., 198.

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(59)

MARY E. HUGHES ET AL. v D. T. PRITCHARD.

(Decided 1 March, 1898.)

Action to Establish Parol Trust—Deed, Absolute—Parol Trust—Evidence—Declarations of Grantor after Execution of Deed.

1. In the trial of an action to establish a parol trust as to land conveyed to the grantee by a deed in fee, absolute in form, and with an expressed money consideration, it was competent for the plaintiff to show by parol evidence as to the circumstances surrounding the execution of the deed and what was said by the grantor and grantee at the time, that the defendant took the title subject to the parol trust declared by the grantor.
2. In the trial of an action to establish a parol trust in land, it was not error to exclude testimony as to the declarations of the grantor, concerning defendant's title, made after the date of the deed.

ACTION tried before *Brown, J.,* and a jury, at Fall Term, 1897, of CAMDEN. The facts sufficiently appear in the opinion. There was a verdict for the plaintiff, and from the judgment thereon defendant appealed.

E. F. Aydlett for plaintiffs.

J. H. Sawyer for defendant (appellant).

FURCHES, J. On 25 January, 1886, David L. Pritchard, then about 78 or 79 years of age, and suffering from cancer, of which he died on the 8th of March following, made and executed a deed to the defendant, David T. Pritchard, for the land now in controversy. The deed in form was a deed in fee simple upon the expressed consideration of $2,500. But the plaintiffs allege that in fact it was a deed in trust. They allege further that the grantor, David L. Pritchard, in view of the fact that he must soon die, and being in debt (to what extent does not appear), desired to provide for the payment of his debts out (60) of his land, and then to provide for his daughter and granddaughter, the plaintiffs in this action. To do this, he proposed to make

a deed to his nephew, David T. Pritchard, the defendant in this action, in trust; that out of the rents and profits of said land, the defendant should first pay off and satisfy his debts, and, then he should convey two-thirds thereof to Mrs. Mary E. Hughes, the grantor's daughter, for life, and the remainder of this two-thirds to Miss Mary E. Hughes, the daughter of the life tenant and granddaughter of the grantor; and the other third was to be conveyed in fee to the children of the defendant in consideration of his services in taking charge of the land, receiving the rents, and paying the debts of the grantor.

These are the allegations contained in the complaint, and upon them the Court submitted the following issue: "At the time of and immediately preceding the execution and delivery of the deed from D. L. Pritchard to D. T. Pritchard, dated 25 January, 1886, was it agreed between said parties that the land therein described should be conveyed to and held by said D. T. Pritchard upon the terms and agreement set out in the complaint?" To this issue the answer was "Yes."

Suppose the allegations in the complaint, and contained in this issue, had been inserted in the deed, there could be no doubt but what the defendant would hold the land in trust, and that it would be his duty to convey two-thirds of it to the plaintiffs, as contended by them.

The plaintiff's evidence on this issue was direct and pointed and fully justified the finding of the jury, if the evidence was com-
(61) petent. The plaintiffs showed by the testimony of Mr. Sawyer, who drew the deed, that the defendant came for him to do the writing; that they went to the grantor's house early in the morning; that the matter was talked over and fully understood by the parties; that the defendant was to give the grantor his note—it was stated in the sum of $5,000 but this was afterwards changed to $2,500 as the nominal consideration. But the terms agreed upon were that the defendant should take possession and control of the farm at once, and out of the proceeds of the farm pay the grantor's debts; and when this was done, to convey two-thirds to Mrs. Hughes for life, and the remainder of this two-thirds to her daughter, Miss Hughes. The other third was to be conveyed to the children of the defendant in consideration of the defendant's services and trouble. That he is not a lawyer, and did not know it was necessary to insert these stipulations and trusts in the deed, but he used the ordinary printed form and filled in the blanks. The evidence was objected to by the defendant upon the ground that it contradicted the deed. The objection cannot be sustained. It does not contradict the deed in any respect. The conveyance to the defendant in fee stands. It is necessary that he should have this to perform the trust. It is not an instance of declaring an absolute deed to be a mortgage, where it is necessary to show the ignorance of the draftsman or

the mutual mistake of the parties. The title passed to the defendant, and, as there was a transmission of title, the plaintiffs have the right to show by parol evidence that the defendant took the title conveyed to him, subject to the parol trust declared by the grantor. *Shelton v. Shelton,* 58 N. C., 292. This case has been approved in *Riggs v. Swann,* 59 N. C., 118; *Whitfield v. Cates, ib*, 136; *Shields v. Whitaker,* 82 N. C., 516; *Holmes v. Holmes,* 86 N. C., 205. This disposes of the defendant's first two exceptions as to the evidence of Sawyer. (62)

There are two other exceptions to the refusal of the Court to allow the defendant to prove declarations of the grantor, as to the defendant's title, made after the date of the deed. We see no error in this. If the defendant had been allowed to prove what he proposed to prove, it could not have affected the case, as the deed itself showed all he proposed to prove.

There is no error, and the judgment is

Affirmed.

JANE M. JONES v. ISAIAH BRINKLEY.

Decided 8 March, 1898.)

Appeal—Defective Findings—New Trial.

Where matters intended to be presented on an appeal do not sufficiently appear from the record so as to enable this Court to give a satisfactory opinion thereon, a new trial will be ordered.

ACTION to recover damages for an alleged trespass on land tried before *Bryan J.,* and a jury, at Spring Term, 1897, of GATES. There was a verdict for the defendant and from a judgment thereon the plaintiff appealed.

L. L. Smith for plaintiff (appellant).
E. F. Aydlett for defendant.

FAIRCLOTH, C. J. We have carefully examined the record in this case, but we are unable to give a satisfactory opinion on the questions which the parties probably intended. We shall have to di- (63) rect a new trial for a better presentation of the matter. We refrain from considering the several matters referred to in the record, except in one particular lest we might prejudice the rights on the next trial.

The complaint alleges that the plaintiff is the owner of a certain tract of land in Gates County, and that the defendant has committed a trespass thereon. The description is very general, containing 227 acres more or less." The answer denies the allegation. The first issue is as follows:

"1. Is the plaintiff the owner and in possession of the land *described* in the complaint?" The jury answer "Yes, one-half of 66 acres."

"2. Did the defendant trespass upon said land *as alleged?*" Answer: "No."

We find a plat in the case, showing two grants under which the plaintiff and defendant claim, and these seem to overlap each other. In the complaint no mention of 66 acres is made, nor is any mention of 66 acres made in the evidence, nor in the charge of the Court, nor in the case settled for this Court. Within the boundaries of each grant, the words "66 acres" are written, and no indication of the locality of the said 66 acres, nor any description thereof. In this condition of the case, we can only give a new trial. *Allen v. Sallinger,* 105 N. C., 333.

New trial.

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(64)

B. BALK v. ISAAC H. HARRIS.

(Decided 24 May, 1898.)

Garnishment — Jurisdiction—Payment by Garnishee Without Compulsion—Evidence—Statute Laws of Another State.

1. A book purporting to be the publication of the statute laws of another State and to be published by the authority of such State, is admissible as evidence of such laws.

2. The exemption laws of this State protect the property of a debtor in this State from exemptions issuing from the courts of this State and (by congressional action) from the courts of the United States, but have no extraterritorial force so as to protect such property when in another State from the operation of its laws.

3. Where a court of another State in attachment proceedings against the property of a resident of this State acquired no jurisdiction by reason of the failure of the affidavit upon which the warrant was issued to state that the defendant had property in that State, the judgment of such court can be collaterally attacked in the courts of this State.

4. A voluntary payment, by a garnishee to the attaching creditor in another State of a debt due by such garnishee to the defendant in this State, will not discharge him from liability to the latter.

BALK *v.* HARRIS.

ACTION tried before *Timberlake, J.,* and a jury, at Fall Term, 1896, of BEAUFORT on appeal from the judgment of a justice of the peace. The facts appear in the opinion. There was judgment for the defendant and the plaintiff appealed.

John H. Small for plaintiff (appellant).
Chas. F. Warren for defendant.

CLARK, J. The plaintiff and defendant resided in North Carolina, and the latter was indebted to the former in the sum of $180 for borrowed money, presumptively payable here. Harris while on a visit to Baltimore was served with notice of garnishment by Jacob Epstein in a proceeding instituted by said Epstein against Balk (65) in the Superior Court of Baltimore City. No service of the summons was made upon Balk. Harris testifies that he gave no bond to appear or pay the money, and employed no lawyer, though the record shows that counsel assuming to appear for him, joined Epstein's counsel in asking that judgment be entered up. After his return home, hearing that judgment had been taken against him in Baltimore, no execution being issued, he paid the $180 to Epstein's lawyer here to be remitted to Baltimore.

In this action the plaintiff excepted on the ground that, (1) The Court in Baltimore not having acquired jurisdiction against him by service of process or attachment of property, the garnishment against Harris was a nullity. (2) That Harris having paid voluntarily and not under compulsion was not discharged from his liability to the plaintiff. (3) That the money loaned defendant was proceeds of sale of his personal property exemptions. (4) That the Court here erred in admitting as evidence the printed volume purporting to be the Public General Laws of Maryland and to be published by authority of the said State.

The last exception cannot be sustained, for The Code, section 1338, makes such book, purporting to be published by the authority of another State, evidence of its statute law. *Copeland v. Collins, post,* 619.

The third exception has no force, for our exemption laws can have no extra-territorial force. *R. R. v. Maggard,* 6 Colo., 85; Story Con. Law, section 539. They are merely exemptions from executions issued by the courts of this State, and by virtue of congressional enactment are also protected as to executions issued by the United States Court in this State. (66)

But, as to the first two exceptions: In the proceedings instituted by Epstein in the Superior Court of Baltimore against Balk, a non-resident, the latter could only be brought into Court by service of

process personally, or by attachment of his property in that State. *Pennoyer v. Neff,* 95 U. S., 714; *Bernhardt v. Brown,* 118 N. C., 700; *Long v. Ins. Co.,* 114 N. C., 465; and it must appear affirmatively by affidavit, as the basis of such proceeding, when the defendant is a nonresident, that he has property in said State. *Wilson v. Seligman,* 144 U. S., 41; *Bacon v. Johnston,* 110 N. C., 114. An examination of the certified transcript from the Superior Court of Baltimore shows that Epstein's affidavit does not aver that Balk had any property of any description in Maryland, but merely that he was a nonresident of said State. The Maryland Court therefore acquired no jurisdiction upon which an order affecting Balk could be issued, and, this being a jurisdictional defect, the judgment of the Maryland Court can be collaterally attacked in this proceeding. *Pennoyer v. Neff, supra; Springer v. Shavender,* 118 N. C., 33.

Furthermore, the payment by Harris was not made under compulsion, but voluntarily, by paying the amount to Epstein's lawyer in North Carolina after his return to this State. Such payment by a garnishee cannot protect him against the claim of his creditor. Drake Attachment (5 Ed.), section 711 (3).

It is true Harris says that he feared that the judgment in Maryland would prevent his goods being shipped to him, but he did not show that he had any goods, nor that any execution issued, nor that they were levied on. He, himself, was under no bond or obligation to appear at Court in Baltimore or to pay the judgment. His voluntary payment, remitted to Epstein, will not discharge his legal liability to the
(67) plaintiff to pay the money he borrowed of him.

The plaintiff further raised the point that the *situs* of the debt being with the creditor in North Carolina where both Balk and Harris resided, and where the debt was payable, Balk had no property in Maryland liable to attachment by reason of the mere facts that his debtor (Harris) was transiently in that city. This is a very interesting question, and there is a great weight of authority to sustain that view, but not without some decisions looking the other way, many of which, on both sides, are collected in the notes to *R. R. v. Smith,* 19 L. R. A., 577. It is unnecessary, however, in this case that we discuss it.

Error.

Cited: *S. c.,* 124 N. C., 468; *S. c.,* 130 N. C., 381; *Sexton v. Ins. Co.,* 132 N. C., 3; *Balk v. Harris, ib.,* 11.

Reversed: *On Writ of Error,* 198 U. S., 215.

MOSES WEISEL v. GEORGE W. COBB, ASSIGNEE OF S. WEISEL & SON.

(Decided 28 May, 1898.)

Rehearing of Decided Causes—Practice—Stare Decisis.

1. Rehearings of decisions of cases of this Court are granted only in exceptional cases and, when granted, every presumption is in favor of the judgment already rendered.
2. Where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered on the first hearing, the former judgment will not be disturbed.

PETITION to rehear the case between the same parties decided at February Term, 1896, of this Court, and reported in 118 N. C., 11.

J. H. Sawyer for petitioner. (68)
E. F. Aydlett, contra.

DOUGLAS, J. This is a petition to rehear the case decided at the February Term, 1896, of this Court, and reported 118 N. C., 11. The endorsement of *Mr. Justice Avery* upon the petition is as follows: "Order upon petition to rehear:—The issues of law involved in this controversy were carefully considered when the case was before the Court upon appeal, but, after reviewing the record, I am now of opinion that there should be a rehearing upon the questions, first, whether the judgment of the Court below was erroneous in the allowance of commissions to the defendant Cobb; second, whether the defendant Cobb was properly chargeable, in any capacity, with interest on any of the fund or solvent credits in his hands."

Therefore, there are only two questions now before us, to wit, the amount allowed for commissions and the defendant's liability for interest. The question as to whether he should be charged with the full amount of the solvent notes and accounts sold by him, cannot now be considered by us, as the rehearing allowed by *Justice Avery* was not general, but was restricted to the two points mentioned therein. As to all other matters, the judgment is now final, and is past review, as the time within which, under the rules of this Court, a rehearing could be granted on the other matters, has long since expired.

We have given this case the most thorough investigation, and are forced to the conclusion that neither the record nor the briefs disclose anything relating to the only points now before us that was not apparently considered when the former judgment was rendered. The allowance of 2½ per cent each way, or five per cent on the (69)

amount received, is in addition to the expenses incurred by the trustee, and is also exclusive of the allowances made to him as administrator of S. Weisel.

As the highest principles of public policy favor a finality of litigation, rehearings are granted by us only in exceptional cases, and then every presumption is in favor of the judgment already rendered.

Every case coming before this Court is thoroughly investigated and carefully considered; and while we are liable to error, which we are always ready to correct, that error must be clearly pointed out to us before we can undertake to set aside a solemn adjudication involving the rights of others. This is the clearly defined policy of this Court, and has been frequently enunciated in unmistakable terms. In *Watson v. Dodd,* 72 N. C., 240, *Chief Justice Pearson,* speaking for the Court, says: "The weightiest considerations make it the duty of the Courts to adhere to their decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily, or some material point was overlooked, or some direct authority was not called to the attention of the Court."

See also *Hicks v. Skinner,* 72 N. C., 1; *King v. Winants,* 73 N. C., 563; *Haywood v. Daves,* 81 N. C., 8; *Devereux v. Devereux,* 81 N. C., 12; *Lewis v. Rountree, ib.,* 20; *Mizell v. Simmons,* 82 N. C., 1; *Ashe v. Gray,* 90 N. C., 137; *Lockhart v. Bell, ib.,* 499, 501; *Ruffin v. Harrison,* 91 N. C., 76; *University v. Harrison,* 93 N. C., 84; *Dupree v. Ins. Co., ib.,* 237, 239; *Fisher v. Mining Co.,* 97 N. C., 95, 97; *Hannon v. Grizzard,* 99 N. C., 161; *Fry v. Currie,* 103 N. C., 203, 206; *Gay v. Grant* (plaintiff's appeal), 105 N. C., 478; *Emry v. R. R., ib ,* 45; *Hudson v. Jordan,* 110 N. C., 250; *Mullen v. Canal Co.,* 115 N. C., 15.

(70) A partial change in the personnel of the Court affords no reason for a departure from the rule, but rather emphasizes the necessity of its application, as was intimated in *Devereux v. Devereux, supra.*

Petition dismissed.

Cited: Capehart v. Burrus, 124 N. C., 50; *Coley v. R. R.,* 129 N. C., 408; *Junge v. MacKnight,* 137 N. C., 293; *McNeill v. R. R., ib.,* 704; *Hill v. R. R.,* 143 N. C., 575; *Herring v. Williams,* 158 N. C., 13.

ANDREW COWAN ET AL. v. GEORGE A. PHILLIPS AND T. E. WARREN.

(Decided 22 February, 1898.)

Action to Set Aside Fraudulent Conveyance—Rights of Creditors—Mortgages—Personal Property Exemption.

1. Where, in an action to set aside a mortgage as fraudulent, it is found that the debts secured by the mortgage were *bona fide*, but the mortgage was fraudulent as to the plaintiff creditors, the latter cannot recover from the mortgagee money paid to him before the levy of an attachment by the creditors.
2. The personal property exemption of a debtor who makes a fraudulent conveyance is not forfeited thereby.
3. In laying off a personal property exemption of a debtor, the property upon which there is no lien must first be exempted.

ACTION tried before *Bryan, J.*, and a jury, at February Term, 1897, of BEAUFORT. The facts are fully stated in the opinion on the former appeal, reported in 119 N. C., 26.

W. B. Rodman for plaintiff.
Chas. F. Warren for defendants (appellants).

FURCHES, J. This case has been here before and is reported (73) in 119 N. C., 26. A new trial was awarded in that appeal, the case has been retried, and it is here again.

The record in this appeal contains forty exceptions, many of them being the same in substance and effect, expressed in different forms and and in different language. They have all been considered by the Court, but it is not deemed necessary or profitable to discuss them separately in this opinion. In our opinion they do not entitle the defendants to a new trial. None of the evidence introduced by the defendants, and none of the evidence offered and rejected by the Court (except that which was clearly incompetent, and so decided to be on former appeal), tended to disprove the facts that the Court had held in the former appeal made the conveyance fraudulent; and the burden of proof was on the defendant.

But in our opinion the judgment is erroneous, and the defendant's exceptions to this are sustained to the extent of causing it to be modified.

As it is found that the debts named in the trust and mortgage to Arthur and to the defendant were *bona fide,* the defendant Phillips should not be held liable for the money paid on these debts (74) before the levy of the attachment. The defendant Phillips should only be held liable to plaintiff for the value of T. E. Warren's half of

the property at the date of the levy of the attachment. The defendant T. E. Warren is entitled to his personal property exemption. *Gamble v. Rhyne,* 80 N. C., 183; *Commissioners v. Riley,* 75 N. C., 144; *Duvall v. Rollins,* 71 N. C., 218.

It appeared on the former appeal that the defendant T. E. Warren, was the owner of $400 or $500 worth of personal property, not included in these assignments, and that there were judgments at that time against him in favor of other creditors. It is therefore probable that his personal property exemption has been assigned to him. If it has, he will be entitled to retain the same; and if it does not now amount in value to $500 he may have the deficiency made good by any other personal property he may have. And if there is a deficiency of said Warren's personal property, including what has heretofore been allotted to him as an exemption, as well as that which has not, to amount to $500, then this deficiency must be allowed him out of the amount of the plaintiff's recovery in this action. But as the plaintiff has a specific lien on the amount of his recovery, the defendant Warren's other personal property must be first resorted to in allotting this exemption, and the amount recovered by the plaintiff in this action can only be resorted to for the purpose of supplying and deficiency that may be after appropriating his other personal property.

If any part of the recovery of the plaintiff, based upon the value of the property attached, shall be taken to make out the personal
(75) property exemption of the defendant T. E. Warren, this amount will be deducted from or entered as a credit on the judgment against the defendant Phillips, but not against Warren.

We see no reason why the plaintiff should not recover his costs against both defendants Warren and Phillips. The judgment will be modified as indicated in this opinion.

Modified and affirmed.

J. F. CHARD ET AL. v. M. F. WARREN, TRUSTEE, ET AL.

(Decided 8 March, 1898.)

Action to Foreclose Deed of Trust—Referee's Findings—Failure to Except to Findings of Referee—Practice—Payment and Satisfaction—Parol Evidence to Explain Deed—Estoppel in Pais—Mortgage, Construction of Clause In.

1. The finding of a referee as to a particular fact should be confirmed if not excepted to.

2. Where an agreement between a debtor corporation and its creditors recited that the debt should be settled by the notes of a third person to be secured

by a mortgage or deed of trust, and such notes so secured were executed, the debts of the corporation were thereby extinguished.

3. Where, in an action to foreclose a mortgage, no answer or demurrer was filed, and no attempt was made to impeach the deed for fraud or mistake, or to reform it, and the deed clearly sets forth the names of the creditors, debtor, the amounts of the debts to be paid, the property conveyed as security, and the power of sale, and the method of application of the purchase money, parol evidence will not be allowed, on a motion to confirm the sale and to make the prescribed application, to explain the deed in any way.

4. Creditors who claim under a deed of trust and file their claims to share in the proceeds of sale, cannot be heard to impeach its provisions.

5. Where, in a deed of trust for creditors, the notes secured thereby were classified as "A" and "B" notes, and it was provided that the proceeds from the sale of pine timber on the lands conveyed should be applied monthly, as it was cut, to the credit of certain of the "A" notes, but did not require the mortgagor should cut the timber and so apply the proceeds, and the deed provided that, in case of a sale of the land, the proceeds should be applied to the *pro rata* payment of all the "A" and "B" notes: *Held*, that the stipulation was not a specific appropriation of all the pine timber on the land to payment of such "A" notes.

ACTION to foreclose a deed of trust covering a large tract of (76) timber lands in DARE, pending in the Superior Court of said county. No answer or demurrer was filed and a decree of sale was entered, by consent, at May Term, 1896. The sale was made on 18 November, 1896, and the motion to confirm the report of sale was heard by *Bryan, J.* (by consent), at Chambers, in Raleigh, on 14 January, 1897, and at New Bern on 16 June, 1897. The plaintiff purchased the land as trustee for the holders of the notes secured by the deed of trust. The Eastern Carolina Land, Lumber and Manufacturing Company, a former owner of the land, and under whose mortgage to secure its bonds it had formerly been sold, filed a petition claiming that the proceeds of the sale should first be applied to the payment of certain debts owed by it evidenced by a part only of the notes secured by the deed of trust to the plaintiff, and that the uncut pine timber on the land should be applied to the payment of said notes. His Honor refused to allow testimony to explain or modify the deed of trust, and the defendant (and certain of the holders of the notes secured by the deed of trust), appealed.

Shepherd & Busbee for Buffalo Banks (note holders).

F. H. Busbee and E. F. Aydlett for defendant, and other creditors (note holders).

MONTGOMERY, J. One of the defendants, the Eastern Caro- (77) lina Land and Lumber Manufacturing Company, in order to

secure an issue of bonds, executed and delivered to the American Loan and Trust Company a deed of trust upon the lands described in the complaint. The bonds, in various amounts, were placed by the company in the hands of the American Exchange Bank of Buffalo, New York, the Bank of Commerce in Buffalo, the People's Bank of Buffalo, W. A. Ensign & Son, of Northeast Pennsylvania, and the Phœnix National Bank of New York, as collateral security, for certain indebtedness of the company. For default in the payment of the indebtedness of the company, proceedings in foreclosure were instituted by the Trust Company in the U. S. District Court for the Eastern District of North Carolina, and a decree for the sale of the company's lands described in the complaint was made, in which decree Mr. Pruden and Mr. Busbee were appointed commissioners to make the sale. They made the sale, and their report thereof was duly confirmed by the Court. The lands, at the commissioners' sale, were purchased by and conveyed to Melvin F. Warren as trustee for the bondholders—creditors of the company above named—it being understood and agreed that Warren, trustee, upon his receiving a deed to the lands, should execute and deliver a mortgage to James F. Chard, the plaintiff in this action, as trustee for the bondholders above named. The plaintiff in this action, in the complaint, alleges that in pursuance of that understanding and agreement, and in execution of his trust, the defendant Warren, trustee, for the purpose of securing the payment of certain promissory notes, aggregating
(78) $181,913.09, which notes are particularly described in the complaint, and executed by Andrew Brown to the said bondholders, by his deed of trust dated 7 January, 1895, conveyed to the plaintiff Chard the lands which he (Warren) had purchased at the sale made by the commissioners.

The present action was begun in the Superior Court of Dare County by Chard, trustee, against Warren, trustee, and John Fox, who is the purchaser of the equity of redemption of the company in the lands described in the complaint, to foreclose the mortgage (a deed of trust), made by Warren, trustee, to Chard, trustee. At the May Term, 1896, of the court, there was entered a judgment of foreclosure, no answer or demurrer being filed by either one of the defendants. R. T. Gray was appointed commissioner to make the sale of the lands. In the same judgment he also was appointed referee to ascertain and report to the Court, who were the holders, and in what amounts, of the first mortgage bonds on 7 January, 1895, the date of the execution of the deed by Warren, trustee, to Chard, trustee, and who were the holders, at the date of the sale by the commissioners Pruden and Busbee, of the notes mentioned and secured in that deed; and also what taxes were due and

unpaid on the land, and also what money, if any, had come into the hands of the trustee, or any for him, from the sale of pine timber on the land. The sale was made by the commissioner, and a report of the same was confirmed by the Court. His findings on the matters referred to him were approved, except that the one declaring M. P. Brown to be the owner of a certain one of the notes in the sum of $673.09 secured in the deed from Warren to Chard was set aside, and the fact was found by his Honor that the note was not her property, but had been paid by the maker, Andrew Brown. M. P. Brown excepted to this ruling. The exception must be sustained. (79)

There was no exception by any of the parties to that finding of the referee, at any time, and it ought to have been confirmed by the Court because there had been no exception filed to the finding of the referee on that point. *Green v. Castlebury*, 70 N. C., 20.

On 14 January, 1897, upon the confirmation of the report of the commissioner Gray, and the making of the order that he convey to Chard, the plaintiff in this action, for the creditors of the company as tenants in common in the proportion and interest hereinafter to be declared by the Court, there arose a question as to the application of the proceeds of the sale of the land to the notes secured in the deed, some of the creditors insisting that they be applied according to the express terms of the deed, while others of the creditors insisted that the application should be made according to an alleged understanding and agreement in writing different from the application required by the deed of trust, made by all of the parties before the sale by Pruden and Busbee to Warren, and which understanding and agreement they alleged formed a part of the trust upon which Warren held the title to the land. Whereupon the matter was continued for a future hearing as was, also, the question whether any evidence would be heard or considered by the Court in addition to the deed of trust. Either party in the meantime was allowed to take evidence by deposition upon proper notice. After the order of 14 January, 1897, the company was made a party to the proceeding, and the company, M. H. Brown and the Phœnix National Bank took the deposition of certain witnesses. By consent of all the parties, the various questions embraced in the order of 14 January were heard by *Bryan, J.*, on 16 June, 1897. By consent his (80) Honor found certain facts, as follows: "At the sale made by commissioner Gray and before the sale began, Busbee, in behalf of the noteholders, the Phœnix Bank, M. H. Brown and the guarantor, the Buffalo City Mills (Limited), gave notice that under the terms of the deed of trust to Chard, the value of the pine upon the property was to be applied to the 'A' notes in the manner set forth in the deed; that he would not ask that the sale should stop, but would claim that the

value of the pine should be ascertained in some manner to be determined by the Court, either by sale or valuation, and applied to the 'A' notes in the manner set forth in the deed. No pine on the land had been cut since the execution of the trust. The representatives of the Buffalo Banks were present and did not admit the claim, but insisted that the pine went with the land." Thereupon, the Phœnix National Bank, M. H. Brown, Warren, trustee, and the company offered to introduce the deposition of certain witnesses for the following purposes:

1. To show the extent and value of the pine, to the end that the value of the same, either as proved or by a sale, or in some way to be directed by the Court, shall be ascertained and applied to the payment of the special notes mentioned in the deed of trust.

2. To prove the agreement between the Eastern Carolina Land, Lumber and Manufacturing Company, and all the Buffalo Banks and the Phœnix National Bank, which is mentioned in the deed of trust and forms a part of it, as it is contended, to show the nature of the trust to M. F. Warren, the persons and corporations for which he was trustee, the nature of his trust and the scope of it, for the purpose of construing the deed of trust, and particularly the application of the various
(81) classes of notes to the payment of the purchase money.

3. To prove that Chard, trustee, and all the Buffalo Banks had full knowledge of the agreement and trust under which Warren held, and Chard, trustee, accepted the conveyance from Warren.

4. To explain the various latent ambiguities in the deed of trust, as set forth in the agreement, and to be further set forth in the bill of exceptions.

5. Generally, as competent under the admitted facts of the case and the language of the deed.

Objection was made to the introduction of the deposition by the Buffalo Banks and Ensign & Son. The Court excluded the testimony, and there was an exception to this ruling made by those who had offered it.

We will consider in the first place the exception as it relates to the land company. In the petition of the company to be made a party to the action it is stated that the only indebtedness of the company at the time of the execution of the deed from Warren, trustee, to Chard, trustee, was represented by the notes of class "A" mentioned in the pleadings and in the deed from Warren to Chard (amounting to $124,428.20, when the commissioner Gray took the account), and that the notes classed as "B" (amounting to $57,524.34), in the deed and pleadings did not form any part of the indebtedness of the company. It does not appear from the petition what indebtedness was represented by the "B" notes. It was alleged in the petition that at the time of the sale of

the lands by Pruden and Busbee to Warren, trustee, the lands were held by Warren in pursuance of an agreement entered into by the company and all the creditors of the company that Warren should purchase and hold the lands in trust to secure the debts of the com- (82) pany; that the agreement was in writing. An alleged copy of the agreement is filed with the petition. It is stated further in the petition that afterwards another agreement was prepared by the creditors, tendered to the company, and that the president of the company, knowing that its provisions were in excess of his authority, nevertheless, executed it. A copy of this last agreement is filed with the petition, and upon the agreement contained in that instrument, it is agreed that the deed from Warren to Chard was executed. The company further alleged in its petition that the company never accepted or consented to the execution of the deed. It was further alleged in the petition that the trust under which Warren purchased the lands was for the primary and sole purpose of securing the indebtedness of the company and for no other purpose, and that all the creditors had knowledge of the purpose of the trust. It is further stated in the petition that all of the debts named in the deed from Warren to Chard ought, in equity, to be postponed to the payment of the indebtedness of the company, which indebtedness the petitioner declares is represented by the "A" notes. The concluding paragraph of the petition, which sets forth the alleged equity of the company, upon which it asks for relief, is in the following words: "Your petitioners is further advised that it is the intention of the holders and owners of the 'B' notes mentioned in the pleadings and in the proof of the debts made before Gray, referee herein (the purchaser at the sale made by commissioner Gray and to whom the title of said lands as directed by the decree has been made by the commissioner), to receive in part payment for the lands the 'B' notes, as well as the 'A' notes, thereby entirely violating the trust under (83) which the lands were conveyed to Chard, trustee, by Warren, trustee, and thereby leaving your petitioner largely indebted to the various banks in Buffalo, whereas, under the agreement heretofore set forth, your petitioner's indebtedness would be almost entirely discharged by the application of the 'A' notes to the payment of the purchase money, which application your petitioner is advised and avers is the legal and proper application." The company has no equity of redemption in the property, for it has conveyed that right to Fox, who is not one of the appellants.

The company's contention is that by the terms of the agreement and understanding under which Warren purchased and held the lands, Warren was to execute a mortgage securing only the indebtedness of the company which it alleges is represented by the "A" notes alone, and

that if the "B" notes are to share equally with the "A" notes in the distribution of the proceeds of the sale, as provided in the deed, "such a course would lead your petitioner (in the words of the petition), largely indebted to the various banks in Buffalo; whereas, under the agreement heretofore set forth, your petitioner's indebtedness would be almost entirely discharged by the application of the 'A' notes to the payment of the purchase money." But the company need have no concern about any alleged balance that might remain unpaid on any of the notes secured in the deed. Both of the agreements, "A" and "B," referred to by the petitioner are a discharge in full of all the indebtedness of the company to all of its creditors named in the deed.

In the agreement referred to in the petition of the company, marked "A," and which the company alleges was a true understanding, it
(84) is stated that in the matter of the settlement of the indebtedness of the company to its creditors, it is agreed by the parties that the indebedness is to be settled by the notes of Andrew Brown, and secured by a mortgage by Warren to Chard upon the lands held by Warren as trustee. It appears, therefore, that the petitioner owes no debts to the creditors, the same having been discharged in express terms by the notes of Andrew Brown and the execution of the mortgage to secure them by Warren to Chard, and the petitioner, therefore, has no equity in the premises, because he has no interest in the matter. If the company should be sued on any alleged balance after the application of the proceeds of the land sale to the notes secured by the deed, the company could, in law, plead the discharge and satisfaction of its former debt. In *Symington v. McLin,* 18 N. C., 291, this Court said: "Even in the case of a previous debt, if the creditor by agreement with the debtor, accept the note of a third person payable to himself, it is presumed to be in satisfaction, and extinguishes the original consideration, and may be pleaded in bar or given in evidence under the general issue."

The creditors, who are appellants, have filed no answer or demurrer to the complaint. There is no effort on their part manifested in the pleadings to impeach the deed for fraud or mistake, or to reform it. They simply come into the cause, after the sale of the lands has been made by the commissioner, and confirmation thereof made by the Court, and by testimony, *aliunde* the deed, offer to prove the nature of the trust to Warren, the person and corporations for which he was trustee, and particularly they say to show the application of the various classes of notes to the payment of the purchase money, and to explain the various latent ambiguities of the deed as set forth in the alleged agree-
ment. The deed from Warren to Chard sets forth with entire
(85) clearness the names of the creditors and the amounts of their debts, the name of the debtor, the property conveyed as security,

the power under which Warren acted, and the manner of the application of the proceeds of the sale. It is true that in the deed from Warren to Chard the notes were classed as "A" notes and "B" notes, but there was a clause in the deed which declared that, if default occur in the payment of any of the "A" notes or interest, then all of said notes shall be considered of the same force and effect without regard to classification. Default was made in the payment of the "A" notes, and because of that default the sale was made. The only ambiguity in the deed was as to the amount of bonds owned by the creditors as affecting the appropriation of the first fifty per cent of the proceeds of the sale. This was referred to the referee who reported on the matter, and to his report there was no exception by any of the parties.

It seems plain, therefore, that any testimony offered for the purpose of showing that Warren properly executed his trust when he executed his deed to Chard, could not be received because it would be useless and immaterial, the deed itself being perfectly clear and consistent; and it would seem equally as clear that any testimony offered to show that he did not faithfully and properly execute his trust could not be offered and received, because there was no proceeding in this case to impeach the deed or to have it reformed.

But beyond this, how can the creditor appellants, who claim under this deed, be heard to impeach it? They have filed their claims before the commissioner and have proved them. The security for their debts depends upon the provisions of the deed from Warren to (86) Chard, and one who claims a right under a deed cannot be heard to impeach its provisions. *Fort v. Allen,* 110 N. C., 183. In Bigelow on Estoppel, 683, it is said: "Upon a principle similar to that applied to persons taking under wills, beneficiaries under a trust are estopped by claiming under it to attack any of its provisions."

One other question remains for consideration. The deed from Warren to Chard provides that any and all proceeds from the sale of the pine timber on the property covered by the mortgage should be accounted for monthly, as it was cut by the mortgagor or his assigns, to the party of the second part or his successors or assigns, and immediately applied pro rata among the holders to the payment of certain of the "A" notes. The appellants contend that that provision of the deed was a specific appropriation of the whole of the pine timber on the lands to those particular notes, and that, notwithstanding the fact that no pine timber has ever been cut, the whole ought now to be valued and disposed of for the benefit of the creditors who hold the particular notes. We do not take this view of the matter. There was no requirement in the deed that the mortgagor or his assigns should cut the pine timber and apply the proceeds to the notes. The provision is a simple direc-

tion that, from such sources of revenue from the lands as might come into the hands of the mortgagor, that part of it derived from the sale of the pine timber, whether in small quantities or large (any and all), should be applied to the particular notes. There being no requirement that all of the pine timber should be cut by the mortgagor and applied to the "A" notes, how could any rule be now laid down by which a referee or the Court could find how much of the timber should be cut and applied to the debts, whether a small quantity or a large
(87) quantity?

There was no error in his Honor's ruling refusing to receive testimony on that point. The defendant Warren has no interest in the controversy and it is not necessary, therefore, to discuss his appeal.

There was no error in the ruling of the Court, except in its findings as a fact that the note denominated in the report of Gray, referee, as Phœnix 1 A for the sum of $673.09 claimed by M. H. Brown, had in fact been paid and that the same should not be allowed to participate in the distribution of the proceeds of the sale of the land.

The judgment is affirmed, except that it must be so modified as to have the share of M. H. Brown in the lands, now held by Chard, trustee, increased to the extent of the value of the note described as "Phœnix 1 A," which note belonged to M. H. Brown, according to the finding of the referee, which was not excepted to by any of the parties.

Modified and affirmed.

Cited: Holloman v. R. R., 172 N. C., 377.

W. M. HAWKINS ET AL. v. RICHMOND CEDAR-WORKS.

(Decided 26 April, 1898.)

Action to Recover Land—Adverse Possession—Color of Title—Appeal—Exception—Agreement of Parties—Judgment—Costs.

1. To ripen a title by adverse possession for seven years it is not necessary that the entry shall have been made under color of title, nor, when color of title is obtained subsequent to the entry, that any declaration shall be made or any act of publicity shown to indicate that the holding thereafter is under color of title, the presumption of law being that a party in possession holds under such title as he has and from the time it was acquired.

2. An exception to findings of fact by a referee cannot be taken for the first time in this Court.

3. Where the parties to a cause pending in court have made agreements in relation to the procedure therein, they cannot object to action which could not have been taken but for their assent, and which was based upon it: *Hence,*

4. Where the parties to an action agreed that the trial judge might hear and determine the case outside of the county where it was pending, and there was no limitation as to the time and place, and the judge within a reasonable time announced his decision, and no notice of withdrawal of consent was given: *Held*, that neither party had the right to object to the signing of the judgment, such signing being a mere formality after the announcement of the decision.

5. Where, on appeal, the judgment below is partly affirmed and partly reversed, as a matter of discretion the Court can order the costs equally divided between the parties. The Code, sec. 527.

ACTION for damages for trespass on land and an injunction, (88) heard before *Timberlake, J.*, at Fall Term, 1896, of DARE, on exceptions to the report of Hon. H. G. Connor, referee. The case as constituted is a consolidation of cross actions by the parties, and was originally referred to H. G. Connor, F. H. Busbee and W. D. Pruden, but the two last named, being of counsel for the parties, withdrew from the decision of the case and left it solely to Mr. Connor. The record is voluminous, and the exceptions to the findings of fact and conclusions of law are numerous. His Honor overruled all the exceptions of the defendants and, by consent, two of the plaintiffs' exceptions. The defendants appealed.

It was agreed during the term of Dare Court that the case should be heard and judgment signed out of term and out of the county. Further than that nothing was said as to time or place. Shortly after the adjournment of court, and during the same week, the case was argued before the judge, when it was agreed that counsel (89) for plaintiff should present other authorities, which authorities were shortly thereafter sent to the Court at Louisburg. After this and before 1 January, 1897, the judge announced to the parties what his decision was, but on account of the failure of parties to agree upon form or judgment, it was not signed until after 1 January, 1897, to wit, 12 April, 1897. The judgment which was signed was the judgment prepared by the counsel for plaintiff and sent to the Court before 1 January, 1897. The counsel for defendant objected to the signing of the judgment after 1 January, before it was actually signed, upon the grounds that the agreement made at Dare Court could not be extended beyond 1 January, 1897, and beyond the district, and that not being signed before, it could not be signed after 1 January, 1897. Counsel for defendant made no point about this till after 1 January, 1897.

E. F. Aydlett and F. H. Busbee for plaintiff.
Shepherd & Busbee, R. T. Gray and W. D. Pruden for defendants.

CLARK, J. Sykes had been in possession a year or more before he obtained the Belangia deed, but it is not necessary to ripen a title by

seven years adverse possession that the entry shall be made under color of title, nor, when color of title is obtained subsequent to the entry, that any declaration shall be made or any act of publicity shown to indicate that the holding thereafter is under color of title. Every possession is presumed to be under such title as the party in possession holds, and from the time such title is acquired. *Bryan v. Spivey,* 109 N. C., 57, does not sustain the plaintiffs' contention, but it is to the contrary. Indeed, we find no authority for his contention. Sykes
(90) entered in 1868, but as he acquired color of title in 1870, and held possession under it till 1881, the referee properly ruled that this ripened the title in him. In *Rogers v. Mabe,* 15 N. C., at p. 195, *Ruffin, C. J.,* says: "If one in possession take a deed in fee from another who has no right, that is colorable title which apparently authorizes the subsequent possession."

As to the contention that the "Richmond Cedar Works Co." and the "Richmond Cedar Works Co., Limited," were different corporations, if there was any evidence to sustain it, the point should have been presented and the fact found below. It is too late to make that exception for the first time in this Court.

There was evidence of slight breaks in the possession of Sykes, but there was evidence which authorized the referee to find that there had in law been a continuous possession under color of title by Sykes for more than seven years. We do not understand that his Honor overruled that finding of fact, but to have sustained the plaintiff's exception upon the proposition of law above stated. He did not reverse the finding of the fact, but the conclusion of law.

The defendant's exception that the central tract should have held a parallelogram instead of a triangle is also made in this Court for the first time and cannot be considered.

The Court below properly overruled all the defendant's exceptions. This Court has carefully and fully considered each of them, as the importance of the case, and the earnestness and ability of the argument demanded, but it would serve no good purpose to discuss them in detail, as they involve merely the application of familiar principles of
(91) law to the facts of this particular case. These exceptions depend largely upon the contention that there was no evidence to support the findings of fact and that certain deeds were too vague and indefinite to constitute color of title, as to which, and all the other exceptions of the defendant, we concur with the rulings of the referee and his Honor. The report of the referee was drawn with care, clearness and ability, and, except in the respect in which it was amended by consent, should have been approved by the Court below. The judgment will be so modified in accordance with this opinion.

By consent of all parties the judge was to hear and determine the case at any point outside of the county of Dare. There was no limitation as to time or place. It was duly argued, and after argument it was agreed that the apellant might present other authorities and they were sent to the judge at his home in Louisburg. Before 1 January, 1897 (the cause was tried at Fall Term, 1896, of Dare), the judge announced to parties his decision. Appellees prepared the judgment but the appellants objected to it, and then for the first time objected to its being signed. Having agreed that the judgment might be signed out of court, the parties cannot object to action which could not have been taken but for their assent and which was based upon it. *Benbow v. Moore,* 114 N. C., 263; *Bank v. Gilmer,* 118 N. C., 668, and numerous cases there cited. Good faith demands that parties abide their own agreement. It might be that, where a matter like this is held by a judge under advisement on unreasonable time, a party might notify both him and the opposite party of the withdrawal of consent, but even then, assuredly, reasonable time must be given the judge to act by naming a future day, by which time, if no judgment is signed, the consent will be withdrawn. (92). But that state of facts is not presented here. There was no notice that if judgment was not rendered by a day named consent would be withdrawn. On the contrary, judgment was actually rendered and announced before any objection was made. The subsequent signing was a formality.

The judgment being "affirmed in part and reversed in part," the Court thinks it a proper case to order that the costs of this Court, including printing the record, shall be equally divided (Code, sec. 527), especially in view of the nature of the action, which is to ascertain the rights of the several parties.

Modified and affirmed.

Cited: Westhall v. Hoyle, 141 N. C., 337; *Chatham v. Landsford,* 149 N. C., 366; *Sturtevant v. Cotton Mills,* 171 N. C., 120.

W. H. ALBERT AND WIFE v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

(Decided 24 May, 1898.)

Action on Life Insurance Policy—Life Insurance—Insurable Interest—Beneficiary in Life Insurance Policy—Misrepresentations—Evidence—Exceptions—Practice—Trial Quarterly Payment of Premiums.

1. A policy of insurance, payable to one who has no insurable interest in the life of the insured, is valid if applied for and obtained in good faith and kept in force by the payment of the premiums thereon by the insured.
2. Under sections 8 and 9 of chapter 299, Acts of 1893, all statements contained in an application for insurance made in this State, or in the policy itself, are deemed to be representations and not warranties; and, hence, misrepresentations as to the age and health of an applicant and as to certain diseases, which the applicant is supposed to have had, do not vitiate a policy unless they materially contributed to the loss or fraudulently evaded the payment of the increased premium, and ordinarily such representations and their effect are questions for the jury and not for the court.
3. Exceptions to testimony offered by one party cannot be sustained when the same facts were testified to by the other party's own witness, especially where such witness was the latter's agent, since his admissions, while having the business in hand, were competent against his principal.
4. In the trial of an action on a life insurance policy, plaintiffs were rightly allowed to offer such policy in evidence without the application, since the policy constituted the contract on which the suit was brought and the application, which was no part thereof, was in the possession of the defendant.
5. It is not error on the trial of an action to refuse to submit issues tendered by a party when they are practically covered by the issues already submitted to the jury.
6. In the trial of an action on a life insurance policy it was proper to admit the testimony of expert physicians who, as medical examiners for the defendant company, had passed upon the application on which the policy was issued, and one of whom had personally examined the applicant.
7. Where the annual premium on a policy of life insurance, primarily payable in advance, was by express stipulation made payable quarterly in advance, and the insured died after the payment of the first quarterly installment, the insurance company is entitled, in an action on the policy, to have the three remaining installments for the current year deducted from the amount of such policy.

(93) ACTION to recover the amount of an insurance policy upon the life of Margaret Ann Gardner and payable to the plaintiff, Mary C. Albert, her step-daughter, tried before *Bryan, J.*, and a jury, at May

Term, 1897, of BEAUFORT. There was a verdict for the plaintiff and defendant appealed, assigning numerous errors. The facts necessary to an understanding of the opinion are set out therein.

Chas. F. Warren and J. H. Small, contra.
W. B. Rodman for defendant (appellant).

DOUGLAS, J. This is an action brought on a policy of insur- (94) ance upon the life of Margaret A. Gardner, who was the step-mother of the *feme* plaintiff, to whom the policy was payable on its face. The insured died within two months after the issuance of the policy, and the defendant refuses to pay the same, alleging that the plaintiff husband had paid the premium and that as neither of the plaintiffs had any insurable interest in the policy, it was void as a wagering contract.

The jury, as instructed by the Court, found that the plaintiffs had no insurable interest; but they also found that the insured had herself taken out the policy and paid the premium. This finding, in support of which there was at least more than a scintilla of evidence, disposes of that defense and of all exceptions based thereon. It is, therefore, not necessary for us to decide whether a step-daughter has an insurable interest; and therefore the cases of *Burbage v. Windley,* 108 N. C., 357, and *Trinity College v. Insurance Co.,* 113 N. C., 244, have no application. In those cases the premium was paid by the beneficiary, while in the case at bar the premium was paid by the insured, as found by the jury. There can be no doubt that a policy of insurance is valid when taken out in good faith and the premium paid thereon by the insured.

The principle is well stated in *Campbell v. Insurance Co.,* 98 Mass., 381, 389, where the beneficiary was the sister-in-law of the insured, as follows: "The policy in this case is upon the life of Andrew Campbell. It was made upon his application; it issued to him as the assured; the premium was paid by him; and he thereby became a member of the defendant corporation. It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by agreement of (95) the parties to receive the proceeds of the policy upon the death of the assured. . . . It was not necessary, therefore, that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported as a policy to herself as the assured." The same principle is recognized in 1 May on Insurance, sec. 112; 2 Id., sec. 399e; 2 Beach Ins., sec. 853; Bliss on Ins., sec. 26; *Scott v. Dickson,* 108 Pa. St., 6, 16.

The defendant in its answer further alleges that the insurer gave false answers in her application, as to her age, her health and certain diseases

which he is supposed to have had; and that, as such answers became warranties, they absolutely nullified the policy. The defendant is doubly unfortunate in this part of its answer, as the jury have denied its allegations of fact, and we feel compelled to overrule its conclusions of law. The act of 4 March, 1893, chapter 299 of the Public Laws of 1893, provides as follows:

"Section 8. All contracts of insurance, the application for which is taken within this State, shall be deemed to have been made within this State and subject to the laws thereof."

"Section 9. All statements of descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and *not warranties;* nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy." This law applies to all policies of insurance, both of fire and of life; and unless such misrepresentations materially contribute to the loss, or fraudulently evade the payment of the increased premium, they do not vitiate the policy. Ordinarily, these are questions of fact for the jury

(96) and not for the Court.

We see no error in the refusal of the Court to submit the issues tendered by the defendant, as they are practically covered by the issues that were submitted. Of course, if the insured herself took out the policy and paid the premium, the policy was not taken out and the premium was not paid by either of the plaintiffs. Again, we find that there was sufficient evidence on these issues to go to the jury and we see no reason to disturb their verdict, as no material error appears in the charge, which was full, fair and intelligible. Nearly all of the defendant's numerous prayers were given.

The first, tenth, eleventh and twelfth were properly refused, as they would practically have left nothing for the jury to determine. It is impracticable to answer in detail each of the twenty-three exceptions filed by the defendant, and it would be equally useless to do so. The motion to nonsuit the plaintiff under chapter 109 of the Laws 1897, the *fons malorum* that has already given us so much trouble, was properly refused, as there was ample evidence to go to the jury.

The second and third exceptions cannot be sustained, as the same facts were testified to by Sudderth himself, the defendant's own witness. Moreover, the admissions of an agent, while he has the business in hand, are competent against the principal. *Howard v. Stutts,* 51 N. C., 372; *McComb v R R.,* 70 N. C., 178; *Southerland v. R. R.,* 106 N. C., 106.

As to exception 4, the plaintiffs had a right to offer in evidence the policy of insurance, as it was the contract upon which the suit was brought, and were not required to introduce the application, which was no part of the policy, and which moreover was in the possession

(97) of the defendant.

We see no error in the ruling out of leading questions and the questions allowed on the cross-examination of the defendant's witnesses.

The testimony of Doctors D. T. and Joshua Tayloe was competent. Both were expert physicians, were medical examiners of the defendant company, had passed upon the application, while one of them had personally made the examination. Particular objection was made to their explaining the meaning of the word "paralysis." Both were medical experts; but whether they were or not, they certainly are presumed to know what they themselves meant by the use of the word "paralysis" in their reports to the defendant company, which employed and paid them. It is a singular fact that the application was signed by the insured in blank, and entirely filled out by the agent of the defendant. It may seem singular that the insured should die so soon after the issuing of the policy, but it seems nearly impossible that she should have had at that time the vast complications of diverse diseases alleged by the defendant without some of them being discovered by the examining physician, whose character and professional standing have not been questioned, and whose position as agent of the defendant would remove any suspicion of partiality towards the insured.

For these reasons we see no error in the judgment so far as the amount of the policy itself is concerned, but from this amount should be deducted the unpaid portions of the premium for the current insurance year, that is, for the three remaining quarters. This is in exact accordance with the express terms of the contract, and does not seem to us an unreasonable stipulation. As we understand it, all policies are calculated for the year beginning with the date of issue, and the (98) entire yearly premium is primarily payable in advance. If the insurer indulges the insured by accepting quarterly payments, it is a favor to him of which his representatives cannot take advantage to the prejudice of the insurer.

Therefore the amount of the three unpaid quarters must be deducted from the amount of the policy in the nature of a set-off, and judgment rendered in favor of the plaintiffs for the difference. The judgment of the Court below is modified and

Affirmed.

Cited: *Powell v. Dewey*, 123 N. C., 104; *McCarty v. Ins. Co.*, 126 N. C., 822; *Hinton v. Ins. Co.*, 135 N. C., 321; *Pollock v. Household of Ruth*, 150 N. C., 213; *Hardy v. Ins. Co.*, 152 N. C., 291; *Hendricks v. Ireland*, 162 N. C., 524; *Ridge v. R. R.*, 167 N. C., 528; *Cottingham v. Ins. Co.*, 168 N. C., 261; *Zollicoffer v. Zollicoffer, ib.*, 330; *Lumber Co. v. Cedar Works, ib.*, 352.

WILLIAM VICK v. HENRY BAKER ET AL.

(Decided 22 February, 1898.)

Judgment by Default—Inexcusable Neglect—Setting Aside Judgment—Practice.

1. A litigant is not relieved by the employment of counsel from all attention to his case, but it is his duty to look after it with such attention as a man of ordinary prudence usually gives to his important business.
2. A judgment by default will not be set aside on the ground of excusable neglect when it appears that defendants changed their postoffice and did not receive the answer mailed to them by their counsel until eleven months after it was mailed, no inquiry for letters having been made by them at their former postoffice, and no communication being addressed to their counsel concerning the matter until eleven months after the time for answering the complaint had expired.
3. A judgment rendered at one term of a court cannot be set aside at a subsequent term except for excusable neglect.
4. Where, in an action to recover land, the defendant fails to file, or is not excused from filing, the bond required by section 237 of The Code, a judgment by default is authorized by section 390 of The Code, even if there has been a failure to file an answer arising from excusable neglect.
5. Where a tenant in common maintains his action for an interest in land, the judgment should be that he be let into possession as tenant in common with the defendants and not for the recovery of the whole tract.

ACTION heard before *Boyken, J.*, at August Term, 1895, of NORTHAMPTON on motion lodged at December Term, 1893, to set aside
(99) a judgment rendered at August Term, 1893, on the ground of excusable neglect. The motion was granted and plaintiff appealed. The facts appear in the opinion.

W. W. Peebles & Son for plaintiff (appellant).
R. B. Peebles for defendant.

CLARK, J. The summons was served in December, 1888, and a verified complaint filed in March, 1889. At Spring Term, 1892, leave was granted to the defendants to reinstate their answer in 60 days. At August Term, 1893, no answer or demurrer having been filed, judgment by default final was taken for the recovery of the realty, no damages being asked. The defendants moved at December Term, 1893, to set aside this judgment on the ground of excusable neglect, alleging that their counsel drew up the answer and mailed it to them, but, having changed their postoffice, the latter did not reach them until eleven

months after it was mailed. The judge did not find the facts specifically as he should have done. *Winborne v. Johnson,* 95 N. C., 46; *Weil v. Woodard,* 104 N. C., 94. But, upon the defendant's own showing, there was inexcusable neglect. The employment of counsel did not relieve them of all attention to the case. Knowing that they had only 10 days in which to file the answer, when that time was about to expire it was their duty to look after the matter and give the case "such attention as a man of ordinary prudence usually gives to his impor- (100) tant business." *Roberts v. Allman,* 106 N. C., 391; *Whitson v. R. R.,* 95 N. C., 385; *Henry v. Clayton,* 85 N. C., 371. It would seem that the defendants did not change their residence, but merely their postoffice; but, however that may be, it is not shown that they notified counsel of the change of postoffice, nor that they inquired at the former postoffice for letters from counsel. Besides, though failing to receive the substituted answer in the 60 days, they neither went to see their counsel nor even wrote him till this judgment was taken, eleven months after the time limited for filing answer had expired. "Such excuses are too thin and bare to hide" their fault. There was error in holding that there was excusable negligence. The neglect being not excusable, the Court was not authorized to set the judgment aside. *Stith v. Jones,* 119 N. C., 428; *Manning v. R. R.,* at this term.

Further, it does not appear, and is not averred, that the defendants filed the bond required by section 237 of the Code, or were excused from filing it, and the judgment by default was authorized by The Code, section 390 (*Jones v. Best,* 121 N. C., 154), even if there had been excusable neglect in failing to file the answer.

The verified complaint, however, was for an undivided half interest in the premises, and the judgment should have been that the plaintiff be let into possession as tenant in common with the defendants, and not for the recovery of the whole tract. The judgment should be reformed below to conform to the complaint, but the order setting it aside altogether must be

Reversed.

Cited: Norton v. McLaurin, 125 N. C., 189; *Coch v. Porter,* 129 N. C., 137; *Pepper v. Clegg,* 132 N. C., 316; *Osborn v. Leach,* 133 N. C., 431; *Patrick v. Dunn,* 162 N. C., 23; *Pierce v. Eller,* 167 N. C., 675.

(101)

ALBERT FULCHER v. M. A. FULCHER.

(Decided 1 March, 1898.)

Tax Sale—Tax List—Description, Sufficiency of.

1. The designation of property in a conveyance or memorandum is sufficient if it affords the means of identification and does not positively mislead the owner.

2. Where the description of a taxpayer's land on the tax list made under the direction of the owner was "Tax List in No. 2 Township, Craven County, for the year 1893," and the taxpayer owned no other land in the township: *Held*, that the description was sufficient to pass title, by the aid of parol evidence, as between the taxpayer and the purchaser of the land at a tax sale.

ACTION for the recovery of land, heard before *Brown, J.*, by consent of parties, at February Term, 1898, of CRAVEN. His Honor rendered judgment for plaintiff and defendant appealed.

Simmons, Pou & Ward and Shepherd & Busbee for plaintiffs.
No counsel contra.

FAIRCLOTH, C. J. The plaintiff claims title under a sheriff's deed with a full description of the land, called a tax title. From the agreed facts and the argument, we find only one question presented, to wit, the sufficiency of the description on the tax list, which was made under direction of the defendant. The description is "Tax list in No. 2 Township, Craven County, for the year 1893." "This was the only land owned by M. A. Fulcher in that township." "The designation of the land is sufficient, if it affords the means of identification, and does not positively mislead the owner." Cooley on Taxation, 407. This would seem to meet the exception, as the defendant cannot be heard to
(102) say that he misled himself.

In *Phillips v. Hooker*, 62 N. C., 193, the memorandum was "To make a deed for her house and lot north of Kinston" in Lenoir County. "It being admitted that she owned but one house and lot in the county," the description was held sufficient to be aided by parol proof.

In *Spivey v. Grant*, 96 N. C., 214, the description was "one horse," and the mortgagor had only one horse. Held, the title passed.

In *Lupton v. Lupton*, 117 N. C., 30, the assignment was "one-half of boat," and it was proved that the husband had only one boat. Held, sufficient to pass title by the aid of parol evidence.

Until recently much property of the State escaped its share of the burden of taxation by reason of technicalities, the mode of listing, irregu-

larity in sales, etc. Laws 1887, chapter 137, which has in substance been followed ever since, wiped out such refinements, and requires the contestant, or those under whom he claims, in order to defeat the purchaser's title, to prove that they were the owners at the time of the sale, or that the property was not subject to taxation for that year, or that the tax had been paid before the sale. This rule seems to be wise, as it tends to equalize State burdens, and to relieve those who have been overtaxed, because some escape. Every taxpayer knows that his property is under a tax lien, and must know when it is not paid, and such neglect as appeared in this case can seldom be the result of good intentions. The general question has been so much considered in the late cases that we feel it useless to repeat at length. *Peebles v. Taylor,* 118 N. C., 165; *Sanders v. Earp, ib.,* 275; *Moore v. Byrd, ib.,* 688.

In view of the foregoing statutes and adjudged cases, we see no (103) error in the ruling of the Court below.

Affirmed.

Cited: *Alston v. Savage,* 173 N. C., 214.

J. F. WHITAKER v. N. DUNN.

(Decided 22 February, 1898.)

Practice—Premature Appeal—Amendment of Summons.

1. An appeal from the refusal of a motion in the Superior Court to dismiss an appeal from a judgment of a justice of the peace, and allowing an amendment to the summons, is premature, the proper practice being to note an exception and to appeal from the final judgment.

2. In the trial of an appeal from the judgment of a justice of the peace in an action for the recovery of personal property, an amendment to the summons to show the value of the property was properly allowed, its effect being to show and not to confer jurisdiction.

ACTION to recover possession of personal property, tried on appeal from a judgment of a justice of the peace before *Bryan, J.,* at November Term, 1897, of HALIFAX. The facts appear in the opinion. In this Court the plaintiff moved to dismiss the appeal on the ground that it was prematurely taken.

E. L. Travis for plaintiff.

McRae & Day for defendant (appellant).

CLARK, J. This action was begun before a justice of the peace to obtain possession of certain personal property. On appeal in the Su-

perior Court the defendant moved to dismiss because the summons did not state the value of the property, which was refused, and the plaintiff's motion to amend by inserting $32, as the value was granted. The defendant appealed. The appeal is premature as to the refusal to dismiss. *Lowe v. Accident Association,* 115 N. C., 18; *Plem-*
(104) *mons v. Improvement Co.,* 108 N. C., 614. An order allowing an amendment is ordinarily not appealable (*Goodwin v. Fertilizer Works,* 121 N. C., 91), but if it had been appealable the proper course was to note the exception and appeal from the final judgment. For these reasons the appeal must be dismissed, but it is not improper to say that the amendment having the effect to show, and not to confer, jurisdiction was properly allowed. *McPhail v. Johnson,* 115 N. C., 298, and cases there cited; *Gilliam v. Ins. Co.,* 121 N. C., 369.

Appeal dismissed.

G. M. NEAL v. PENDER-HYMAN HARDWARE COMPANY.

(Decided 1 March, 1898.)

Contract—Breach of Contract—Damages—Principal and Agent.

1. Where one violates his contract, he is liable for such damages as are caused by the breach and such as may reasonably be presumed to have been in the contemplation of the parties when the contract was made.

2. If an agent knows, or can by ordinary care ascertain, the purposes for which implements sold by him for his principal are used, his knowledge is the knowledge of his principal.

3. The manufacturer who makes and the agent who sells flues for curing tobacco in localities where tobacco is cultivated, must be presumed to know the proper season for cutting and curing tobacco, and that if it is not cut and cured in apt time serious loss will result.

4 Where, in an action for damages by a tobacco planter against a manufacturer of tobacco flues for breach of contract to deliver to plaintiff on July 1st, tobacco flues for curing plaintiff's crop, it appeared that the flues were not delivered at that date, and that the defendant wrote on the 15th of July, and again on the 27th of July, that the flues would be shipped at once, but they were never shipped: *Held*, that plaintiff can recover for damages to his crop because, in consequence of waiting for the flues, the tobacco was not cut and cured in time and he had to use cast-off flues in bad condition.

(105) ACTION for damages for breach of contract, tried before *Timberlake, J.*, and a jury, at June Term, 1897, of EDGECOMBE, on

appeal from the judgment of a justice of the peace. The facts are stated in the opinion. There was a verdict for $100, and from the judgment thereon the defendant appealed.

Battle & Thorne for plaintiff.
John L. Bridgers for defendant (appellant).

FAIRCLOTH, C. J. The defendant was engaged in manufacturing flues for curing tobacco raised by farmers, and by its agent, Taylor, contracted to deliver flues to the plaintiff at Whitakers, N. C., on 1 July, 1895, with bill of lading attached, no money to be paid till the flues were delivered. The flues were not delivered on 1 July, but on 15 July the defendant wrote to the plaintiff: "Flues are ready for shipment. Send us $5 on account and they will be sent at once." The plaintiff sent $5, and on 27 July received acknowledgment of the receipt of $5, with statement, "will ship at once." On 2 August the plaintiff wrote: "Please ship by first freight If you cannot, return my money at once, so I can buy elsewhere"; and on 5 August: "Please return my money to me at once. I want it so I can buy my flues at Rocky Mount. Don't fail to send by first mail." After some time the money was returned and the flues were never sent.

The plaintiff, and others who inspected the crop in the field, testified that unless tobacco was cured in time it was always damaged, and that when the correspondence ceased the crop was then damaged by reason of delay in cutting and curing it. (106)

The plaintiff testified that he tried to buy flues at Rocky Mount, and elsewhere, but could not do so; that the damage continued by delay, and that he borrowed some old cast-off flues in bad condition from a neighbor, and that his tobacco was injured by the use of such flues.

The defendant contends that the plaintiff has shown no case for special damages, inasmuch as they did not flow naturally from the breach of contract, and that he had failed to show that the defendant had knowledge that special damages would result from a failure to deliver the flues according to contract, and the defendant's exception is that his Honor refused to so charge the jury.

The Court charged that the plaintiff must prove, by preponderance of evidence, the contract, its breach, damage, the manner and amount of damage, and explained fully the measure of damages and submitted to the jury the evidence of the plaintiff's effort to get other flues after the breach, and his failure to do so.

The rule of damages has been stated thus: "Where one violates his contract he is liable for such damages as are caused by the breach, and

such as may reasonably be presumed to have been in contemplation of the parties at the time the contract was made." *Mace v. Ramsey,* 74 N. C., 11; *Mills v. R. R.,* 119 N. C., 693, 702.

If the agent Taylor knew or could by ordinary care have known for the purpose for which the flues were intended, his knowledge is the knowledge of his principal. *Hubbard v. Troy,* 24 N. C., 134; *Bank v. School Committee,* 118 N. C., 383.

(107) We think it must be common knowledge in localities where tobacco is cultivated, that, if it is not cut and cured in apt time, serious loss is the necessary consequence, as well as the proper season for cutting and curing, and we must assume that this common knowledge was present with the agent and the defendant who was engaged in manufacturing the flues for such purposes.

We are of opinion that the charge of the Court in substance responded to the request of the defendant, and we see no error in it.

Affirmed.

Cited: Lewark v. R. R., 137 N. C., 386; *Development Co. v. R. R.,* 147 N. C., 508; *Furniture Co. v. Express Co.,* 148 N. C., 92; *Lumber Co. v. R. R.,* 151 N. C., 25; *Walters v. Lumber Co.,* 163 N. C., 543.

L. L. STATON v. GEORGE L. WIMBERLY.

(Decided 22 February, 1898.)

Action for Penalty—County Commissioner—Neglect of Official Duty—Practice—Directing Verdict.

1. A county commissioner is liable to the penalty imposed by section 711 of The Code when he acts corruptly or grossly, intentionally and willfully neglects or refuses to perform his duty; but where he commits an error in the honest exercise of his judgment he is not liable to the penalty.

2. In the trial of an action for the penalty, under section 711 of The Code, for defendant's failure and neglect as county commissioner to construct a draw in a county bridge across a river, it appeared that there had been a question whether the stream above the bridge was navigable, and that during six months or more of the year the water was insufficient to float the plaintiff's or other boats, and that the draw had been put in by the board of commissioners, of which defendant was a member, as soon as the question of the navigability was determined by the Engineering Department of the United States Government; that the plaintiff owned a boat which plied at times above the bridge, and that defendant was a man of

excellent character, and had for sixteen years discharged his duty as commissioner: *Held*, that it was proper for the trial judge to direct a verdict for the defendant.

3. It is proper to direct a verdict for the defendant in an action for a penalty in a case where it would be the duty to set aside the verdict if rendered against him.

ACTION to recover a penalty under section 711 of The Code, (108) tried before *Timberlake, J.*, on appeal from the judgment of a justice of the peace, at June Term, 1897, of EDGECOMBE. The facts appear in the opinion of the Court. His Honor instructed the jury that, upon all the evidence, the plaintiff was not entitled to recover, and a verdict having been rendered accordingly, judgment was given for the defendant and plaintiff appealed.

Staton & Johnson for plaintiff (appellant).
John L. Bridgers, and Battle & Mordecai for defendants.

FAIRCLOTH, C. J. This is an action against the defendant, as county commissioner, to recover a penalty of $200, under The Code, section 711, for failing to construct a draw span in the county bridge across Tar River at Tarboro, which section declares a failure of duty to be a misdemeanor and makes the offender also liable to a penalty of $200.

On the lower border of the town a railroad bridge spans the river and 300 yards above is the county bridge in question, entering said town. Three miles above the plaintiff had located his cotton-seed oil mill and used a boat on said river to and from his mill for transportation of his material and products of the mill. Somewhere above the mill another railroad bridge spanned said river with a draw in it. The lower bridge had no draw, until the plaintiff sued and recovered damages, prior to the demand in the present case, when the draw was built. Prior to 5 March, 1895, it was the duty of the county commissioners (109) to consult and advise with the board of magistrates in such matters, which they did, and the board declined to construct the draw because it was unnecessary and would be oppressive to the taxpayers. After that date the duty devolved solely on the board of commissioners.

The plaintiff complained to the Engineering Department at Washington, D. C., and on notice a full hearing was had in July, 1895, when the Department decided that a draw must be put in, and as soon as practicable it was put in and accepted by the authorities.

It appeared that during six months or more of the year the water above the bridge was insufficient to float plaintiff's or other boats. There was conflicting evidence as to whether the river above the bridge was a navigable stream.

The plaintiff insists upon the above facts that the defendant was negligent and liable to the consequences imposed by said section 711 of the Code. It was proved by plaintiff that the defendant's character was "excellent—none better," and that he had been a faithful officer to the county for 16 years.

The defendant relies on the following facts and conditions as a defense:

1. That said bridge was erected and kept up more than a century without any draw in it and is well above the river.

2. That no attempt has been made to navigate the river above the bridge until plaintiff did so.

3. That said river is not *stricti juris* navigable, and in such cases it is the duty of the plaintiff at his own expense to construct the draw (110) by the express terms of The Code, section 3719.

4. That plaintiff transferred the question to the Engineering Department of the United States Government, and that, after full hearing and the decision was made, the defendant had the draw put in as soon as practicable, and the delay was reasonable.

5. That The Code (section 707 (15), 2053), requires that draws be provided only when and where the same "may be necessary to allow the convenient passage of vessels."

His Honor held that upon the evidence the plaintiff could not recover and directed a verdict for the defendant. This is the principal question.

Official corruption is not necessary to impose liability for neglect of duty to the public in the discharge of official duties. When gross negligence, intentional neglect and willful refusal are apparent and established, the penalty follows, and upon that ground the defendant was held guilty in *S. v. Hatch,* 116 N. C., 1003, without imputing corruption. Any officer, judicial or ministerial, acting corruptly, whether under or without law, is responsible civilly or criminally, but if he acts honestly in the exercise of his judgment and commits an error, he is not criminally liable. *S. v. Powers,* 75 N. C., 281.

From the evidence sent to this Court we are unable to see that the defendant's conduct was unreasonable. In view of the questionable navigable character of the river above the county bridge, he might well have hesitated, with the provision of The Code, section 3719, before him; and his prompt action in constructing the draw, as soon as the question was settled, excludes the idea of *willful* negligence or refusal to do his duty.

In England the common law rule of ebb and flow of the tides determines whether the stream is navigable, but in North Carolina (111) the rule is, if the water is sufficient to carry a sea vessel the

stream is navigable without regard to tides. In streams of less water, navigable only at certain periods, they constitute another class. *S. v. Glen,* 52 N. C., 321; Code, sec. 3719.

Looking through the matter we do not see any evidence amounting to gross carelessness or willful negligence, without which the defendant is not liable civilly or criminally, and, if the case had gone to the jury and a verdict of guilty returned, it would have been the duty of his Honor to set the verdict aside. The law allows some discretion in the board of commissioners by express terms of the statute, and we do not see any abuse of that discretion. His Honor properly directed a verdict of not guilty. This view renders any consideration of any other question unnecessary.

Affirmed.

Cited: *S. v. Baum,* 128 N. C., 605; *Turner v. McKee,* 137 N. C., 253; *Templeton v. Beard,* 159 N. C., 66.

W. F. PARKER, ADMINISTRATOR OF D. L. SIMMONS, v. GEORGE A. HARDEN, EXECUTOR OF NANCY M. SIMMONS.

(Decided 22 February, 1898.)

Practice—Amendment—Discretion of Judge—Premature Appeal.

1. It is in the discretion of the trial judge to allow an amendment which neither asserts a cause of action wholly different from that set out in the original complaint nor charges the subject-matter of the action nor deprives the defendant of defenses which he would have had to a new action.
2. Where a complaint alleges that defendant converted money, an amendment thereto alleging that defendant had received the money as trustee is allowable in the discretion of the court, as it neither asserts a cause of action wholly different from that set out in the original complaint nor changes the subject-matter of the action nor deprives the defendant of any defenses which he would have had to a new action.
3. An appeal from an order allowing an amendment to a pleading is premature, and will be dismissed. The right practice in such case is to note an exception and appeal from the final judgment.
4. The fact that on a former trial the correction of an error in the pleadings would have decided the case in favor of the defendant does not prevent the court from allowing the complaint to be amended.

ACTION tried before *Bryan, J.,* at November Term, 1897, of (112) BERTIE. The complaint in the action originally alleged a conversion of money received by Nancy M. Simmons, the testator of the

defendant Harden, in her life time, and upon the granting of a new trial by the Supreme Court (121 N. C., 57), the plaintiff was allowed by his Honor to amend his complaint by alleging that his intestate, D. L. Simmons, had given to Nancy Simmons a sum of money to be held in trust for his estate. From the allowance of the amendment the defendant appealed.

R. B. Peebles for plaintiff.
Francis D. Winston for defendant (appellant).

CLARK, J. When the case was here before (121 N. C., 57) the Court held that there had been error in refusing the defendant's prayer for instruction that the action was barred by the statute of limitations. When the case went back the Court below permitted the plaintiff to amend his complaint. The amendment allowed was such as rested in the discretion of the Court and was not reviewable; but had it been appealable the appeal would be dismissed as premature, since the proper course was to note an exception and appeal from the final judgment. It is true that the error on the former trial was such that its correction, as the pleadings then stood, would have decided the case for the defendant, but this did not necessarily deprive the Court of the power
(113) to permit an amendment of the complaint. *Bernhardt v. Brown,* 118 N. C., at p. 700. The amendment neither "asserts a cause of action wholly different from that set out in the original complaint nor changes the subject matter of the action nor deprives the defendant of defenses he would have had to a new action." *King v. Dudley,* 113 N. C., 167, and cases cited Clark's Code (2 Ed.), pp. 223, 224.

Appeal dismissed.

Cited: Goodwin v. Fertilizer Works, 123 N. C., 162; *Hockfield v. R. R.,* 150 N. C., 421; *Hardware Co. v. Banking Co.,* 169 N. C., 747; *Lefler v. Lane,* 170 N. C., 183; *R. R. v. Dill,* 171 N. C., 177.

D. W. BRITTON, ADMINISTRATOR OF JOSIAH MIZZELL, v. MARY E. RUFFIN, ADMINISTRATRIX OF J. B. RUFFIN.

(Decided 22 February, 1898.)

Action for Breach of Warranty—Covenant of Warranty—Possession Under Color of Title—Trial—Question for Jury.

1. A deed purporting to convey title is color of title whether the grantor was the owner or not.
2. Where, in the trial of an action for breach of covenant of warranty in a deed for land, it appeared that the plaintiff took possession under the deed of 1874, and defendant testified that plaintiff took possession of the land in 1874 and kept it until 1890, when he surrendered it to a claimant, in the meanwhile working and selling timber from it to other parties, it was error to instruct the jury that upon the whole evidence they should find that the plaintiff had not been in possession for seven years, the question whether there had been such possession being for the jury and not for the court.
3. In such case the jury should have found that the plaintiff had been in adverse possession for seven years; his title had ripened when he surrendered the land, and there has been no breach of warranty.

ACTION for the breach of an alleged warranty contained in a (114) deed from defendant's intestate to plaintiff's intestate, tried before *Bryan, J.*, and a jury, at Fall Term, 1897, of BERTIE. There was a verdict for the plaintiff, under the direction of his Honor, and from the judgment thereon defendant appealed.

Battle & Mordecai for plaintiff.
Francis D. Winston for defendant (appellant).

FURCHES, J. This is an action upon an alleged breach of warranty in a deed for real property. The plaintiff went into possession of the land under a deed from the defendant in 1874. This was color of title whether the defendant was the owner of the land or not, which would ripen into a perfect title by seven years adverse possession thereunder. There was evidence tending to prove that the plaintiff was in the adverse possession of this property from 1874 until 1890, when he surrendered it to a claimant by the name of Wynn.

Joseph W. Burden testified that Britton, the plaintiff, "took possession of the swamp in 1874 and kept it until 1890, when Wynn took it. Britton worked it and sold timber to other parties." This evidence raised the question of fact as to the length of time the plaintiff had the possession. This fact was one for the jury and not for the Court. If the plaintiff held possession under this deed for more than seven years,

he was the legal owner in 1890, when he surrendered to Wynn. His cause of action (if he has one) did not accrue until the breach of the warranty, and this was in 1890 (if at all) when the plaintiff surrendered possession to Wynn. If he had been in possession seven years when he surrendered the possession, he had the superior title and it was
(115) his folly to surrender to Wynn, who had no title; and there has been no breach of warranty. The Court charged the jury that, upon the whole evidence, they should find that the plaintiff had not been in possession for seven years. To this charge the defendant excepted. There is error, for which the defendant is entitled to a new trial. There were other exceptions as to evidence, etc., which may not arise again, and we have not considered them.

New trial.

Cited: *S. c.*, 123 N. C., 70; *Bond v. Beverly,* 152 N. C., 61; *Stewart v. McCormick,* 161 N. C., 627.

J. W. BYRD v. FRANK BAZEMORE ET AL.

(Decided 22 February, 1898.)

Action for Trespass—Landlord and Tenant—Injunction—Practice—Appeal—Case on Appeal—Exceptions—Waiver.

1. The transcript of a record in another action, not in evidence on the trial of the cause in which the appeal was taken, cannot be allowed as evidence or considered on the hearing of the appeal.
2. Where an appellant, whose case on appeal was excepted to by the appellee in an irregular manner, submitted the matter to the judge for settlement, the defects in the appellee's exceptions were thereby waived.
3. In the trial of an action for trespass upon the plaintiff's possession it appeared that the owner of land placed the plaintiff in possession under a verbal agreement that the plaintiff should take care of such owner so long as he should live; and that, plaintiff having cultivated only a portion of the land the first year, the owner leased a portion to others for the second year, whereupon plaintiff brought his action against the owner and his lessees for damages and sued out an injunction to restrain them from trespassing on his possession, alleging the insolvency of such lessees but not of the owner. It also appeared that the plaintiff was indebted to the owner for money borrowed, and that he was insolvent: *Held,* that there was no ground for issuing an injunction.

(116) ACTION heard before *Brown, J.,* at December Special Term, 1897, of BERTIE, on motion to dismiss the complaint and dissolve the restraining order theretofore issued. The motion was allowed and plaintiff appealed.

Francis D. Winston and St. Leon Scull for plaintiff.
R. B. Peebles for defendant.

FURCHES, J. Upon the call of this case, the plaintiff interposed two motions preliminary to the hearing upon the case as presented in the record proper. The first was to be allowed to offer in evidence on the hearing of the appeal in this Court, a transcript of record in another action, not in evidence on the trial of the case from which this appeal was taken. There are no precedents to support this motion, and there is as little principle to support it as there is precedent. It cannot be allowed.

The second motion was to adopt the plaintiff's statement of the case on appeal and substitute it for the case made by the judge who tried the cause. This motion is based on the following facts, alleged by the plaintiff's attorney and not denied by the attorney of the defendant: That plaintiff in apt time prepared a statement of the case on appeal and served the same on the defendant's counsel; that the defendant's counsel excepted to all of the plaintiff's case, after the first word and before the last word, and returned it to the plaintiff's counsel; that the plaintiff then transmitted the case to the judge to be settled by him, and went before the judge and insisted that the judge adopt his case as the case on appeal, which the judge declined to do and settled the case, as it appears in the record proper.

This was not a compliance with the terms of the statute, and is not approved by this Court as a rule of practice. Had the plaintiff's counsel treated it as being no legal exception, filed his case on ap- (117) peal with the clerk, as provided for by the statute, it may be that he would be on a better footing than he is. But this question is not presented, and we make no ruling upon it, and will not do so until the question is presented by the record. But, if the plaintiff had such rights as we have been discussing, in our opinion he waived them when he recognized this as an exception, and went before the judge to have the case settled. This motion is also denied.

This brings us to the consideration of the case on appeal as presented by the transcript proper. And it reminds us of what we see so much of in the newspapers—"government by injunction." The defendant being alone, took the plaintiff, his son-in-law, to live with him, upon a verbal agreement that he should take care of the defendant Bazemore for life and that he should have the land for his life, and then his wife (the defendant Bazemore's daughter), should have it in fee. The plaintiff and his family moved in with Bazemore about the last of the year 1895 or in the early part of the year 1896, and the plaintiff tended a crop on the land in 1896; and he alleges in his complaint and reply that he paid

the rent for that year. He only cultivated a part of the land, and the defendant Bazemore rented a part of it to another person and he cultivated that, and paid the rent to the defendant Bazemore. The plaintiff had but one horse, and could only cultivate a one-horse crop. The defendant Bazemore offered to let the plaintiff take his crop, wherever he wished, but the plaintiff refused to select any part of the land for his crop. The defendant Bazemore then rented a part of his land to the other defendants, and they commenced work thereon. On 1 April,
1897, the plaintiff commenced his action for damages against the
(118) defendants, and for an injunction against the defendant's trespassing on his possession. It is not alleged that Bazemore was insolvent, and it is admitted by the plaintiff that he was at the commencement of this action and now is indebted to the defendant Bazemore for advances and money loaned, to the amount of $70 or $75, and that he is insolvent.

Upon this state of facts, disclosed by the evidence of the plaintiff, the defendants moved for judgment upon the ground that the plaintiff had failed to make out a case. The Court sustained the motion, dismissed the action and dissolved the injunction theretofore issued. This ruling must be affirmed.

The verbal contract, if it was as testified to by the plaintiff, was void under the statute of frauds, which is pleaded and relied upon, and the plaintiff can derive no benefit from that. The only ground he has to rest upon is that he cultivated a part of the land in 1896, and he says paid the rent. This being so and he being allowed to remain on the land in 1897, the law will presume a tenancy for that year. But a tenant of what part of the land? The law by presumption would not increase his tenancy. It could only presume he was the tenant of what he cultivated in 1896. He did not cultivate it all in 1896, and the evidence fails to show what part he did cultivate; nor does it show that the defendants took possession of any part of the land that he had cultivated in 1896.

There was no ground for issuing the injunction, and of course it should have been dissolved when the plaintiff failed to make a case. There is no error and the judgment must be

Affirmed.

Cited: Presnell v. Garrison, post, 596; *Miller v. Womble, post,* 141; *Love v. Huffines,* 151 N. C., 381.

(119)

A. CAPEHART ET AL., EXECUTORS OF W. J. CAPEHART, DECEASED, v. W. P. BURRUS AND WIFE.

(Decided 1 March, 1898.)

Will, Construction of—Intention of Testator—Description of Property Disposed of by Will—Technical Word "Stock."

1. In construing a will it must be considered as a whole for the purpose of arriving at the intention of the testator, which must always prevail.
2. In construing a will, words of art should be taken in their technical meaning unless it appears that they were used in a different sense, and when the language used is not "words of art," it should be construed to have the meaning of such words in ordinary parlance.
3. The primary meaning of the word "stock," in law language, is choses, bonds, evidence of interest in incorporated or joint-stock companies, etc.
4. Where a testator gave his wife several tracts of land, two horses, two cows and other personal property, and, by other items, gave lands to each of several children, and, in another item, declared that "all my notes, bonds, stock, and money on hand I wish divided between my wife" and children named: *Held*, in an action to construe the will, that the word "stock" means bonds and evidence of interest in companies and not "live stock," notwithstanding the fact, as discovered after the death of the testator, that he had no shares of stock when the will was written or at his death, but did have a large amount of live stock.

FAIRCLOTH, C. J., and CLARK, J., dissent.

ACTION by the executor of W. J. Capehart to construe the will of the testator and to obtain advice and directions as to settlement of the estate, heard before *Brown, J.*, at December 1897, Special Term of BERTIE. The facts appear in the opinion. His Honor sustained the contentions of the defendants and plaintiffs appealed.

Francis D. Winston for plaintiffs.
Simmons, Pou & Ward for defendants.

FURCHES, J. The principal question presented in this appeal (120) is the meaning to be given to the word "stock" in construing the will of W. J. Capehart. It appears from the will that the testator was a man of considerable estate; that on 5 December, 1894, he made the will under consideration, and died in March following. At the time of making the will he had a wife and several children, all of whom were living at the time of his death.

By the third paragraph of his will he devised to his wife, Eliza Mason Capehart, three several tracts or parcels of land in fee simple. By the fourth paragraph he willed to his said wife two horses to be se-

lected by her, two milch cows to be selected by her, one buggy and harness, corn, fodder, and one thousand pounds of pork from the gallows, all his poultry, and all his household and kitchen furniture, except the organ, piano, and the furniture in Minnie's room. These he gave to Minnie by the next paragraph of his will.

By paragraph 8 he gives one tract of land, and mills and gins thereon, to his daughter, Minnie Capehart, in fee simple.

By paragraph 8 he loans to his daughter, Martha Tyler, for her natural life "her home tract of land," and then in fee simple to her children.

By paragraph 10 he loans to Susan Tyler, another daughter, for her natural life, two tracts of land in Northampton County, and at her death to her children.

By paragraph 11 he gives to Margaret Burrus, another daughter, a tract of land in Northampton County called the "Brown tract," for her life only, and at her death to Lizzie Burrus, in fee simple.

By paragraph 12 he devises to his son, Dr. A. Capehart, in fee (121) simple, the Indian Woods place.

By paragraph 13 he devises to Leroy Capehart, another son, the land on the right hand side of the public road in Roxobel.

By paragraph 14 he provides that "all my notes, bonds, stock and money on hand, I wish divided between my wife, Eliza Mason Capehart, Minnie Martin Capehart, Margaret Lula Burrus, Leroy Capehart and Dr. A. Capehart."

By paragraph 15 he provides that all the rest of his estate "whether named in this item or not, consisting of both real and personal property, I direct my executors to sell as follows: The personal property for cash, and the lands on a credit of five years, on equal installments with retained title until the lands are paid for. I express and give my executors full authority to sell and dispose of said lands not herein mentioned by me, and as herein directed."

By paragraph 16 he provides that, out of the proceeds arising from the sale of the property mentioned in paragraph 15 of his will, his executors are directed to pay the following: To Helen Tyler, one hundred dollars; to Bertie Tyler, one hundred dollars; to Charles C. Tyler, one hundred dollars; "and all the rest and residue of said sum, so arising from said sales, I give equally share and share alike to Dr. A. Capehart, Leroy Capehart and Minnie Martin Capehart."

There are some general rules to be observed in construing a will: That the whole will must be considered for the purpose of arriving at the intention of the testator, if that can be done, and then to put such construction upon the will as will carry out the intention of the testator, if the language used therein will authorize the Court to do so. *Brawley*

v. Collins, 88 N. C., 605; that words of art should be taken in their technical meaning, unless it appears from the will that they (122) were used in a different sense; that when the language used is not "words of art," it should be construed to have the meaning of such words in ordinary parlance. And there are other general rules which do not apply to this case. But, at last every will stands alone and must be construed alone. There are no fixed and certain rules to guide the Court in making the construction.

With these general observations, we will proceed to put such construction on this will, as it seems to us the language used will authorize, and most nearly carry out the intention of the testator—as we are not authorized to make his will, but only to interpret its meaning from the will itself. *Brawley v. Collins, supra.*

It is contended by the plaintiffs that the word "stock," used in paragraph 14, means choses, bonds of corporate bodies, or of governments, or evidence of shares in corporations or joint companies, while the defendants contend that it means live-stock, horses, mules, cattle, etc. The Court below adopted the defendants' contention, and held that it meant live-stock—domestic animals. In this, we are of the opinion there was error, and that the plaintiffs' contention is correct, that is, that it means dead stock, choses, bonds, evidence of an interest in capital stock of some incorporated or joint stock company.

This is the primary meaning, in law language, of the word "stock." 23 A. & E. Ency., has a chapter entitled "Stock," and in a treatment of over one hundred pages this word is given no other meaning than that given to it in this opinion. On page 584 of this volume, the discussion commences, and the meaning of the word "stock" is given. This author says that the word "stocks" "is sometimes used, but with doubtful accuracy, and it is at least obsolescent." Besides this, it is used (123) in the same sentence with "all my notes, bonds, stock, and money on hand." This, in our opinion, is significant of the meaning the testator intended it to have. It is in the wrong place, or, as was said by counsel, "it is in the wrong stable for horses and mules."

In *Brawley v. Collins,* 88 N. C., 605, the testator gave his wife a life estate in a part of his lands, and devised other parts in fee simple. He made no express disposition of the remainder of the land he willed to his wife for life. This devise to his wife was in paragraph 11, in which he provided as follows: "It is my will that all *property,* money and effects willed by me to my wife Mary, that may be left at her decease, shall be equally divided between my daughter Betsy, and grandsons, Stephen Brawley and Peter W. Brawley." Upon the death of the wife, Stephen and Peter claimed two-thirds of the land willed to their grandmother, Mary, for life, under section 11 of the will. In construing this

will the Court say "that the word *property* is used in clauses 9, 10 and 11 of the will, and in the two former, evidently to designate personal things. In clause 10, it follows an enumeration of certain small articles of household furniture, and it is plainly intended to cover such articles as are not specifically mentioned, but are of the same general class with those that are mentioned." In the succeeding clause (the clause under which Stephen and Peter claim) "it is in association with money and effects, and is, as in the proceeding, necessarily confined to personalty, since all the property not named in the will must exclude realty, which is named and devised." "The 11th clause also associates all prop-
(124) erty, money and effects, and as the other disposed of what had been omitted, this disposes of what had been specified and given to the widow, which remained at her death. The words are evidently used in the same sense in both paragraphs and bear an obvious relative meaning to each other."

It seems to us that this comes as near being a case directly in point as can well be found, in the construction of wills. And if the words "all *property*" are to be construed to mean only *personal* because they are used in association with the disposition of personal property in the two preceding paragraphs of that will, then the word "stock," when used in the same paragraph and in the same sentence with notes, bonds and money (all of my notes, bonds, stock and money on hand), in the will under consideration, would be given the meaning contended for by the plaintiffs—the same kind of personal property, as notes, bonds and money.

This interpretation and construction are supported by other dispositions of the will. The testator had previously given to his wife two choice horses, two choice milch cows and a thousand pounds of pork. So, he could not dispose of *all* his live-stock in paragraph 14, as claimed by the defendants, without defeating the former provision made for his wife, and this should be considered in giving an interpretation of the will. *Ruffin v. Ruffin*, 112 N. C., 102.

It was contended by the defendants in support of their contention that "stock" must mean live-stock, such as horses, mules, etc., and that the testator had no such "stock," as contended for by the plaintiff, at his death; and that, if the plaintiffs' contention is correct, the testator was willing something he did not have. This may be so, and still, in our opinion, not make "stock," as used in this will, mean live animals. If it be true that he had no "stock" securities at the time the will was written, nor at the time of his death, this fact does not appear
(125) in the will, which must be construed from what appears in the will itself. *Brawley v. Collins, supra.* From what appears in the will the testator was a man of considerable wealth and was able to

own such "stock." A will speaks as of the date of the testator's death. *Champion Ex parte,* 45 N. C., 246. And if we were allowed to speculate as to this matter, it may be that he expected to own such stock at his death. But this is not necessary, and, as no such thing appears in the will, we are not allowed to do so. This we think is a different question from that raised in the cases cited by the defendants, where the question was as to whether stock, deposited in a bank, passed to the legatee by the language "all my bank stock" in that bank, when the testator owned no stock in the bank, but had stock on deposit in the said bank. This was more a question of latent ambiguity than a construction of the will—of fitting the thing willed to the will. And the Court held that it was clearly the intention of the testator to dispose of this stock in the bank to the legatee named, and that he had used language sufficiently explicit to do so. This is not the case in this will.

It is admitted here that the live-stock is disposed of either by this or the next succeeding paragraph of the will. This is the residuary clause, and directs the executors to sell all the rest and residue of his property, both real and personal, not heretofore disposed of by this will. The live-stock was not disposed of, unless it is by the word "stock" in the 14th paragraph, except the two horses and the two cows given to the testator's wife.

It was contended that the testator had a large amount of live-stock, and that is used as an argument in favor of their contention. It does not appear from the will what live-stock he had, and, if it (126) did, we fail to see the strength of this argument that the defendants' counsel saw.

There is error in the judgment below. The word "stock," as used in paragraph 14 (written 13) of the will of W. J. Capehart, does not mean live-stock, such as horses, mules, etc. Such horses, mules and other live-stock, as belonged to the testator at his death, are included in the 15th paragraph (written 14th) and it is the duty of said executor to proceed to sell the same as therein provided, and, out of the proceeds of such sales, he will pay the testator's debts and the costs and expenses of administration, and then, out of the proceeds arising from these sales, pay the legacies of $100 each to Helen Tyler, Bertie Tyler and Charles C. Tyler, and the residue thereof he will divide equally between Dr. A. Capehart, Leroy Capehart and Minnie Martin Capehart, as provided in said paragraph of said will.

Error.

There will be judgment according to this opinion.

CLARK, J., dissenting. By paragraph 13 of the will, the testator provides that all his "notes, bonds, *stock* and money in hand" should be di-

vided between his wife and four children named. Now, if the testator had possessed both kinds of stock, investment stocks and live-stock, by the settled rules of construction the "stock" would be taken from the context to be investment stock. But this is a mere rule of construction to aid in the ascertainment of the testator's intent and does not apply in a case like this. Here it is alleged in the complaint and admitted that the testator had not a dollar of investment stock, but had a large quantity of live-stock. In arriving at his intent it is just and natural
(127) to conclude that he intended to divide the kind of stock he had and not that kind which he did not have. *Clark v. Atkins,* 90 N. C., 629, and cases there cited. Furthermore, in order to arrive at the intent of the testator, which is the sole object, it is proper to consider the condition of the testator's family and estate and the kind and extent of property he owned at the time of making the will. *Lassiter v. Wood,* 63 N. C., 360; *Edens v. Williams,* 7 N. C., 27. It is, therefore, corroboration of this view that the testator had given the bulk of his large landed estate to his wife and the same four children who are named in clause 13, and that his live-stock was necessary to the working and stocking of said farms, while, if the word "stock" in said 13th clause is held meaningless, the live-stock would be thrown into the residuary clause (clause 14) by which it is to be sold, and (after some small legacies) the proceeds are to be divided (clause 15) among three only of those children who are named in the 13th clause, thus leaving out, without any imaginable cause, the wife and the other child who, with these three, had participated in the nearly equal division of his realty and of the notes, bonds and money. These two would thus be called on to buy live-stock to furnish and work the farms devised to them, while the other three children, instead of getting the corresponding one-fifth of the live-stock to work their one-fifth of the realty, get more than enough, *i. e.,* one-third. This result would also seem to indicate that by the word "stock," in clause 13, the testator meant to divide such stock as he had—live-stock—among the five between whom he shared the bulk of his realty. The fact that, in clause 3, he had given his wife a small quantity of personal property with "two horses
(128) and two cows to be selected by her," does not militate against this view. That clause, construed in connection with clause 13, is more like the allotment of a year's provisions to the wife in addition to her child's part of the personal property. On this point I concur with the judge below.

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

Cited: *S. c.,* 124 N. C., 48.

W. A. BARBER v. W. H. BUFFALOE.

(Decided 8 March, 1898.)

Action of Claim and Delivery—Fraudulent—Conveyance—Consideration—Fraud—Evidence, Sufficiency of—Exceptions—Practice.

1. Exceptions cannot be made for the first time in this Court, and hence, a defendant in an action to set aside a deed of assignment alleged to be fraudulent cannot, for the first time, in this Court, contend that it was incumbent on the plaintiff to show on the trial below that the debts secured in the deed were *bona fide*.

2. Where, in the trial of an action involving the validity of a deed of assignment for creditors alleged to be fraudulent, the trustee shows the existence of the evidences of some of the debts named in the deed, he thereby proves a consideration sufficient to support his title to the assigned estate. It is not necessary that he should prove the existence of all the debts named in the deed, nor of any particular debt.

3. Where, in an action involving the validity of a deed of assignment for creditors alleged to be fraudulent, a debt was attacked which, if allowed, would absorb the entire estate, the note of the assignor to the creditor to the amount of the debt, together with the testimony of the assignor that he had given the note for borrowed money, was sufficient proof of the existence of the debt.

4. To render a deed of assignment for creditors void, it is not necessary that the trustee shall participate in or have knowledge of the fraudulent intent of the assignor, the fraudulent intent of the latter, only, being sufficient to invalidate it.

5. Where, in the trial of an action involving the validity of a deed of assignment for creditors, it appeared that the deed was written by an attorney at midnight shortly after the plaintiff had obtained a judgment against the assignor; that the deed provided that balance of a debt secured by a mortgage on the debtor's home should be paid first; that a relation, who was surety in such preferred debt, accompanied the attorney to the assignor's house and went with him during the night to have the deed recorded, and at the sale of the assignor's home under the mortgage became the purchaser and permitted the assignor to remain in possession without paying rent; and that the balance of the debt, after applying the proceeds of the mortgage sale, exceeded the value of the assigned estate: *Held*, that the evidence of fraud was sufficient to require the submission of the question to a jury.

CLAIM AND DELIVERY, tried before *Timberlake, J.*, and a jury, (129) at Spring Term, 1897, of NORTHAMPTON. The facts appear in the opinion. There was a verdict for the plaintiff and from the judgment thereon defendant appealed.

R. O. Burton for plaintiff.
R. B. Peebles for defendant.

FURCHES, J. This case has been here before and is reported in 111 N. C., 206, and in 114 N. C., 228. On 9 December, 1889, J. C. Lassiter made what appears to be a general assignment of all his property to the plaintiff Barber, in trust, apparently to secure and pay all his debts. In this deed of assignment it is provided that Barber, the trustee, shall at once take the property named in the deed into his possession, to sell the same for cash, privately or publicly, and out of the proceeds arising therefrom to first pay the debt of Norman & Everett, after the proceeds of other property of Lassiter, mortgaged as a security for the Norman & Everett debt, are applied. This mortgaged property has been sold, and it brought $1,000; it was bought by one Biggs, surety
(130) on the Norman & Everett debt, and uncle of Lassiter's wife. And it is admitted that the Norman & Everett debt will absorb the proceeds arising from sales of property in Barber's hands as trustee, after payment of costs, charges, etc. The deed in terms provides that, after the Norman & Everett debt is paid, all the assignor's debts shall be paid *pro rata,* and the debt of Augustus Wright is one of the debts named in the deed of assignment.

It was in testimony that the defendant is a public officer—a township constable; that on Saturday, 7 December, he served two summonses on Lassiter issued in favor of Wright, and these summonses were returnable that day before a justice of the peace, at which time judgments were taken amounting to about the sum of $265; that on the day following (Sunday) Lassiter sent to the town of Scotland Neck for Dunn, an attorney, to draw the deed of assignment; that Scotland Neck is in Halifax County, a distance of 16 miles and across the Roanoke River; that Jackson, the county seat of Northampton County, is only 11 miles; that Dunn went to Lassiter's that night, and Biggs, the surety on the Norman & Everett note, went with him, and the deed of assignment was drawn between twelve and one o'clock that night; that this deed was sent to Jackson that night and registered early next morning; that the land mortgaged as security of the Norman & Everett debt, for which Biggs was surety, was soon afterwards sold and Biggs became the purchaser at the price of $1,000; that Lassiter has continued to live on this land ever since said sale and purchase by Biggs, without paying rent therefor.

The defendant contended in this Court that it was incumbent on the plaintiff to show on the trial below that the debts secured in the
(131) deed of assignment were *bona fide,* or that he should have shown at least that there were such debts as those named in the deed of assignment, and cited *Feimster v. McRorie,* 34 N. C., 287, and *Hodges v. Lassiter,* 96 N. C., 351, for this position. There was no such position as this taken on the trial below by prayer for instructions or by excep-

tion. It is made here for the first time and should not be allowed on that account. Exceptions cannot be made for the first time in this court. *Phipps v. Pierce,* 94 N. C., 514; *Calvert v. Miller,* 94 N. C., 600; *Rodman v. Harvey,* 102 N. C., 1; *Lindsey v. Sanderlin,* 104 N. C., 331.

But it could not be sustained if it had been made. The case shows that when Lassiter was on the stand as a witness he was handed a paper, and he said: "The paper handed me is the note I gave to Norman & Everett, referred to in the deed to Barber. It was for borrowed money."

It also appeared that the debt of Wright, upon which the judgments were taken and which the defendant sets up and claims as his justification for seizing and taking the property named in the trust and sued for in this action, is a part of Lassiter's indebtedness named in said deed of assignment. These facts appearing on the trial answered the requirements of the law. It is not intended that the debts named in the deed shall be shown by the trustee to be *bona fide.* This would throw upon him the burden of disproving fraud, which is contrary to the general rule in issues of fraud, as shown by many decisions of this Court. He that alleges fraud must prove it. The assignee has only to show that there were *evidences* of such indebtedness existing at the time of executing the assignment. *Feimster v. McRorie, supra.* This was shown by the evidence of debt and judgment under which the (132) defendant claims to justify himself in taking the property, and also, by the testimony of Lassiter when he said "this is the note I gave Norman & Everett, named in the deed of assignment. It was for borrowed money."

It has been contended that it was incumbent on Barber, the trustee, to show the existence of all the debts named in the deed, or, at least, that he should do this as to the debts that would be paid in part or in full out of the trust fund. This we do not understand to be the rule. It is only required of the plaintiff to show a consideration to support his legal title. And this is held to be done when he shows the *evidence* of outstanding debts. It is not necessary that he should show this as to all the debts named in the deed, nor as to any particular debt. *Feimster v. McRorie, supra; Hafner v. Irwin,* 26 N. C., 529. But if the rule contended for, that he must show the debt or debts that would be paid by a sale of the property conveyed in the deed, obtained, the plaintiff has done this by showing the existence of the Norman & Everett note.

The defendant among other things prayed for and asked the following instruction:

"4. That it is not necessary that the trustee Barber should participate in any such alleged fraudulent intent or have knowledge of it. It is sufficient to avoid the deed if Lassiter alone was actuated by such intent."

As this seems to have been a general assignment by Lassiter, an utterly insolvent debtor, for the benefit of his creditors, this was a proper instruction and should have been given, unless there was no such evidence of fraud on the part of Lassiter as should have been sub-
(133) mitted to a jury. *Woodruff v. Bowles,* 104 N. C., on p. 197.

We are of the opinion that there was such evidence of fraud as should have gone to the jury.

Without recapitulating all the evidence bearing upon the issue of fraud, the fact that Biggs, the real party benefited by the deed of the assignment, went with the attorney who drew the deed, across the Roanoke River, a distance of sixteen miles, on Sunday night; that he bought Lassiter's home, mortgaged to secure the debt for which he was surety, and that he has allowed Lassiter to occupy it ever since without rent, taken in connection with the other evidence in the case, are such circumstances, in our opinion, as call for an explanation before a jury. One element of fraud in such cases is benefit to the assignor.

There was error in not giving the defendant's fourth prayer, and also in the Court's directing the verdict of the jury.

New trial.

DOUGLAS, J. I concur in the judgment in this case, but not in the argument. The plaintiff's trustor, J. C. Lassiter, executed to the plaintiff a deed of trust conveying his stock of merchandise, with other personal property, to secure his creditors, preferring a debt for $2,500 to Norman & Everett. This preferred debt is admitted to be sufficiently large to absorb the assets after setting aside the lawful exemptions. The defendant, acting as constable, seized the property under execution, which was taken back by the plaintiff under claim and delivery proceedings.

This cause has been twice before this Court, in 111 N. C., 206, and again in 114 N. C., 228, on a petition to rehear.

(134) The only difference as far as I can see between the case as now constituted and as it was on the former trial is that the preferred debt to Norman & Everett, the *bona fides* of which was then apparently admitted, is now contested. This is a material difference, and throws the original burden upon the plaintiff to show the *bona fides* of the deed of trust under which he claims. This he must do by showing the actual existence of the debts secured thereby, or at least of a sufficient amount in number or value to satisfy the jury that the deed was not intended as a colorable security for fictitious debts, but was made with the honest intent of securing real debts. Every deed, whether in trust, or of absolute conveyance; requires an adequate valuable consideration to support it as against purchasers or creditors. *Feimster v.*

McRorie, 34 N. C., 287; *Hodges v. Lassiter,* 96 N. C., 351. These authorities, along with numerous others, lay down the well established rule that such debts having been proved or admitted, the burden of proof then shifts to those seeking to attack the deed *aliunde.* If the alleged fraud appears upon the face of the deed it becomes a question of law; but in the case at bar the deed of trust is admitted to be in all respects regular in form. I think that the debts, whose validity must be shown, should belong to that class really intended to be secured, in this case being the debt of Norman & Everett which dominates the trust and absorbs the assets. To hold such a deed valid simply because it professed to secure certain debts admittedly honest but postponed to a class beyond any possibility of payment, would be a judicial invitation to the perpetration of fraud. As the burden rested upon the plaintiff to show the existence of the Norman & Everett debt, there was error on the part of his Honor in *directing* a verdict upon the first issue. (135) *Spruill v. Ins. Co.,* 120 N. C., 141, and cases therein cited.

Much of the defendant's argument involved practically a rehearing of the matters decided in the former opinion of this Court, which have already been once reheared. As far as that opinion applies to the case as now constituted, it is the law of the case, and I do not feel at liberty to review it. It should also be borne in mind that any opinion concurred in by a majority of the Court becomes the opinion of the Court, and remains the individual opinion of the justice delivering it only in so far as it may treat of matters not properly before the Court or not necessary to the determination of the case.

Cited: *Royster v. Stallings,* 124 N. C., 65.

H. D. MILLER v. W. M. WOMBLE.

(Decided 1 March, 1898.)

Creditor and Debtor—Debts Secured and Unsecured—Running Account—Application of Payments.

1. When there are two or more debts owing by a debtor to a creditor, the former may direct the application of any payment he makes; if he does not do so, the creditor may do so at his pleasure before bringing suit; if neither the creditor or debtor directs the application, the law will make it to the most precarious debt.

2. While the rule for the appropriation of payments on running accounts is that the first item on the credit side of the account will be applied to extinguish the first item on the debit side, yet it has no force against an understanding of the parties to the contrary.

3. Where M. took a mortgage on W's crops to secure advances and thereafter made further advances under an agreement that the crops should be given to him and first applied to the settlement of the unsecured account, and only a running account was kept covering all the advances and containing the debit and credit items: *Held* that, when payments from the crops equaled the amount secured by the mortgage, the lien of the latter was not discharged thereby.

(136) ACTION, commenced before a justice of the peace, and tried upon appeal at December Special Term, 1897, of BERTIE, before *Brown, J.*, and a jury.

R. B. Peebles for plaintiff.
Francis D. Winston for defendant (appellant).

(139) FAIRCLOTH, C. J. When there are two or more debts, the rule governing the application of payments in this State, is:

1. The debtor may apply the payment to either debt at his pleasure.

2. If he fails to make the application, the creditor may do so at his pleasure.

3. If neither make it, the law applies the payment to the most precarious debt. The debtor must direct the application when he makes the payment, and cannot resume the power at any time thereafter. The creditor may make the application at any time before action is brought and not thereafter. These rules apply where there are more than one debt. *Moss v. Adams,* 39 N. C., 42; *S. v. Thomas,* 33 N. C., 251. In *Mayor v. Patton,* 4 Cranch, 317, *Chief Justice Marshall* in reversing the judgment below said that "the error was in holding that the (140) creditor's election was lost if not immediately exercised." In the case before us, the defendant contracted with the plaintiff early in 1896 for supplies to the amount of $75 and secured the same by a lien on his crops, and in the fall when the amount was about exhausted, he, according to the plaintiff's evidence, applied for further advancements, saying that he had crop enough to pay all, and that, "if I would advance him more to make his crop, he would deliver his crop to me, and that it should first be applied to the unsecured account last advanced, that is, to the supplies advanced after his agreement, until that was paid, and then to the crop mortgage account. I agreed to this and advanced him as requested, in all about $237.38." Only one account, called a "running account," was kept, showing in paralled lines the debits and credits. The action is for the balance on the store book.

The defendant's position is that as there is only one account of the en-

tire transaction, the rule of applying the first credit to the first item of the account, and so on, must be observed, and that when the payments equaled the amount secured by mortgage, the lien on his crop was discharged; and he requested the Court to charge the jury that the plaintiff must make out his claim by more than a proponderance of evidence, which was refused, and he excepted. The fallacy is in disregarding the agreement of the parties entered into before any payments were made. Neither reason nor the authorities support the defendant's contention. "The rule for the appropriation of payments on running accounts is that the first item on the credit side of the account will be applied to extinguish the first item on the debit side of the account; but this rule has no force against an understanding of the parties to the contrary. A merchant is not estopped from showing an understanding or agreement inconsistent with the deductions the law would draw (141) from the face of his books, unexplained." *Mack v. Adler,* 22 Fed., 570; *Bancroft v. Holton,* 59 N. H., 141; *Smith v. Vaughan,* 78 Ala., 201; *Langdon v. Bowen,* 46 Vt., 512. "The law makes the application on failure of the parties to do it, on the presumption of the interest and intention of one or the other of the parties, and therefore it would give way to an actual application by both of the parties, as furnishing direct evidence and superseding the necessity for presumption. There could be no doubt that the concurrence of both the parties in an application of payments *ex post facto* would be effectual between them." This is the language of *Ruffin, C. J.,* in *Moss v. Adams, supra.*

The motions of the defendant are disposed of in *Byrd v. Bazemore, ante,* 115. There was no error in the view of the law applied by the Court below.

Affirmed.

Cited: Rouss v. Krauss, 126 N. C., 670; *Lee v. Manley,* 154 N. C., 246.

STATE EX REL. GEORGE HOUGHTALLING ET AL. v. THOMAS TAYLOR ET AL.

(Decided 1 March, 1898.)

Quo Warranto—County Commissioners—Trial of Title to Office—Sufficiency of Complaint on Demurrer.

1. In an action to try the title to the office of county commissioner held by a defendant, only citizens and taxpayers of the county can be relators.

2. Where persons who have been elected and qualified as county commissioners bring an action against persons appointed by the judge of the

district, under the provisions of chapter 135, Laws 1895, to try the defendants' title to office, the complaint must allege that the plaintiffs are citizens and taxpayers of the county.

(142) QUO WARRANTO, brought by leave of the Attorney-General, to test the right of the defendants to sit as County Commissioners of Vance, brought to and tried at the October Term, 1897, of VANCE, before *Timberlake, J.*, and a jury.

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

(143) FURCHES, J. The relators were duly elected commissioners of Vance County at the November election in 1896 and were duly inducted into office on the first Monday in December of that year. After the relators were elected, but before they were inducted into office, A. W. Graham, then one of the Judges of the Superior Court, and holding the courts of the Judicial District in which the county of Vance is located, acting under chapter 135, Laws 1895, appointed the defendants commissioners of said county, and they were inducted into office. This action is brought for the purpose of trying the title of the *defendants* to said office under this act of the Legislature, and under this appointment of *Judge Graham.*

The defendants interposed the objection and moved to dismiss the plaintiff's action for the reason that they do not allege they were
(144) residents and taxpayers of Vance County. In answer to this motion the plaintiffs say this is not necessary, as the complaint alleges that they were elected commissioners of Vance County by the vote of the people.

This would be a sufficient averment if the defendants were holding and claiming the offices to which the plaintiffs claimed to have been elected, and the object of this action was to try the *plaintiffs'* title. The relators would then have a direct personal interest in the action, and it would not be necessary for them to allege that they were residents and taxpayers of Vance County.

But this action is not brought to try the title of the relators. The defendants do not dispute their title, and the fact that the relators are commissioners goes for nothing. It need not have been alleged in the complaint. The relators stand just as if they were not commissioners—just as any private citizen would stand, in bringing this action for the public good. In such case the plaintiffs, having no direct personal interest in the action, must show that they have some public interest to be affected or that may be affected by the defendants being allowed to

hold said office, that is, that they are residents and taxpayers in the county where the defendants are holding and exercising the office.

This may seem to be a technical objection, but it is not. If this were not the law, our best people, elected to office beyond all doubt, might be annoyed and vexed by persons from other counties or even from other States, who had not the slightest interest in the office or in the public good.

But this is not a new question in this State. It has been decided by this Court in at least two cases, and we are governed by those decisions. *Hines v. Vann,* 118 N. C., 3; *Foard v. Hall,* 111 N. C., (145) 369, and cases there cited.

The defendant's motion must be allowed and the plaintiffs' action dismissed.

DOUGLAS, J., dissents.

Cited: Caldwell v. Wilson, 121 N. C., 424; *Mott v. Comrs.,* 126 N. C., 877; *Jones v. Riggs,* 154 N. C., 282; *Midgett v. Gray,* 158 N. C., 135.

NANCY L. McGOWAN v. W. K. McGOWAN.

(Decided 1 March, 1898.)

Action for Malicious Prosecution—Malice—Question for Jury—Trial.

While, in some cases, malice may be inferred from the want of probable cause, the law makes no such presumption, and, in the trial of an action for malicious prosecution, it is for the jury and not the court to make such inference of fact.

ACTION for damages for malicious prosecution, tried before *Timberlake, J.,* and a jury, at September Term, 1897, of PITT. The issues submitted and the responses thereto were as follows:

1st. Did the defendant maliciously and without probable cause procure the arrest and imprisonment of plaintiff as alleged? Answer: Yes.

2d. What damage has the plaintiff sustained thereby? Answer: $1,500.

3d. Did the defendant speak maliciously of and concerning the plaintiff the false and defamatory words alleged in the second cause of action? Answer: Yes.

4th. What damage has the plaintiff sustained thereby? Answer: $1,000.

J. A. Lang testified for the plaintiff that, at the instance of the defendant he issued a warrant on 4 November, 1895, against the
(146) plaintiff for larceny of wood belonging to the defendant; that the case was dismissed after the hearing before him and the defendant was adjudged to pay the costs.

The plaintiff testified as follows:

"I was brought to Greenville by the sheriff from my home, about five miles in the country, having been arrested by him under the warrant for larceny, sworn out by the defendant before J. A. Lang, justice of the peace, being the warrant put in evidence herein; was in sheriff's custody from 1 o'clock p. m., until night. I was gathering corn in my mother's field, and came to where a tree had been cut down in the field across thirteen rows of corn and split into wood. My sister and myself hauled this wood home and both of us were arrested on same warrant, charging us with larceny of this wood. Am cousin of the defendant. It was eleven or twelve o'clock in the day when we hauled wood away. Don't know who cut wood; wood was on land leased by my mother from Mr. Skinner. She went there in 1853 and has lived there continuously since. The tree was standing in fence run on mother's leased land, and was cut down across the corn cultivated by us on said land, and the wood was split up on said land. For some time the defendant's feelings towards me have not been good. The defendant said to me during trial before Mr. Lang, "You stole my wood and you stole my rails that Ed. Carney mauled." There were a number of people present in the room at the time he said this, who heard it. He had been driving up and down our field, said he would do as he pleased. He and his hands would pass through the cultivated field near the house singing and cursing. There was no road at all until he made one. He would just
(147) drive where there was no road—and drive across our crops after they were planted. He had gun in his buggy twice when passing through field. My brother objected to his going through field and we filled up the path made by his passing through there twice, but he cleaned it out and went right on. I suffered greatly in my feelings when arrested and have suffered greatly since. Can't describe my feelings. It has given me lots of trouble. Have suffered great pain and anguish on account of it. I never stole any rails or bothered any. A number of people were present when he said I stole rails."

Several witnesses testified to plaintiff's good character.

Here the plaintiff rested her case, and the defendant offered no evidence.

His Honor stated that he should instruct the jury that, if they believed the evidence, they must answer first and third issues yes, and did so instruct the jury and defendant excepted.

The Court further charged the jury fully as to the law and measure of damages, to which there was no exception.

While defendant's counsel was addressing the jury counsel for plaintiff arose and objected to his making an argument to show want of probable cause, inasmuch as there was no denial in the answer of the issuing of the warrant and her discharge upon it for larceny of the plaintiff herein, who was the defendant in the prosecution; that the law presumed probable cause, and no evidence having been offered to rebut it, their want of probable cause could not be argued to the jury. Court sustained objection and defendant excepted.

Judgment was rendered for the plaintiff on the verdict above (148) recited and defendant appealed.

Galloway & Tyson and James E. Moore for plaintiff.
Bond & Fleming and Jarvis & Blow for defendant.

MONTGOMERY, J. The complaint sets forth two causes of action, the first one being for malicious prosecution and the second for slander. The defendant did not enter a demurrer on account of the misjoinder. The first issue was as to whether the arrest and imprisonment of the plaintiff was malicious and without probable cause, and the second was as to whether the defamatory words were spoken of the plaintiff maliciously. The defendant introduced no testimony. The Court instructed the jury that if they believed the evidence they should answer the first and third issues "Yes." In this instruction there was error in so far as it was applied to the first issue. In actions for malicious prosecution, both the want of probable cause and malice must concur. This Court said in *Johnston v. Martin,* 7 N. C., 248, that "malice alone is not sufficient, because a just accusation may be made from malicious motives; nor is the want of probable cause alone sufficient." In the case of *Johnson v. Chambers,* 32 N. C., 287, it was said that "the dismissal of the State's warrant raised a presumption of the want of probable cause but it did not also raise a presumption of malice; for the question of malice was not inquired of by the justice of the peace. Malice may in some cases be inferred from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact which the jury may or may not make, and it should have (149) been left to them." This Court also said in *Brooks v. Jones,* 33 N. C., 260, that "where there is a total want of probable cause the jury will infer malice almost of necessity, as a prosecution wholly groundless cannot be accounted for in any other way." On account of the error pointed out in his Honor's instruction there must be a new trial. And

it is suggested that, if the trial is had on the same complaint and answer, the entire damages be assessed under one issue, and not under two issues as was the case on the last trial.

New trial.

Cited: Kelly v. Traction Co., 132 N. C., 374; *Stanford v. Grocery Co.*, 143 N. C., 427.

MARY E. HINNANT ET AL. v. ISHMAEL WILDER.

(Decided 1 March, 1898.)

Action to Recover Land—Partition—Costs—Charge Upon Land—Sale for Nonpayment—Homestead.

1. The costs in proceedings for partition (including the expenses of the partition) are charges upon the several shares in proportion to their respective values.
2. In an *ex parte* proceeding for the partition of lands, partition was duly made and one part was assigned in severalty to A. The decree ordered the costs to be paid by the partitioners in equal proportions. A. failed to pay the amount adjudged against him, and the share allotted to her was sold on execution issued on the judgment. No homestead was allotted to A., who had no other land, and her interest was not worth $1,000: *Held*, in an action by the heirs of A. against the purchaser at the execution sale, that the sale was valid.

ACTION for the recovery of land, tried before *Timberlake, J.*, at Fall Term, 1896, of WILSON, upon a case agreed as follows:

F. A. Woodard for plaintiff.
H. G. Connor for defendant (appellant).

(151) FAIRCLOTH, C. J. In 1874, tenants in common filed an *ex parte* petition for partition, which was duly made and one part was assigned in severalty and confirmed to plaintiffs' ancestor, who is now dead. In the decree of confirmation it was ordered "that the costs of said proceeding and partition was adjudged to be paid by the said petitioners in equal parts." Plaintiffs' ancestor failed to pay the amount $10.50 adjudged against her and an execution issued and the share allotted to her was sold by the sheriff and purchased by Teasley, who conveyed the same to the defendant, who is in possession. No homestead was allotted by the sheriff to plaintiff's ancestor, who owned no other land, and this tract was not worth $1,000. Are the plaintiffs the owners and entitled to recover?

The question is a new one in our State, and the counsel of neither party was able to furnish any authority in this or any other State. We must, therefore, proceed on the "reason of the thing," and such analogies as we have. The Code, 1902, provides in partition that the compensation of the commissioners, allowances to parties, the expenses incurred for surveying, and all fees and costs of the proceeding shall be paid as the Court may direct. The rule governing costs on actions on contract or other evidence of debt, in which one party recovers cost against another, has no application here. (152)

In partition proceedings the Court does not proceed *in personam* but *in rem;* in fact, it cannot proceed at all if the title or litigated rights are in dispute until those questions are judicially determined. The property is the debtor to the extent of any charge put upon it. Originally, no cost was allowed in partition, but that rule yielded to the common sense of the country, and the rule was adopted of taxing the cost "equally" without regard to the interest or estate of the parties. This rule was shaken by the Court in *Hyde v. Hindly,* 2 Cox Cases, 408, and the result was statutory regulations, such as we have in our Code and Laws, 1887, chapter 214 and 284. The general rule now is to apportion the costs according to the value of the interest of the respective parties.

It may be noted that equity jurisdiction is not purely litigious, as at common law, but is often protective and administrative, and in those instances the costs of the cause may be different. Under the protective and administrative branch, it would seem to be a wholesome principle that the party needing and asking for aid should be liable for the costs necessarily incurred in granting his request.

A tenant in common cannot convey his estate by metes and bounds, nor have his homestead allotted, until his property has been assigned in severalty, and this he prays the Court to do. The partition decree conveys no estate, but only serves to indicate where it is, and to relieve it from the status of a community of interest. And the same may be said of the homesteader's rights.

When partition is effected by sale, the money comes into the hand of the Court and remains as real estate until further orders. The Court does not then hesitate to pay the costs and other charges (153) out of the fund in hand and distribute the residue. It will order the payment out of any other fund of the same party under its control, because it is only the milder method of compelling obediance to its orders. *Clerk's Office v. Allen,* 52 N. C., 156; *Clerk's Office v. Bank,* 66 N. C., 214.

The charge of money upon the better share for equality of partition is legal and follows the land wherever it may go without regard to actual

notice. The money charged is realty, not because it is essentially so, but because the law cannot tolerate the injustice of taking the property of one person and giving it to another without compensation or a sufficient *security* for it, and we perceive no good reason why the same principle should not be applied to secure compensation for the services of the Court officers and other expense performed under the direction of the Court. It is no answer to say that they may recover a judgment in assumpsit against the party for services rendered, for that would apply to either kind of partition and would be worthless in each case, when insolvency shall intervene, as seems to be the case in this instance. The charge is the security.

When the petitioners ask the Court voluntarily to partition their lands they place the property in the hand and under the control of the Court, as effectually as if it was the proceeds of the partition by sale, and we see no difference in treating the costs alike in each case.

In *Long v. Walker,* 105 N. C., 90, the debt was contracted before 1867, and the matter of costs adjudged therein arose after 1868, and the defendant claimed his homestead against the costs, but not against the judgment debt. This Court held that the cost as an incident of
(154) the judgment was a lien on the property to the same extent as the principal debt, *i. e.,* the homestead right was subject to the judgment for costs. This case is cited only to show the disposition of the law to execute its own decrees for costs as well as otherwise.

Freeman Cotenancy and Partition, section 549, says, in the case of sale for partition, that "the costs of the suit and the various necessary proceeding therein, including the sale, are to be paid, and the residue, after making such payment constitutes the fund to be apportioned."

The only questions raised in *Coles v. Coles,* 2 *Beasley,* 365 (13 N. J. Eq.) related to costs in partition, and the Court held that "equity follows the practice at law (meaning since the statutes passed) and charges the cost of the proceeding as well as the expenses of the partition upon the several shares in proportion to their respective values. This is the well settled rule of the Court and is in conformity with the practice in New York. The rule is moreover an equitable one."

If the costs are not secured as a charge on each share, then they are simply a personal liability, and if one tenant fails to pay his part, the other tenants, who have paid their proportions, would be liable for the defaulter's portion, and thus inequality is produced, the same injustice done, as in partition in unequaled values, without owelty. This would be giving the property of one to another without compensation, which is an injustice the law will not do or permit to be done.

We conclude that the sale was authorized by the judgment on which the execution issued, and that the judgment in the Superior Court was erroneous.

Reversed.

Cited: *Wilson v. Lumber Co.*, 131 N. C., 167.

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(155)

ISAAC A. SUGG ET AL. v. C. M. BERNARD.

(Decided 8 March, 1898.)

Trustee—Liability for Costs.

Where no mismanagement or bad faith on the part of a trustee is shown in an action to which he is a party, as trustee, he is not individually liable for the costs of the action.

ACTION heard before *Robinson, J.*, at March Term, 1897, of PITT, on appeal by the defendant from an order of the Clerk of the Superior Court of said county, reviving a judgment against the defendant and directing the issue of execution thereon.

Shepherd & Busbee for plaintiff (appellant).
Argo & Snow for defendant.

FAIRCLOTH, C. J. Plaintiff recovered a judgment in 1887 (156) against defendant, trustee of Perkins & Robbins, for $1.00, with the costs of the action. The referee reported that there was $1.00 in the hands of said trustee, which he paid into the clerk's office, as he might. Code, section 438. In 1896, notice issued to defendant to show why execution should not issue against him for the costs. It was admitted that the defendant had paid on said judgment all the funds in his hands or which ought to come into his hands as trustee.

In actions against trustees, etc., costs shall be recovered as in an action defended in his own right, "but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the Court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense." Code, section 535.

When the defendant paid on the judgment the amount found in his hands, leaving the costs unpaid, he was protected from personal liability

(157) by said section, and as no mismanagement or bad faith has been shown, he is not individually liable for said costs.

Affirmed.

Cited: *Lance v. Russell,* 165 N. C., 632.

F. G. JAMES v. GREENVILLE LUMBER COMPANY.

(Decided 22 March, 1898.)

Corporations—Material Furnished—Lien—Priority of Claim—Execution on Judgment for Materials.

Where it does not appear that a steam engine and boiler, sold and delivered to a corporation, were necessary to the conduct and continuation of its business, such machinery cannot be considered as "materials furnished" under section 1255 of The Code, so as to permit the mortgaged property of the corporation to be sold under execution on a judgment obtained for the price of such machinery.

ACTION for the recovery of land, tried before *Timberlake, J.,* and a jury, at December Term, 1897, of PITT. The facts are set out in the opinion.

Bond & Fleming for plaintiff (appellant).
Jarvis & Blow and Shepherd & Busbee for defendant.

(158) MONTGOMERY, J. In May, 1892, Latham & Skinner sold and delivered to the Greenville Land and Improvement Company a steam engine and boiler at the price of $200. Afterwards the defendants, being in debt for money borrowed, executed two mortgages upon its real property described in the complaint. The property was sold
(159) under the mortgages in December, 1892, and bought by P. B. Taliaferro, who conveyed to S. C. Hamilton, Jr., and the last named afterwards conveyed the property to the defendant. On 5 July, 1893, the plaintiff obtained a judgment in a court of a justice of the peace against the Greenville Land and Improvement Company for the price of the engine and boiler, and the amount was declared to be for materials furnished by the plaintiff to the company purchasers, under section 1255 of The Code. The justice's judgment became one of the Superior Court by transcript on 8 July, 1893. The real estate was sold under an execution issued upon the judgment, and was purchased by the plaintiff.

The present action is for the possession of the real estate by the plaintiff, who was the purchaser thereof at the execution sale. The claim of the plaintiff is that the engine and boiler were materials furnished under section 1255 of The Code, and that the sale of the land under the mortgages was void as to the debt due by the Greenville Land and Improvement Company to Latham & Skinner for the engine and boiler.

It is not claimed by the plaintiff that the sale of the engine and boiler constituted a lien upon the land as for materials furnished. No lien was ever filed. Nor is there any claim set up by the plaintiff under section 685 of The Code, for no action to enforce the collection of the purchase price was commenced within sixty days after the registration of the mortgages. If the engine and boiler can be considered as materials furnished under section 1255 of The Code, the plaintiff would be entitled to recover the land. If not, then he acquired no rights at the sheriff's sale. In *Coal Co. v. Electric Light Co.*, 118 N. C., 232, it was decided that section 1255 of The Code gave no lien (160) for materials furnished, as did section 1781 of The Code, and that it was intended to give additional relief to laborers and material men who had served, or furnished material, to corporations after they had made mortgages upon their property to other creditors—section 685 preferring laborers and material men as to their claims prior to or at the time of the execution of the mortgages or deeds of trust. In that case, on this subject, the Court further said: "The object seems to have been two-fold, one to enable such concerns to continue their operations which they would probably not be able to do if it was known they had nothing out of which their employees and contractors would make their debts. But the other and probably the principal object moving to this enactment was to give protection to this class of laborers and contractors who had contributed their labor and material to keep the concern going. In that case the claim was for coal furnished the electric light company, and on the ground that coal was necessary to run the concern to keep it going, it was held to be embraced in the term "material furnished." It does not appear in the present case that the engine and boiler were necessary to keep the Greenville Land and Improvement Company going. They may have facilitated the work of the company, for they were used by the company. They may have increased its output of finished material, but they may not have been essential to the conducting and continuation of its business. There was no error in the ruling of the Court in dismissing the action on the defendant's motion made under the act of 1897.

No error.

CLARK, J., concurring. It seems to me that this is the test: where the material furnished to keep the business going is something that is consumed in the use, as coal for instance, or labor performed or (161) a *tort* committed, which are intangible and unmortgageable, or is such material as goes into and makes part of the realty or the product in such a way as to be undistinguishable from the mass, as timber put into a building, or cotton that is manufactured, these things come within the purview of the remedy provided by The Code, section 1255; but where the subject matter for which the debt is incurred keeps its identity, as an engine, even though built into the wall, this section does not apply (and section 1781 would not apply) because the party had its remedy by retaining title or taking a mortgage on the property sold. For this reason neither section 685, 1255 nor 1781 here applies. The Code, section 685, does not apply for the additional reason that the action was not brought within sixty days after the registration of the mortgage, nor section 1781 for the additional reason that no lien was filed.

FURCHES, J., concurs in the concurring opinion.
FAIRCLOTH, C. J., dissents.

Cited: Electric Co. v. Power Co., post, 601; *Fulp v. Power Co.,* 157 N. C., 155.

STATE EX REL. E. T. CLARK, ADMINISTRATOR, v. R. M. PEEBLES.

(Decided 12 April, 1898.)

Modification of Judgment on Rehearing.

The judgment rendered on former appeal in same case (120 N. C., p. 31) is modified in the respects mentioned in the opinion.

PETITION to rehear case decided at February Term, 1897, and reported in 120 N. C. R., at p. 31.

Thomas N. Hill and F. D. Winston for plaintiff.
R. B. Peebles for defendant (appellant).

(162) MONTGOMERY, J. This case has been reheard upon the application of the defendant, the decision in the first hearing being reported in 120 N. C., 31. Probably there never were before the Court more complicated and perplexing matters than the record presented in

the original case. There were hundreds of pages of the transcript of the record, hundreds of pages of the printed case on appeal, and exceptions by the hundred. The rehearing was confined to the 43d, 44th and 45th exceptions of the plaintiff as brought up by the appeal. Upon a re-examination of the report of the referee, the judgment of his Honor who heard the exceptions, and the account of John T. Peebles, the intestate of the defendant, we find that upon the first hearing we overlooked, without fault of ours, the conditions under which the disbursements by John T. Peebles, the administrator *de bonis non* with the will annexed of Solomon Boone were made to Indiana Bristow. We are now of the opinion that the items of $200 and $184.67, the interest thereon, and $100 and $91.07, the interest thereon, which were found by the referee to have been proper disbursements of the administrator Peebles, and allowed by his Honor over the exception of the plaintiff, ought to be allowed as a credit to the defendant, and his Honor's judgment to that effect ought not to have been disturbed. In conformity to this view we now modify the judgment entered below under the former decision of this Court, herein referred to, the extent that the share of Mrs. Bristow, to wit, $882.90 be reduced by the amount of the two items above mentioned. As to the item in the account of Peebles, administrator, etc., of $150 and $143.50 the interest thereon, paid to William Grant, the same will not be disturbed for the reason given in the former (163) opinion. The costs to be taxed upon the matter of this rehearing will be paid equally by the plaintiff and defendant. The former judgment and decision are modified as herein declared.

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

Cited: *Shelby v. R. R.*, 147 N. C., 538.

JOHN R. PENDER, RECEIVER, v. J. P. MALLETT ET AL.

(Decided 2 May, 1898.)

Practice—Appeal—Demurrer—Order for Examination Under Section 580 of The Code.

1. An appeal lies from a judgment overruling a demurrer.
2. A party cannot appeal from an order to appear before the clerk to be examined under oath concerning the matters set out in the pleadings as provided in section 580 *et seq.* of The Code.

PETITION by defendant for *certiorari* as substitute for an appeal pending in EDGECOMBE on the grounds stated in the opinion.

Jacob Battle for plaintiff.
G. M. T. Fountain for defendant (petitioners).

CLARK, J. The Court overruled the demurrer, gave the defendant time till 20 May, to file answer, and ordered that defendants appear before the clerk to be examined under oath concerning the matters set out in the pleadings, Code, section 580 *et seq.* The defendant excepted to the order and the judgment, but the Court being of opinion that an appeal did not lie, noted the exception and directed the clerk not
(164) now to send up a transcript. The defendants thereupon applied, after notice to the plaintiff, to this Court for a *certiorari.* It is true that an appeal from the order of examination is premature and will not lie. *Vann v. Lawrence,* 111 N. C., 32; *Holt v. Warehouse Co.,* 116 N. C., 480. But an appeal lies from the judgment overruling a demurrer. *Commissioners v. Magnin,* 78 N. C., 181; *Ramsay v. R. R.,* 91 N. C., 418, and they are decisive of this application. The hearing here was complicated with other matters which have no bearing upon the sole question before us, which is as to the defendant's right to appeal at this stage of the case. The *certiorari* will issue, but it will not suspend the order of examination of defendants.

Motion allowed.

Cited: *S. c.,* 123 N. C., 59; *Chambers v. R. R.,* 172 N. C., 560, 561.

NANCY McGOWAN v. WILLIAM McGOWAN.

(Decided 22 March, 1898.)

Homestead—Right of Debtor to Select—Allotment—Exceptions—Practice.

1. An allotment of a homestead exemption is illegal where the debtor is not given the opportunity to be present and make his selection.
2. Where a judgment debtor excepted to the allotment of a homestead by appraisers upon the ground, which was not denied, that they gave him no opportunity to be present and make his selection, it was error to dismiss such exceptions, though he disclaimed having title to the land which, in making such exceptions, he asked to have allotted to him as a homestead.

MOTION TO DISMISS exception of defendant to the report of appraisers in the allotment of his homestead under execution heard before
(165) *Timberlake, J.,* at December Term, 1897, of PITT.

Swift Galloway and James E. Moore for plaintiff.
Bond & Fleming and Jarvis & Blow for defendant.

CLARK, J. The defendant's exceptions to the homestead allot- (167) ment are somewhat calculated to confuse. He avers:

(1) That the appraisers did not value the homestead, with its dwellings and buildings, selected by him; that they gave him no opportunity to make the selection; that he had no notice of their appointment or time and place of meeting; and that they did not select a parcel or tract of land including his dwelling house, but allotted to him a tract which he had conveyed to L. A. McGowan years ago and in which he had no interest; that it is not in his possession, and that exclusive of improvements put on it by the purchaser, it is not worth $1,000, but he says further—

(2) That while he disclaims ownership of the lands conveyed by him to L. A. McGowan, which he avers was done *bona fide* and for value, he is informed that the plaintiff will levy upon and sell said lands as the defendant's property, and he demands that his homestead be laid off therein; and he says also that he owns no land whatever.

The plaintiff agreed that the exceptions of the defendant should be read as evidence. There was no evidence in reply and the allegations of fact are to be taken as true. It is not very clear, but it is a reasonable inference that the lands conveyed by the defendant to L. A. McGowan are more extensive than the tract which is allotted to him as a homestead. It is strange that a debtor should insist upon an allotment of a homestead in lands which he says do not belong to him, but the Constitution, Art. X, sec. 2, gives him the right to make the selection, and the (168) Code, section 503, provides that the appraisers shall lay off "such portion as he may select." As it appears that this was not done, and that the petitioner was given no opportunity to select, it was error to dismiss the exceptions. They should have been sustained and the matter remanded to the appraisers that they might give the defendant such opportunity. The plaintiff relied on (1) That the exceptions did not comply with chapter 347, Laws 1885, in that they failed to specify the property in which the re-allotment should be made. This would be true if the allotment had been regularly made, but the defendant's exception is that no legal allotment had been made because he was not given opportunity to be present and make his selection. (2) That the defendant having disclaimed owning any land at all he is estopped to object to the action of the appraisers. On the contrary, which he avers that he has conveyed away the lands *bono fide,* he demands that he be laid off a homestead therein and that he have his right allowed to select its location.

While it looks strange that the defendant should seek a homestead in property which he says is not his, he seems mindful of the fact that a jury may differ with him as to the *bona fides* of his conveyance, and he is taking no risks. *Whitehead v. Spivey,* 103 N. C., 66. On the other hand, if, as he says, the plaintiff will seek to set aside the conveyance as fraudulent and subject the land to her judgment as the property of the defendant, it does not lie in the plaintiff's mouth to object to the defendant having his homestead legally laid off therein. If it (169) should prove to be the defendant's property, he would be entitled to have his homestead therein (*Crummen v. Bennett,* 68 N. C., 494), and would be estopped (*Marshburn v. Lashlie, post,* 237; *Whitehead v. Spivey, supra*), by a homestead laid off therein. There should be opportunity, therefore, given him to select it.

Error.

Cited: *McKeithen v. Blue,* 142 N. C., 363.

D. D. GARDNER AND E. O. GARDNER, HIS WIFE, v. W. A. HEARNE ET AL.

(Decided 1 March, 1898.)

Judicial Sale—Foreclosure of Mortgage—Commissioner's Deed.

1. In the absence of an equitable right clearly established to the contrary, a commissioner appointed by a court to make a sale and execute a conveyance to the purchaser named in the decree of confirmation cannot be compelled to make a deed contrary to the terms of such decree.

2. Where a commissioner appointed by the court to sell land reported E. as the purchaser, and the decree confirming the sale directed him to convey title to such purchaser, and, before a deed was made, A. filed a motion for an order directing the commissioner to make the deed to him on the ground that the commissioner's report (by an interlineation) stated that E. had transferred her bid to him, it was error on the hearing of such motion to exclude affidavits showing that the report was altered without the knowledge or consent of the commissioner, after it was filed, so as to show the transfer of E's bid to A.; that when the decree of confirmation was made the alleged transfer was not before the court and that the report, as originally made by the commissioner, was consistent with the decree itself.

(170) MOTION in an existing cause on the part of the purchaser of land sold under decree of Court, to compel the commissioner to execute a deed, heard before *Timberlake, J.,* at November Term, 1897, of WILSON.

GARDNER *v.* HEARNE.

C. M. Bernard and R. O. Burton for plaintiff.
F. A. Woodard and H. G. Connor for defendants (appellants).

MONTGOMERY, J. In an action for the foreclosure of a mortgage upon real estate, instituted in Wilson Superior Court by E. O. Gardner and her husband against W. A. Hearne, A. J. Simms was appointed commissioner to make sale of the property conveyed in the mortgage. A report of the same was filed by the commissioner and a decree of confirmation entered with the order that the commissioner should make title to the purchaser upon payment of the purchase money. No deed, however, has ever been made by the commissioner to any one. In his report of the sale the commissioner stated that E. O. Gardner was the purchaser.

The matter before us is upon a motion made by A. D. Gardner, the son of the purchaser, upon notice to the commissioner Simms to have the original action reinstated on the docket and for him to show cause why he, as commissioner, should not execute and deliver to A. D. Gardner a deed to the real estate described in the original com- (171) plaint and decree. A. D. Gardner, in his affidavit filed by him as the basis for his motion, stated as a reason why the commissioner should make a deed to the property to him that the report of the sale by the commissioner contained a statement that the purchaser E. O. Gardner, his mother, had transferred her bid to him, and that the Court in its decree of confirmation acted on this transfer of bid. The commissioner in his answer to the motion of A. D. Gardner, among other things, said that the decree of confirmation of the sale required him to make title to the purchaser, E. O. Gardner; that she has never called on him for the deed or instructed him to make it to any other person; and that he has no knowledge or information in regard to any transfer by the said E. O. Gardner of her bid to A. D. Gardner; that no such transfer was ever shown to him or called to his attention, and that at the time of the filing of the report of sale, A. D. Gardner was living with his mother and father, the plaintiffs in the original foreclosure proceedings, and an infant only one or two years of age. The commissioner filed with his answer an affidavit made by F. A. Woodard, a part of which affidavit is as follows: "That as appears by the record, A. J. Simms was appointed commissioner to sell said land, and at said sale the affiant, representing the said E. O. Gardner, bid the sum of $505, being the amount due on said note as aforesaid. That affiant prepared the report for said commissioner, stating that said E. O. Gardner was the purchaser. That affiant calls attention to the fact that it appears by an examination of said report that the words 'who has transferred her bid to A. D. Gardner' although in the handwriting of affiant, were inserted after the filing of said report."

(172) The commissioner further answering files an affidavit made by F. I. Finch in which the affiant sets out that since the commissioner's sale and confirmation, E. O. Gardner and her husband have sold the lot of land referred to in the commissioner's report to him at the price of $2,500, and that that amount was the full value of the property at the time Gardner and wife conveyed to him.

Upon the hearing of the motion the Court below held that the affidavits (including the one of commissioner Simms, as we understand it) were incompetent and irrelevant as to the matters then being inquired into, and made an order directing the commissioner to convey the property to A. D. Gardner. There was error in this ruling. This is not a proceeding in which it is sought by some person other than the commissioner to have set aside a deed which had been made by mistake of the commissioner. No deed, as we have said, has ever been made, and this proceeding is in the nature of one in equity whereby it is sought on equitable grounds to compel an officer appointed by the Court to make a sale, to execute a deed, contrary to the directions contained in the decree of confirmation. The affidavits tend to show that when the decree of confirmation was made the alleged transfer of the bid by E. O. Gardner to her son was not before the Court, and that the report of sale as originally made by the commissioner without the alleged transfer (as the commissioner avers) of the bid, is consistent with the decree itself. If it should be found that the alleged transfer of the bid was made after the report was filed and without the knowledge or consent of the commissioner, and he should, in violation of the order confirming the sale, convey to the affiant, A. D. Gardner, he might subject him-
(173) self to pecuniary liability at the suit of persons who have acquired interests in the land. In the present proceeding A. D. Gardner has set out no causes for equitable relief, and until such shall be shown it would be inequitable to compel the commissioner to make a deed contrary to the terms of the decree and which might subject him to pecuniary loss.

There was error in the respect pointed out in his Honor's ruling, and the matter will be remanded to the end that the affidavits be considered, the facts found, and judgment pronounced accordingly.

Remanded.

F. M. RAWLINGS v. LIZZIE NEAL.

(Decided 1 March, 1898.)

Practice—Printing Record—Rule of Court—Amendment—Husband and Wife—Right of Husband to Mortgage Wife's Crop—Trial—Admissions by Wife.

1. An amendment of a Supreme Court rule of practice as to printing the record on appeal does not apply to a case tried before the amendment was made.
2. A husband cannot mortgage crops made by his wife and children after his death on lands owned by his wife.
3. Where, on the trial of an action involving the title to crops mortgaged by a husband but made on the wife's land by herself and children after the husband's death, the widow admitted that her husband had the right to mortgage the crops, but she denied having given him authority to do so: *Held*, that the admission was the admission of an erroneous proposition of law and is not binding on her.

CLAIM AND DELIVERY, tried before *Timberlake, J.*, and a jury, at Fall Term, 1897, of NASH. The facts appear in the opinion. There was a verdict for the plaintiff (under the instructions of his Honor) for the crops sought to be recovered, and from the judgment thereon defendant appealed. (174)

Spier Whitaker for plaintiff.
Battle & Thorne for defendant.

FURCHES, J. When this case was called the plaintiff moved to dismiss the defendant's appeal for the reason that the record was not printed as required by Rule 29, and upon inspection it plainly appears that it is not. The printing and punctuation are both bad, and it is printed in a little pamphlet about two-thirds the length required by the rule. As this case was tried before the rule was amended, we hold that it is not subject to the amended rule, and, while we hold that this case is not subject to the amended rule, we take occasion to say that we will expect the rule to be complied with in cases where it does apply.

The defendant is the widow of J. W. Neal, who died in April, 1896. He and his wife (the defendant) for several years had been, and were at the time of the death of the husband, living on a tract of land owned by the defendant. In February, 1896, the husband executed a crop lien to the plaintiff (or a mortgage, as it is called both, in the case, and no copy is sent) for the purpose of obtaining supplies to aid him in making a crop for the year 1896. In the lien was included a prior

indebtedness of $126.81 according to the plaintiff's admission. The testimony tends to show that some supplies were gotten after the execution of this lien and before the death of the husband, and others were gotten by the defendant after the death of the husband, but charged to the husband. The crop of 1896 was made entirely by the labor of the defendant and her two children.

Upon this state of facts, the plaintiff claims the entire crop of 1896, for which he brought this action, had the property seized and
(175) put into his possession. And the question before the Court was, is the plaintiff the owner of this crop or not?

It is not pretended that the defendant signed the lien papers, but it is claimed by the plaintiff that she knew her husband had made the lien and that he had been giving similar liens on previous crops to her knowledge, and that she had acquiesced in his right to do so.

The defendant knew that her husband had given similar liens and that he had used the proceeds of the crop raised on the land in discharging the same. But she denied that he had any authority from her to do so, and she denied knowing of the contract under which the plaintiff claims, until a short time before this action was commenced.

There is other property besides the crops involved in this action, a part of which, the defendant admits, belonged to her husband, and the cows and hogs were found to be her property. This leaves the contest to depend upon the title to the crops.

Whether a husband, who cultivates his wife's land by her consent, would not be entitled to a part of the crop, as another tenant would be, and if so, have the right to mortgage his part or to give a crop lien thereon, as discussed in *Wells v. Batts,* 112 N. C., 283, and *Branch v. Ward,* 114 N. C., 150, need not be discussed in this opinion—as it appears from the uncontradicted evidence in the case that these crops were raised by the defendant and her two children, after the death of the husband. This being so, and the crops being raised on her land, they belong to her.

And the question presented is, whether the husband had the right to mortgage the wife's property without her joining in the deed? We are
of the opinion he had not, and that the plaintiff cannot recover
(176) these crops or any other property shown to be the defendant's.

The case of *Bazemore v. Mountain,* 121 N. C., 59, was cited for the plaintiff. But that case is decided upon entirely different principles from those involved in this case, and there is no analogy between them.

The Court below appears to have put its ruling upon the ground that the defendant had admitted, on her cross-examination, that her husband had the *right* to mortgage the crops. The defendant did make this admission. But she all the while denied that she had given him *any au-*

thority to do so. So, this was the admission of an erroneous proposition of law, which the Court should have corrected. But the defendant at the date of this mortgage was a *feme* covert, and would not have been bound if she alone had made it. And certainly she could not be bound by her husband's mortgage, because she did not object to his making it, or by assenting verbally to her husband's making it. There is error and a new trial is awarded.

New trial.

Cited: *S. c.*, 126 N. C., 274; *Thompson v. Coats*, 174 N. C., 198.

(177)

J. H. WOOD, ADMINISTRATOR OF PENNIE WOOD, v. S. J. BARTHOLOMEW.

(Decided 12 April, 1898.)

Action for Damages—Nonsuit Under Act of 1897—Practice—Broadside Exception—Negligence—Contributory Negligence—Burden of Proof —Directing Verdict.

1. A general or "broadside" exception to a charge to the jury will not be considered on appeal.

2. It is only where the defendant alleges that the plaintiff's evidence on a trial has failed to make out a case against the defendant that Laws 1897, chap. 109 applies; hence,

3. Where, in the trial of an action for damages arising from the negligence of defendant, in which contributory negligence was relied upon as a defense, the plaintiff's evidence made out a case of negligence, it was not error to refuse to dismiss the action under Laws 1897, chap. 109, for, the burden of the issue as to contributory negligence being on the defendant, the finding thereon must be left entirely to the jury.

4. It is only where there is *no* evidence to support the issue on contributory negligence that the court can direct the verdict.

ACTION for damages, tried before *Timberlake, J.*, and a jury, at April Term, 1897, of FRANKLIN.

The issues submitted were:

1. Was the death of the plaintiff's intestate caused by the negligence of the defendants in selling podophyllin?

2. Did the decedent contribute, by her negligence, to her death?

3. What damage, if any, has the plaintiff sustained?

The facts are summarized in his Honor's charge which is referred to, with approval, in the opinion, and which was as follows:

"This is an action brought by the plaintiff against the defendants to recover damages, which he alleges he has sustained by the death of
(178) his wife, brought about, as he alleges, by the selling by defendants to plaintiff of a poisonous drug, to wit, podophyllin, instead of a harmless drug, to wit, rhubarb.

In order that you may intelligently determine how the matter is, the Court will submit to you several questions, which you will answer, from the testimony in the case, after applying each principle of law as I shall give them to you. The first question which you are to answer is this: "Was the death of the plaintiff's intestate caused by negligence of defendants in selling podophyllin?"

Negligence, in a general sense, is any omission to perform a duty imposed by law for the protection of one's own property or person or that of another. Negligence, to some extent, should be measured by character, risk and exposure of the business under consideration; and the degree of care of all parties is higher where the lives of others are endangered than in ordinary cases. The burden of proving negligence rests on the party alleging it, and when a party charges negligence on the part of another as a cause of action, he must prove the negligence by the preponderance of the evidence. Now in this case, if the jury should find the weight of evidence to be in favor of the defendants, or that it is equally divided or balanced, then you should answer the first question or issue "No"; and if you do this you need not answer either of the others.

In order to find for the plaintiff in this issue, you must find by this rule of proof two things: First, that the defendants sold to plaintiff podophyllin when he called for rhubarb; and secondly, that the death of his intestate resulted from the taking of said drug. The evi-
(179) dence offered on the part of the plaintiff to support his first contention is, first, his own testimony. He tells you he went to the defendant's place of business in Castalia, and asked for rhubarb; also that when he got to Dr. Sills', having gone after him to attend his wife, he stated to Dr. Sills that he asked for rhubarb. Next the testimony of the witness White, who told you he saw Wiley Bartholomew a day or two after the alleged occurrence, when said Bartholomew expressed much regret at the death of Mrs. Wood, and added that it was his mistake, occasioned by having bottles of rhubarb and podophyllin near together on same shelf, and that he would not have had it happen for anything. To the same effect is the testimony of the witness Gupton, who told you he had heard said Bartholomew make a similar statement the next day or two after the alleged sale. And then plaintiff says you have Mr. Wood corroborated as to his statement to Dr. Sills by Dr. Sills

himself who, being asked, says that said Wood did tell him, the night he went for him, that he asked the defendants for rhubarb.

On the other hand you heard the evidence of defendant Bartholomew himself, who tells you that Wood did call for podophyllin, and he gave him just what he called for; and the further testimony of the witness Brown, who says he was in the room adjoining the drug store and heard Wood ask for podophyllin. Now this presents a clear-cut question of facts, which you must determine for yourselves.

If you should not be satisfied by greater weight of evidence that Wood asked for rhubarb and not podophyllin, you need not trouble yourselves further, but at once answer that issue (the first), "No," and return to the clerk. If, however, you should come to the conclusion that he did ask for rhubarb, then you will proceed to consider the other (180) view under the first issue, and that is, if the defendant sold podophyllin by mistake for rhubarb, did the said drug cause the death of Mrs. Wood? Plaintiff says it did, and says he has introduced evidence sufficient to satisfy you by greater weight of evidence; says he has shown you that the drug was administered—provided, of course, that you have found as heretofore explained, that the drug asked for was rhubarb and not podophyllin; that at the time it was administered his wife was in comparatively good health; that soon thereafter she became sick—had violent vomitings, nausea and purging, all of which he says are symptoms of poison by the drug podoyhyllin. That he has shown you, further, that his two sons, who were also in comparatively good health, were also made violently sick by the taking of similar doses, and that in about four or five hours from time of taking it his wife was dead. Plaintiff argues that you can come to no other conclusion than that her death was caused by the taking of said drug.

In addition to this he further notes the testimony of Dr. Sills, who says: I think she must have died from the effect of that dose of medicine.

On the other hand, the defendants say you should not be so satisfied; that the testimony offered on behalf of plaintiff himself is not sufficient to do so; and then, further, that testimony tending to show that death would not result in less than ten or twelve hours, causes the scales to go down on his side. You should consider these contentions of defendants together with other arguments made by their counsel, and if you should not then be satisfied, by greater weight of evidence, that Mrs. Wood's death resulted from the taking of the drug, you will in this event answer issue, "No," and not consider the other issues. (181) If under my instructions you should, however, answer this issue "Yes," you will then proceed to consider second issue, to wit: Did decedent contribute, by her negligence, to her own death?

Contributory negligence is negligence not only upon the part of the one committing the injury, but also upon the part of him upon whom injury is committed and by which they both contribute thereto. One who is injured by the ordinary negligence of another cannot recover damages therefor, if the injured party by his own ordinary negligence proximately contributed thereto, so that it would not have happened but for his fault. On this issue the burden shifts to defendants: that is, the defendants must offer evidence which outweighs plaintiff's—else you will find for the plaintiff and write "No" as your answer. This, defendants say, they have done. They say that they have shown you that Mrs. Wood failed to exercise the care and diligence which a reasonably prudent person ought to have done under the circumstances. Mr. Wood admitted that Mrs. Wood had taken rhubarb several times before, and there being evidence tending to show that the two drugs in question are easily distinguishable by their smell and taste, they say further if she had used ordinary care she would not have taken the drug. They rely further upon the expert testimony also tending to show this. You have heard it all from the lips of witnesses and I have read you my notes of it, and it is your duty to give due consideration to it.

On the other hand the plaintiff says that the testimony tends to show that Mrs. Wood was a woman of only ordinary intelligence; that
(182) the paper containing the medicine was handed to her on the porch at twilight and believing that it was rhubarb, she did just what an ordinarily prudent person would also do under such circumstances, to wit: take it without further investigation. If the jury should find that the light on the porch was such that the two drugs by sight could not be distinguished, and further shall find that there was nothing else to call Mrs. Wood's attention to the difference in the medicine from rhubarb, then it was not negligence in her to take it without carrying it to her nose or tasting it. Ordinary negligence is the want of such care and diligence as reasonably prudent men generally, in regard to the subject-matter of inquiry, under such circumstances as those under consideration, would use to endeavor to prevent the injury complained of; or that care which a person of common prudence takes of his own concerns; or that degree of care which men of common prudence exercise about their own affairs. If the defendants have satisfied you by the greater weight of evidence that from the former use of rhubarb and her knowledge of its taste and smell (her faculties being unimpaired), Mrs. Wood could, by the exercise of ordinary care, as before explained, have discovered that the medicine that she took was not rhubarb, she would be guilty of contributory negligence, and you will answer this issue "Yes." If they have not so satisfied you, you will answer it "No." If you have answered the first issue "Yes," and the second issue

"No," you will then proceed to answer the third. The only evidence of damages is that of Mr. Wood himself, who says that his wife's services were worth $150 per annum. According to the table of mortality her expectancy would be twenty-two and four-tenth years. You will multiply twenty-two and four-tenths years by $150, and then compute the present cash value of that sum. If the jury should (183) be satisfied that Mrs. Wood was a woman of delicate health, they can make such allowances as they think proper therefor. The testimony in the case is conflicting and you must reconcile it, if you can, and if you cannot, you must say who has told the truth. You will not allow any punitive damage or damages to solace plaintiff's grief. In determining this, you will consider the demeanor of witnesses on the stand, the reasonableness of their statements, any interest which they may have in the result of the suit, and also the evidence of good and bad character which has been given one of the witnesses. In considering this case, you will not do so from your sympathy or prejudice, but render your verdict from the testimony, applying the principle of law which I have given you. To recapitulate: If you should find Mr. Wood called for podophyllin instead of rhubarb, you will answer first issue "No," and not consider the matter further. If you find he called for rhubarb and was given podophyllin, but that Mrs. Wood's death did not result from the taking of the podophyllin, you will do likewise. On the other hand, if you find Mr. Wood called for rhubarb and got podophyllin, and that Mrs. Wood's death resulted from the taking of the podophyllin, you will answer that issue "Yes," and proceed to consider the second. If you find that Mrs. Wood did not use the ordinary care, as before explained in these instructions, which she ought to have used, you will answer it "Yes," and consider the third; otherwise you will answer it "No," and proceed to ascertain damages according to the rule I have laid down. The burden on the first issue is on plaintiff, and on second issue on defendant."

To the several charges as given by the judge the defendants (184) excepted.

The jury responded to the issues as follows: To the first issue, "Yes"; to the second issue, "No"; to the third issue, "$1,600."

There was judgment on the verdict for the plaintiff and defendant appealed.

T. W. Bickett for plaintiff.

F. S. Spruill, W. H. Ruffin and P. W. Avirett for defendant.

FURCHES, J. The defendants are druggists, and the plaintiff, according to the finding of the jury, applied to them for rhubarb and they sold him podophyllin. This drug was given to his wife as rhubarb, from the

poisonous effects of which she died. And this action is brought against the defendants for damages caused by their negligence in selling the plaintiff podophyllin for rhubarb. The defendants deny that they sold podophyllin for rhubarb, and allege that if they did, and it was the cause of the death of the intestate, wife of plaintiff, still her death was caused by her own negligence contributed to that of defendants. But the jury has found that the death was caused by the negligence of defendants and not by the negligence of the intestate, contributed thereto—that intestate was not guilty of negligence in taking the drug, negligently sold by the defendants.

These questions are settled by the jury and must stand, unless the Court has committed some error in not dismissing the plaintiff's action upon the motion of defendants under the act of 1897, or in allowing improper evidence under the objection of defendants, or has failed to give some proper instruction asked by defendants, or has given
(185) the jury improper instructions as to law governing the case which has been properly taken and pointed by exceptions. We have examined the record and fail to find any such errors.

There are some exceptions to evidence, but none of them can be sustained.

There are numerous prayers for instructions, not given by the Court as asked. But in our opinion every proper instruction asked by the defendants is given in the exhaustive written charge of the Court. And if there were error in the charge (and if so we have failed to see it) the exception to the charge is so general—"broadside"—that it could not be considered by the Court. *Barcello v. Hapgood,* 118 N. C., 712; *S. v. Downs, ib.,* 1242.

But the case was principally argued before us upon the Court's refusing to dismiss the plaintiff's action at the close of plaintiff's evidence under the act of 1897; and that the Court failed to find and instruct the jury that the testator's death was caused by her own negligence in taking the defendants at their own word and in taking the drug to be what they said it was. That she, an uneducated woman in the science of medicine, should have discovered in the evening twilight by her sight and smell, what the defendants, being druggists, had failed to discover in broad open daylight by their sight and their smell, when they put up and weighed this drug!

We have considered at some length the effect of the statute of 1897 in *Purnell v. R. R., post,* 832, in which we held that the defendant has the right to have the ruling of the Court reviewed upon the status of the case at the time the motion is made. But the defendants, it seems to us, have entirely misconceived the application of this statute and
(186) the duty of the judge.

It was not contended by defendants that plaintiff's evidence did not make out a case of negligence against the defendants. This statute only applies where it is alleged by the defendant that the plaintiff's evidence failed to make a case against the defendant. If the defendants were guilty of negligence that caused the interstate's death, and there was no contributory negligence on her part, the defendants are certainly liable.

The burden of the issue of contributory negligence is on the defendants. It is an affirmative issue and cannot be found by the Court. It must be determined by the jury. *White v. R. R.*, 121 N. C., 484; *S. v. Shule*, 32 N. C., 153. The Court might find that there was *no* contributory negligence if there was no evidence to support this issue. But that would be just what the defendants did not wish the Court to find. There is no error and the judgment is

Affirmed.

Cited: Meares v. R. R., 126 N. C., 428, 430; *Neal v. R. R., ib.*, 648; *McMillan v. R. R., ib.*, 726; *Mfg. Co. v. R. R.*, 128 N. C., 285; *Bessent v. R. R.*, 132 N. C., 944.

W. L. McGEHEE v. A. S. TUCKER, ADMINISTRATOR OF N. H. MURPHY.

(Decided 12 April, 1898.)

Appeal—Premature Appeal—Hypothetical—Propositions of Law—Practice.

1. This Court will not entertain premature or fragmentary appeals.
2. Where the pleadings in a cause raise an issue as to a fact necessary to be determined, and the parties, by agreement, reserve the ascertainment thereof and submit a hypothetical proposition of law depending on such fact, an appeal will not lie from the decision thereon.

ACTION, heard before *Boykin, J.*, at April Term, 1896, of (187) FRANKLIN. The purpose of the action and facts connected herewith are stated in the judgment of his Honor. When the case was called for trial it was agreed by counsel for both parties at the hearing, that the issue raised in the pleadings, as to whether the defendant's intestate died seized of any real estate, should be reserved; and that the Court, upon the pleadings and upon the admission contained therein, should determine the question as to whether or not the plaintiff's judgment is barred by the statute of limitations, and whether it constitutes a legal demand against the intestate's estate.

After hearing the pleadings read and the argument of counsel, the Court was of opinion that the plaintiff's judgment was not barred by the statute of limitations, and that it does constitute a legal demand against the intestate's estate in the order of distribution as provided by statute, and so ruled.

The defendant excepted.

His Honor rendered judgment as follows:

"It appears to the Court that in October, 1893, N. H. Murphy died intestate in the county of Franklin, and that on 31 October A. S. Tucker qualified as his administrator. That having procured from the Superior Court an order to sell the personal property of the decedent for cash, the said defendant shortly after his qualification sold the said personal property, deriving therefrom the sum of $387.87. That on 27 June, 1885, the plaintiff obtained judgment against the defendant's intestate for the sum of $196.46 with its interest from 1 January, 1881, till paid, and for costs, $1.45. That on 10 August, 1885, the plaintiff procured said judgment to be docketed in the Superior Court, in Book No. 2, at page 128. That this action was instituted on 11 Janu-
(188) ary, 1895, to have said judgment so docketed declared a lien on the assets in the hands of the personal representative, and to ask the Court to direct the distribution of said assets according to the statute of distributions after declaring the same to be a lien. It further appears that the personal representative has, out of the sum of $387.87, so derived from the personal estate, paid out the sum of $186.56 for and on account of debts due by the estate of the decedent, which (with the exception of the costs of administration, the taxes assessed against the decedent and the funeral expenses), are of rank and dignity inferior to the plaintiff's judgment. It further appears that the defendant has filed his answer, in which he admits the facts and each of them found above, but insists in said answer that the plaintiff's judgment is barred by the statute of limitations and forms no lien upon any part of the intestate's property and is not entitled to any precedence over any debt due by the intestate and in itself is no valid demand against said estate. And the plaintiff and defendant having agreed to submit the questions herein raised for the Court's settlement and determination, it is now by the Court ordered; considered and adjudged: That the said judgment so taken and docketed as aforesaid by the plaintiff against the defendant's intestate, is a lien upon the estate of the decedent in the defendant's hands arising from the personal property having preference and priority over all claims and demands against said estate, except the debts having specific lien (the taxes assessed against the said decedent, the funeral expenses and the other judgments taken against said decedent of an older date than the one taken by the plain-

tiff). It is further the opinion of the Court, and the Court doth so declare: That the said judgment is not barred by the statute (189) of limitations.

"The Court is of the further opinion, and doth so declare: That the defendant, in paying the debts of lesser rank and dignity than the plaintiff's judgment committed *devastavit* of the intestate's property and effects."

To this judgment the defendant excepted, and appealed therefrom.

F. S. Spruill, W. M. Person and J. B. Batchelor for plaintiff.
C. M. Cooke and T. M. Bickett for defendant.

CLARK, J. Whether the intestate of the defendant died seized of realty is an indispensable fact to be ascertained before the application of the statute of limitations can be determined. The pleadings raise an issue as to that fact, but counsel by agreement reserved the ascertainment thereof and presented a hypothetical proposition of law to the Court. The Court will not entertain fragmentary or premature appeals. Clark's Code, section 584, and cases cited. *Hinton v. Ins Co.*, 116 N. C., 22. As was said by *Pearson, C. J.*, in *Hamlin v. Tucker*, 72 N. C., 502, the Court will not "take two bites at a cherry."

Appeal dismissed.

Cited: Griffin v. Cupp, 167 N. C., 96.

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(190)

BAKER, GINSBERG & CO. v. W. A. BELVIN.

(Decided 24 May, 1898.)

Appeal—Practice—Findings by Trial Judge—Garnishment—Judgment of Justice of the Peace, Appeal From.

1. The findings of fact by the trial judge are not reviewable except in injunction and like proceedings, or on exceptions to findings of fact upon a referee's report upon the ground that there was no evidence.

2. On appeal from the refusal of a motion to set aside a judgment of a justice of the peace (from which no appeal was taken within ten days) the only question that can arise is the regularity of the justice's judgment.

3. Since the enactment of secs. 364-366 of The Code, a judgment may be taken against a garnishee, who is found to be indebted to the debtor, in the action to which the garnishment proceeding is ancillary, and it is not necessary to bring a separate action against such garnishee.

4. Where judgment is given against a garnishee in an action against the debtor, it is proper to make an order applying the collections made on such judgment to the judgment obtained or to be obtained against the debtor.

ACTION tried before *Robinson, J.*, at May Term, 1897, of VANCE, on appeal from the refusal by a justice of the peace of a motion to set aside a judgment rendered by him and on a motion for a *recordari*. The facts are sufficiently stated in the opinion. The action of the justice of the peace was affirmed and the *recordari* refused, and defendant appealed.

W. B. Shaw for plaintiffs.
T. T. Hicks for defendant.

CLARK, J. Except in injunction proceedings and others of that nature, or on exceptions to findings of fact upon a referee's report upon the ground that there was no evidence, the findings of fact by the
(191) judge below are not reviewable. (Clark's Code, 2 Ed., pages 567, 568, and Supplement to same, page 85.) We will not look into the conflicting affidavits in a case of this kind, as to which the Court below was as well fitted to come to a correct conclusion upon the facts as the Appellate Court, and probably more so, from a better knowledge of the witnesses and the benefit of their presence.

Upon the facts as found by his Honor, it appears that as to each of the three cases (afterwards by consent consolidated into one in the Superior Court), the justice of the peace on 4 August, 1896, issued attachments in actions brought against I. Stein, a nonresident debtor, which on 6 August, were served on W. A. Belvin, together with a notice (under The Code, section 364) to appear before the justice the next day at 10 a. m. and be examined on oath touching any indebtedness to him by I. Stein. In obedience thereto Belvin appeared and was examined on oath, and on his denial an issue was made up (as provided by The Code, section 366). The justice, upon the evidence, finding that Belvin was indebted to I. Stein in the sum of $550, rendered judgment that the garnishee was liable to plaintiff in each of the three actions in the sums, respectively, of $145.50, $74.47 and $58.50, besides interest and costs in each case. Belvin was present and knew of these adjudications, but took no appeal. Eleven days thereafter, on 18 August, Belvin moved before the justice to set aside the judgments of 7 August, which motion was overruled and no appeal was taken. On 1 September, the return day of the attachments and warrants, judgments in the said three cases were entered against I. Stein for the amounts above recited, for which
(192) the indebtedness in hands of Belvin had been condemned. On

that day Belvin appeared and again moved to set aside the judgments which had been rendered against him on 7 August, which motion was overruled and Belvin appealed to the Superior Court. The justice further adjudged that the amounts collected on the judgments against Belvin should be applied to the satisfaction of the judgments rendered that day against I. Stein, and from this order Belvin appealed. I. Stein also appealed from the judgments rendered against him, but subsequently, in open court, through his counsel, withdrew his appeal. Upon the above state of facts the Court held that the judgments of 7 August, 1896, were in all respects regular and confirmed the same, with costs of the appeal. Belvin excepted and appealed.

The appeal by Stein having been abandoned and Belvin having appealed only from the judgments against himself, the only question open is the regularity of the judgment of 7 August (*Finlayson v. Accident Assn.*, 109 N. C., 196), for, no appeal having been taken within ten days thereafter, the case rests upon Belvin's motion, made 1 September, to set aside the judgment. For this he relies upon *Carmer v. Evers,* 80 N. C., 55, which held that judgment could not be rendered against the garnishee in the pending action, but a separate action must be brought in the name of the sheriff or the defendant for the recovery of the debt due by the garnishee to the defendant. This was the law at the time that decision was rendered (Batt. Rev., chapter 17, section 204), but it was contrary to the spirit of The Code system, which is averse to a multiplicity of actions when the whole matter can be more expeditiously and cheaply settled in one; according to The Code (sections 364, (193) 366) brought forward and reënacted the provisions (formerly in the Revised Code) under which these proceedings were had. The judgment of 7 August, found on the issue raised, that Belvin was indebted to I. Stein and adjudged that to the extent of the amounts named, in each case less than $200, that indebtedness was liable to plaintiffs—in effect that it was security (*Carmer v. Evers, supra*) for such judgments as plaintiffs should recover in those actions. Belvin did not appeal and is bound by those judgments. On 1 September, judgments were obtained against I. Stein and he abandoned his appeal, so those judgments are final. The order applying the collections on Belvin's judgments to judgments obtained against I. Stein was a necessary legal consequence, and was no ground of appeal for Belvin. His only ground of complaint was that the finding 7 August on the issue raised by The Code, section 364, "whether he was indebted to I. Stein" was an erroneous finding. That was the only matter which touched him. He did not appeal therefrom in ten days, and in fact he has never appealed. His motion on 1 September to set aside the judgment and his appeal from the refusal thereof could only bring up the question of the irregularity of the judg-

ment of 7 August—and we have seen that it was regular—and could not restore a lost appeal from the judgment as erroneous. *Finlayson v. Acc. Co.,* 109 N. C., 196. No ground for a *recordari* was shown.

Affirmed.

Cited: Lewis v. Overby, 126 N. C., 349.

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(194)

STATE EX REL. J. W. PIPKIN ET AL. v. C. MCARTAN ET AL.

(Decided 8 March, 1898.)

Appeal—Service of Case on Appeal—Practice—Rule of Court—Agreement of Counsel—Entry on Record.

1. As the time for service of case on appeal is fixed by statute, it cannot be extended by the trial judge or otherwise except by consent.
2. Stipulations as to the extension of time for service of case on appeal must be entered on the record or be contained in some writing; otherwise, if an alleged agreement for such extension is denied, it will not be considered by this Court.
3. An entry on the Superior Court docket of "20 days" is meaningless in itself, but, if an entry which the court was authorized to make, the judge could at a subsequent term draw it out at greater length so as to make the record speak the truth.

ACTION tried at November Term, 1897, of HARNETT, before *Robinson, J.* There was a judgment for the defendants and the plaintiffs appealed. In this court, the appellees moved to dismiss the appeal on the ground that the case on appeal was not served in due time.

D. H. McLean for plaintiffs (appellant).
Simmons, Pou and Ward for defendants.

PER CURIAM. The statute having fixed the time allowed for serving notice of appeal, and cases on appeal and counter cases, the judge cannot extend time. *Woodworking Co. v. Southwick,* 119 N. C., 611; *Hemphill v. Morrison,* 112 N. C., 757. It can only be done by consent. Here, counsel on one side swear that consent was given, and the other side deny this, and the alleged agreement must be disregarded. Rule 39; *Sondley v. Asheville,* 112 N. C., 694; *Graham v. Edwards,* 114 N. C., 228. The entry on the docket, "twenty days," means nothing in itself, but if it was an entry the Court was authorized to make, the judge

at the next term could draw it out at greater length to make (195) the record speak the truth, but as the only validity it has is as the alleged agreement of counsel, and the context whether it was made by counsel, and its meaning, could only be determined upon conflicting affidavits of counsel, it must be disregarded. Consent to extension of time is not shown. There is hence no valid case on appeal, and there being no error on the face of the record proper, the judgment is

Affirmed.

Cited: Cozart v. Assurance Co., 142 N. C., 523.

W. R. SIMMONS v. EMANUEL JARMAN.

(Decided 8 March, 1898.)

Landlord and Tenant—Tenant from Month to Month—Notice to Quit.

1. Where a tenant, under a lease for the year 1896, at a specified price per month, payable in advance, held until June, 1897, and the landlord received rent up to June, 1897: *Held*, that the tenancy was from month to month in 1897.

2. Where a tenant from month to month, who had paid his rent to 1 June, 1897, received no notice from his landlord on 18 May, 1897, "to get out within thirty days": *Held*, that such notice was invalid as to May, as the rent had been paid, and as to June, because the prescribed time for quitting did not end with the end of the month. (Section 1750 of The Code.)

3. Where a tenant from month to month agrees to pay monthly in advance, but there is no condition of forfeiture in the event the rent is not so paid, the landlord cannot turn the tenant out for nonpayment of rent.

SUMMARY PROCEEDINGS in ejectment, commenced before a justice of the peace and heard on defendant's appeal before *Robinson, J.*, at September Term, 1897, of WAYNE.

W. C. Munroe for plaintiff.
W. D. Pollock for defendant (appellant).

FURCHES, J. The plaintiff rented the premises in dispute to (197) the defendant at the price of $3 per month, to be paid in advance—rental to commence on 1 January, 1896, and the defendant was to have the privilege of retaining possession for the year. The defendant retained possession during 1896 and until 22 June, 1897, when this proceeding was commenced.

This constituted a renting from month to month, commencing on 1 January, 1896. And it is evident that the parties understood it (198) to be by the calendar month, as the plaintiff speaks of receiving the rent for the month of May, etc." The renting being by the month, when the defendant was allowed to hold over in 1897, and the plaintiff received rent for that year up to and including the month of May, this constituted the defendant a tenant from month to month in the year 1897. *Jones v. Willis,* 53 N. C., 430.

This being so, the defendant was entitled to fourteen days notice to quit, ending with the end of the month. *Branton v. O'Briant,* 93 N. C., 99; Code, section 1750, which is now, by chapter 227, Laws 1891, reduced to seven days. The only notice shown to have been given was on 18 May, 1897, and this was "to get out within thirty days." This notice did not comply with the law. It could not have been for the month of May, as it did not say so, and was not fourteen days before the end of that month. It could not apply to the month of May, as the plaintiff received rent for that month, which was a waiver of any rights the plaintiff might have had for that month. *Richburg v. Bartley,* 44 N. C., 418. It was not in compliance with the law for the month of June, because it did not end with the end of that month. *Branton v. O'Briant, supra;* Code, section 1750. In fact, this action was commenced before the end of June, to wit, on 22 June. The rent was to be paid monthly in advance. This was never done, the payments all being made after the beginning of the month.

But there was no condition of forfeiture in the event the rents were not so paid. And the plaintiff had no right to turn the defendant out on account of the non-payment of rent. *Meroney v. Wright,* 81 N. C., 390.

We have not considered the other interesting question pre- (199) sented, as to the effect of the optional lease, discussed in *McAdoo v. Callum,* 86 N. C., 419. There is error and a new trial is awarded.

Error. New trial.

A. U. KORNEGAY v. JOHN R. MORRIS.

(Decided 5 April, 1898.)

Will, Construction of—Devise—Life Estate—Limitations—Contingent Executory Devise—Cross Remainder.

A testator gave to his wife, F., for her life, considerable property, the remainder in which, in another clause, he gave to his son W. in trust for his other sons, J. and A. A subsequent item provided, "If my sons J. and A.

should either of them die without legitimate offspring, my will is and I do hereby direct that that portion of my estate given to the one so dying shall go to the son still living, and if both shall die without legitimate offspring, the income arising from both their portions shall go to my wife, F., during her life or widowhood, and in the event of the marriage or death of my wife, F., then the portion set aside for them to go to my son W. and his legal representatives." A guardian for A. was named in the will. Subsequent to the death of the testator, J. died without issue, and thereafter W. also died without issue. *Held:*

(1) That it was clearly not within the contemplation of the testator that the conditions upon which the limitations should take effect should be fulfilled during his lifetime, but whatever doubt there might be as to such intention is settled by the provisions of section 1327 of The Code.

(2) That J. and A. took cross-remainders and, upon J's death without issue, his part went to A.

(3) That A. being alive, without children, the estate of W. was a contingent executory devise which, upon W's death without issue, descended to A., his only heir at law.

(4) That the widow F. has a beneficial estate in the property, contingent upon A's dying without issue before her death or marriage.

ACTION for specific performance of a contract concerning land, tried before *Timberlake, J.*, at January Term, 1898, of WAYNE, upon an agreed statement of facts, the substance of which is set out in the opinion. There was judgment for the plaintiff and defendant appealed. (200)

Allen & Dortch for plaintiff.
Aycock & Daniels for defendant.

FURCHES, J. In May, 1883, James F. Kornegay made and published his last will and testament, and in August of that year he died; that said will, after the death of the testator, was duly admitted to probate in Wayne County, and the executor, W. F. Kornegay, therein named, qualified; that the testator left him surviving a widow, Frances E. Kornegay, and three sons, the said W. F., J. J. and A. U. Kornegay, who are the legatees and devisees mentioned in the will, W. F. being the oldest, and some fifty years of age, and A. U. the youngest and not twenty-one when his father, the testator, died; J. J. has since died, and since his death W. F. has died, and A. U. has reached his majority of twenty-one years.

That since the death of J. J. and W. F., and since the said A. U. reached his majority, the complaint *alleges* that he has bargained and sold to the defendant Morris a lot in the city of Goldsboro for $300; that the plaintiff executed a bond for title to said lot, and the defendant executed his note for the purchase money, which is now due; that the plaintiff has tendered to the defendant a deed conveying said lot to the defendant, and that the defendant refuses to pay the same.

The defendant answers and says that he is ready, able and willing to pay for said lot according to the contract, if he can get a clear, in-
(201) defeasible title thereto, but that said lot is a part of the real estate owned by the said James F. Kornegay, and disposed of by him in the fourteenth paragraph of his will; and that the defendant is advised that the plaintiff cannot make and convey to him such title. The widow, Frances E. Kornegay, is still living.

This makes it necessary that this section fourteen of said will shall be construed, so far at least, as to determine the question presented—whether the plaintiff can make a clear, indefeasible title to said lot so contracted for and sold to the defendant. It is stated that W. F. Kornegay died intestate, without leaving issue or any lineal descendants, and leaving the plaintiff his sole heir.

The testator gave to his wife, Fannie, considerable property for life, which in the eleventh clause of his will, he gave to his son W. F. in trust for his sons, John J. and Albert U. after her death. And in the fourteenth item he provides as follows: "If my sons John and Albert should either one of them die without legitimate offspring, my will is, and I do hereby direct that that portion of my estate given to the one so dying shall go to the son still living, and if both shall die without legitimate offspring, the income arising from both their portions shall go to my wife, Fannie E. Kornegay during her life or widowhood, and in the event of the marriage or death of my wife Fannie, then the portion set aside for them to go to my son, W. F. Kornegay, and his legal representatives."

It is manifest from these provisions that it was not within the contemplation of the testator that these limitations should be fulfilled during his life time. It cannot be that, when he provided a guardian for his son Albert, he expected Albert to die in his life time, nor can it be that, when he made a provision for his wife, to be void upon her
(202) marrying, he could have expected her to marry during his life time. So that *Hilliard v. Kearney*, 45 N. C., 221; *Burton v. Conigland*, 82 N. C., 99, and other cases cited for the purpose of establishing this position, are not in point. None of the cases cited conflict with this opinion, as to the time not being limited to the testator's death when the conditions or contingencies should happen. But if there had been any doubt as to this (and we think there is not) the statute of 1827, now section 1327 of The Code, and the case of *Buchanan v. Buchanan*, 99 N. C., 308, has in our opinion settled all doubt on this point.

The devisees John J, and Albert U. took cross remainders, and John dying and leaving no issue, his part went to Albert. *Galloway v. Carter*, 100 N. C., 111; *Spruill v. Moore*, 40 N. C., 284.

But Albert is still living and has no children, which made the estate of W. F. Kornegay a contingent executory devise. The person (W. F.) being certain, but the event upon which his estate depended being uncertain, it was such a contingent estate as might be transmitted by descent. 2 Fearne Remainders, pp. 28, 30, 433; *Fortescue v. Satterthwaite,* 23 N. C., 566. And W. F. being dead without issue, and leaving Albert his only heir at law, this contingent estate descended and vested in Albert.

But if Albert dies without leaving issue, the widow, Fannie E., is to have the "income" from the whole estate left John and Albert, until her death or marriage. This gives her a contingent estate in this property. 29 A. & E. Enc., 404. Her estate is also contingent, depending upon the death of Albert without leaving issue. This contingency may never happen, and she may never receive any benefit from this estate. But if Albert should die, without leaving issue, before she dies (203) or marries, she may then enforce the collection of the rents arising therefrom, upon or against the lot itself, as this income would be a lien on the property itself. *Gray v. West,* 93 N. C., 442.

Error. Reversed.

FAIRCLOTH, C. J., dissenting. It is agreed that in considering the construction of wills the whole instrument must be considered, and that the primary intent of the testator, when it can be seen, governs the case. It appears from the will and the agreed facts that the widow is amply provided for during her life; that the ultimate remainderman, W. F. Kornegay, was over fifty years of age, and was reputed to be a man of large means; that John Kornegay was of feeble intellect, and that Albert was of tender years, was intelligent and of good habits. From these undisputed facts I infer that John and Albert were the prime objects of the testator's intent. John having died without issue of course his interest survived to Albert.

The principle of allowing a devise to vest absolutely at the earliest period, consistent with the will, relieves the estate of conditions and avoids the doctrine of perpetuity and executes the main intent of the testator, when not expressly forbidden by words or controlled by peculiar circumstances.

Hilliard v. Kearney, 45 N. C., 221, was well considered and has been followed ever since. The application of the principles of that case is the only question in subsequent cases. There the gift was to five sisters, and "if either of them die without an heir (construed to mean child or issue), her part to be equally divided among her other sisters." It was held that upon the death of the first sister without issue, the life tenant having died, the estate became absolute to the others as tenants in common and the doctrine of successive (204)

survivorship to the last was not allowed. The principlen there announced is that when there is an intermediate period, between the death of the testator, and that of the legatee, as was the case in *Price v. Johnson,* 90 N. C., 592, to wit, "At the age of twenty-five years," that time would be adopted, but if there be no such time, then the estate will become absolute at the death of the testator, "unless there be words to forbid it, or some consideration to turn the scale in favor of the latter," *i. e.,* the death of the legatee. There are certainly no words in the will forbidding such a construction and I can see no facts in this case to lead us to a different conclusion. If it be urged that this view cuts off the income to the widow for life, and the ultimate contingent remainder, the answer is that that is the result only of giving effect to the primary intention of the testator, which appears from the will as before stated.

Davis v. Parker, 69 N. C., 271, rested solely on the authority of *Hilliard v. Kearney, supra.* The testatrix said, I give the balance of all my property to Jno. Thomas Hollowell and his heirs, "and if he should die and leave no lawful heirs of his body, then in that case, I give Celia Mayo the sum of two thousand dollars, to her and her heirs, and all the balance of my property I give to my nearest relations, all except Joshua Davis," etc. John Thomas Hollowell died intestate, without issue. It was held that Hollowell's estate became absolute at the death of the testatrix. In that case the remainder was to the "nearest relations" of the testatrix, and that would have been the declaration of the law in *Hilliard v. Kearney,* cited above, if successive survivorship had (205) been allowed and the last surviving sister had died without issue.

In one case the will points to the heirs generally and in the other the law would have designated the *same class* as the ultimate takers of the estate. *Davis v. Parker, supra,* seems to fit the case before us.

I take another view. There is certainly no interest left in the testator and no possibility of any reverter to him or his heirs, as was the case in *Trexler v. Holler,* 107 N. C., 617. The interest of W. F. Kornegay is a good contingent remainder, the person being certain, and is not too remote, even if it could not become a vested estate, as my brethren think, until the death of the widow. *Baker v. Pender,* 50 N. C., 351. It being admitted by the agreed facts that the plaintiff is the only brother and heir at law of the remainderman, I do not see why the estate in remainder should not descend to the plaintiff and become vested. Code, 1281. That would be the same result as that in my first contention, vesting an absolute estate in the plaintiff. I do not think that the provision that the widow shall have the income of the land during her life, if she should live after the death of the legatees without issue, conveys to her any estate in the land. *Burton v. Conigland,* 82 N. C., 99.

My conclusion is that, at the death of the testator, the estate vested absolutely in John and Albert and, by the death of the former, his estate survived absolutely to the latter. If that was not so, I am much inclined to the opinion that upon the death of the remainderman without issue, his interest descending upon the plaintiff, his only heir at law, gave him a fee-simple estate.

Cited: S. c., 124 N. C., 424; *Sain v. Baker,* 128 N. C., 258; *Kornegay v. Miller,* 137 N. C., 661; *Harrell v. Hagan,* 147 N. C., 113; *Dawson v. Ennett,* 151 N. C., 545; *Perrett v. Bird,* 152 N. C., 222; *Smith v. Lumber Co.,* 155 N. C., 391; *Vinson v. Wise,* 159 N. C., 656; *Rees v. Williams,* 164 N. C., 132; *S. c.,* 165 N. C., 209; *Springs v. Hopkins,* 171 N. C., 491.

(206)

B. H. GRIFFIN v. GOLDSBORO WATER COMPANY.

(Decided 24 May, 1898.)

Corporation — City Franchise—Water Companies—Rates—Uniformity of Rates—Injunction.

1. Where a corporation operates under a franchise by which it enjoys the benefit of the right of eminent domain, it is affected with a public use, and must, to the extent of the public interest therein, submit to be controlled by the public.

2. While the right of fixing rates is a legislative function it is nevertheless competent for the courts, certainly in the absence of legislative regulations, to protect the public against the execution of oppressive and unreasonable charges by a corporation enjoying a municipal franchise.

3. The acceptance of a municipal franchise by a water company carries with it the duty of supplying water to all persons along the lines of its mains without discrimination and at uniform rates.

4. While a town has a right to grant a franchise to a water company, and the water company has the power to stipulate that it will not charge in excess of the maximum rates named in the ordinance granting the franchise, yet, if such maximum rates are discriminating or unreasonable, they are not binding upon consumers, whom the courts will protect against unreasonable charges.

5. Where, in the hearing of a motion to dissolve an order restraining a water company from exacting from the plaintiffs rates alleged to be unreasonable and discriminating, the answer admitted that the proposed rates were not uniform, but denied that they were unreasonable and oppressive, and the evidence as to the unreasonableness of the rates was not satisfactory, it was not error to continue the injunction to the hearing.

GRIFFIN *v.* WATER COMPANY.

ACTION for an injunction, pending in WAYNE, and heard before *Timberlake, J.,* at Chambers, on 19 April, 1898, on a motion to dissolve a restraining order theretofore issued. His Honor continued the injunction to the hearing, and defendant appealed.

Allen & Dortch for plaintiff.
J. W. Hinsdale for defendant.

(207) CLARK, J. The defendant corporation is the owner of a plant which supplies water to Goldsboro and its inhabitants under a franchise granted by the city. It has no competition. The complaint alleges that to prevent competition the defendant reduced its rates largely to certain parties who threatened to establish a rival company, but not only did not make a corresponding reduction to the plaintiffs and other customers, but proposes to put in meters whereby the rates to plaintiffs and others will be greatly increased, and threatens to cut off the water supply of the plaintiffs if they do not pay the increased rates, which will be to their great injury; that the rates charged by the corporation are not uniform and those charged the plaintiffs are unjust and unreasonable. The defendant denies, as a matter of fact, that the rates charged the plaintiffs are unreasonable, and contends, as a proposition of law, that the company's rates are not required to be uniform, and that it can discriminate in the rates it shall charge. It also relies upon the schedule of rates contained in the contract with the city, and avers that the charges to the plaintiffs do not exceed the rates therein permitted.

The defendant corporation operates under the franchise from the city, which permits it to lay its pipes in the public streets and otherwise to take benefit of the right of eminent domain. Besides, from the very nature of its functions it is "affected with a public use." In *Munn v. Illinois,* 94 U. S., 113, which was a case in regard to regulating the charges of grain elevators, it was held that, in England from time immemorial and in this country from its colonization, it has been customary to regulate ferries, common carriers, hackmen, bakers, millers,
(208) public wharfingers, auctioneers, innkeepers, and many other matters of like nature, and where the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use and must, to the extent of that interest, submit to be controlled by the public.

Probably the most familiar instances with us are the public mills whose tolls are fixed by statute, and railroad, telegraph, and telephone companies, for the regulation of whose conduct and charges there is a State commission, established by law. There have been reiterated decisions in the United States Supreme Court and in the several States affirming the doctrine laid down in *Munn v. Illinois, supra,* and as to

every class of interest affected with a public use, among others, water companies. *Spring Valley v. Schottler,* 110 U. S., 347. The right of fixing rates is a legislative function which the courts cannot exercise, but it is competent for the courts, certainly in the absence of legislative regulations, to protect the public against the exaction of oppressive and unreasonable charges and discrimination. "The franchise of laying pipes through the city streets and selling water to the inhabitants being in the nature of a public use, or a natural monopoly, the company cannot act capriciously or oppressively, but must supply water to all impartially and at reasonable rates, and an injunction will issue to prevent the cutting off the water supply where the customer offers to pay a reasonable rate and the company demands an unreasonable one." 2 Beach Pri. Corp., sec. 834(c); *Munn v. Illinois, supra; Lumbard v. Stearns,* 4 Cush., 60. In the 29 A. & E. Enc., 19, it is said: "The acceptance by a water company of its franchise carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish. All persons (209) are entitled to have the same service on equal terms and at uniform rates." If this were not so, and if corporations existing by the grant of public franchises and supplying the great conveniences and necessities of modern city life, as water, gas, electric lights, street cars, and the like, could charge any rates, however unreasonable, and could at will favor certain individuals with low rates and charge others exorbitantly high or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. They could kill the business of one and make alive that of another; instead of being a public agency created to promote the public comfort and welfare, these corporations would be the masters of the cities they were established to serve. A few wealthy men might combine and, by threatening to establish competition, procure very low rates which the company might recoup by raising the price to others not financially able to resist—the very class which most needs the protection of the law—and that very condition is averred in this complaint. The law will not and cannot tolerate discrimination in the charges of these quasi-public corporations. There must be equality of rights to all and special privileges to none, and if this is violated, or unreasonable rates are charged, the humblest citizen has the right to invoke the protection of the laws equally with any other.

While the defendant cannot charge more than the rates stipulated in the ordinance granting it the franchise, because granted upon that condition, those rates are not binding upon consumers who have a right to the protection of the courts against unreasonable charges. Since the Constitution of 1868, Art. VIII, sec. 1, if the rates had been (210) prescribed in a charter granted by the Legislature they would be

subject to revocation, and, indeed, independently of that constitutional provision (*Stone v. Farmer's Co.,* 116 U. S., 307; *R. R. v. Miller,* 132 U. S., 75; *Chicago v. Munn,* 134 U. S., 418; *Georgia v. Smith,* 70 Ga., 694; *Winchester v. Croxton,* 98 Ky., 739), still less can these rates bind consumers (if unreasonable or discriminating), since the town had authority to grant the franchise but not to stipulate for rates binding upon the citizens. The Legislature did not confer that power. The rates are binding upon the company as a maximum simply because, acting for itself, it had the power to accept the franchise upon those conditions.

Singularly enough it appears, incidentally, in the evidence furnished by the defendant, that in the towns in North Carolina which do not own their waterworks, the maximum rates charged consumers are from 100 to 400 per cent more than the maximum rates charged consumers in Wilson, Asheville, and Winston, the only towns which own their waterworks.

The allegations of fact that the rates are unreasonable and oppressive are denied. That they are not uniform is not denied, and the defendant contended that it had the right to discriminate, which cannot be sustained. On the final hearing the cost and value of the property will be material in determining as to the reasonableness of the rates charged. *Smythe v. Ames* (known as the "Nebraska Case"), U. S. Supreme Court, 1898. The evidence offered on that point on the hearing below is not satisfactory, the mere amount of mortgage bonds issued on the
(211) property being no reliable guide to the courts as to the true value of the investment. It may be, as sometimes happens, that the bonds and stocks are watered. Nor is the evidence of the cost of construction and operation conclusive, as has often been held, for it may be that the work was extravagantly constructed or is operated under inefficient management, and the public is not called on to pay interest upon such expenditures, in the shape of unreasonable or extortionate rates. *Missouri v. Smith,* 60 Ark., 221; *Chicago v. Wellman,* 143 U. S., 339; *Livingstone v. Sanford,* 164 U. S., 578.

The court below properly continued the cause to the hearing.

No error.

Cited: Gorrell v. Water Co., 124 N. C., 334; *Solomon v. Sewerage Co.,* 133 N. C., 150; *Solomon v. Sewerage Co.,* 142 N. C., 449; *Power Co. v. Whitney Co.,* 150 N. C., 32; *Horner v. Electric Co.,* 153 N. C., 539; *Telephone Co. v. Telephone Co.,* 159 N. C., 14; *Woodley v. Telephone Co.,* 163 N. C., 286.

M. E. ROBINSON v. CITY OF GOLDSBORO.

(Decided 24 May, 1898.)

Municipal Corporations—Contracting Debt—Issue of Bonds—Election —Repeal of Statute.

1. The fact that, at a municipal election held on the question of issuing $50,000 bonds "for a system of sewerage and other public improvements," there was an adverse vote, did not exhaust the power of the municipality to hold another election on the question whether bonds to the amount of $30,000 should be issued "for the purpose of constructing a system of sewerage."
2. Where an act of the General Assembly confers authority upon a town to establish a sewerage system and to issue bonds therefor "as and when the board of aldermen may determine," the latter words imply a continuing authority to submit the question to a vote of the people.
3. Repeals of statutes are not to be implied, and when an act professes to repeal a former statute and, at the same time, to reënact it in its own or similar terms, there is no appeal.

ACTION for an injunction to restrain the issue of bonds by the (212) city of Goldsboro for the establishment of a sewerage system, heard by consent before *Adams, J.*, at Chambers at Kinston, on 13 May, 1898. The injunction was refused, and plaintiff appealed. The facts and the grounds upon which the injunction was asked appear in the opinion.

I. F. Dortch for plaintiff.
Allen & Dortch for defendant.

FAIRCLOTH, C. J. This action, by a resident taxpayer, is to enjoin the city of Goldsboro from issuing bonds and levying a tax, to pay the interest semiannually and the principal at maturity, for the purpose of constructing a system of sewerage for said city.

Laws 1891, ch. 61, passed in strict conformity to the requirements of the Constitution, section 1, for the purpose of providing a system of sewerage for the city of Goldsboro, or of making other public improvements, . . . or for either or both of such purposes "as and when the board of aldermen may determine," authorizes and empowers the board to issue its bonds from time to time not to exceed in the aggregate $40,000. Section 4 requires the board annually to levy a particular and specified tax to pay said bonds. Section 5 requires, before issuing any of such bonds, that the question upon notice shall be submitted to the qualified voters of said city. An amendatory act, chapter 107, Laws

1893, ratified 25 February, 1893, which was not passed as required by Article II, section 14 of the Constitution, in section 4 enacts: "That section one, line seven (7) of chapter sixty-one of the Private Laws of eighteen hundred and ninety-one be amended by striking out the words forty thousand and inserting in lieu thereof the words 'fifty thou-
(213) sand,' and, as thus amended, that sections one, two, three, four, and five of said chapter be and the same are hereby reënacted."

The resolution of the board, to hold an election on 2 May, 1898, was under the act of 1891, ch. 61, amended by Laws 1893, ch. 107, to vote on issuing bonds in the sum of $30,000 for the purpose of constructing a system of sewerage" and of levying a tax, etc. The notice of such election was in the same language, and that the electors would vote "approved" or "disapproved." At the time of said election the number of qualified voters was 1,009 and a majority voted "approved." It appears in the record that on 13 March, 1893, an election was held "for a system of sewerage and other public improvements" for issuing bonds in the sum of $50,000, and a majority voted "disapproved."

His Honor dissolved the restraining order and held that the city had power to issue the bonds, and plaintiff appealed.

Two questions are presented to this Court: (1) Did the election held 13 March, 1893, exhaust the power of the defendant, or could the board hold another? To the average mind it would seem that it did not. The first was for a double purpose, to wit, an issuance of bonds for $50,000 for sewerage and other improvements not specified. The second was for a single object specified and for a definite sum. The object and conditions were not the same in the two instances.

In *Caldwell v. Justices,* 57 N. C., 323, it was held that under a railroad charter, amended at a subsequent session, authorizing a stock subscription by the county, the justices could submit the proposition for approval, although a former proposition had been submitted to the voters and rejected, and so, *toties quoties,* according to emergencies. This decision has been approved several times and is conclusive of the
(214) present question. The words in section 1, "as when the board of aldermen may determine," imply continuing authority to submit the question. (2) Does the passage of Laws 1893, ch. 107, without complying with the Constitution, Article II, section 14, and without three several readings, etc., affect the question? If that act had never been passed no one would doubt the existence of the power under Laws 1891, ch. 61. The act does not profess to repeal anything, and repeals are not to be implied. The act (section 4) amends the former act only as to the amount of the bonds that may be issued, and expressly reënacts sections 1, 2, 3, 4, and 5 of the act of 1891. Those are the sections that confer the power to issue bonds and levy taxes under their prescribed regula-

tions. The point, then, is whether repealing and reënacting at the same time, a former statute, does repeal it. All good authorities are to the contrary. "Where a law is amended and reënacted, those parts of the law simply repeated are not repealed and reënacted, but are considered to have continued in force from the beginning." 23 A. & E. Enc., 285, and authorities cited. This Court has repeatedly held "that if the Legislature enacts a law in the terms of the former one, and at the same time *repeals* the former, this amounts to a reaffirmance of the former law, which it does not, in legal contemplation, repeal. The provision is continued without intermission." *S. v. Williams,* 117 N. C., 753; *Wood v. Bellamy,* 120 N. C., 212. These authorities more than cover the ground in this case. Here, nothing is repealed, and the sections 1, 2, 3, 4, and 5 reënacted were not and had not been repealed, and needed no help. They contained full authority for issuing bonds to the (215) amount of $40,000, and they confer no power now to issue any larger amount. "Local option" laws ought to be liberally construed, to the end that the object and will of the corporate voters may be enforced. If the qualified voters of a municipal corporation desire to tax themselves for their own convenience, comfort, and health, the common-sense view is that they should be allowed to do so by every reasonable intendment of the legislation under which they are authorized to do so.

The *power* to contract and to levy the tax being conferred, and the consent of the taxpayer fairly obtained, it is difficult to see how the courts could restrain the *exercise* of such power. We see no error in the record, and the judgment below is

Affirmed.

Cited: Cottrell v. Lenoir, 173 N. C., 146.

M. M. SMITH v. CYRUS THOMPSON, SECRETARY OF STATE, ET AL.

(Decided 8 March, 1898.)

Secretary of State—Supreme Court Reports, Contracts for Sale of, on Commission—Invalid Contract.

The Secretary of State, to whom section 3635 of the Code commits the sale of the Supreme Court Reports on a commission of 5 per cent upon the amount of such sales, and who is authorized by section 5, chapter 473, Laws 1889, to allow a reasonable discount to booksellers in the State, has no authority to contract with a firm of booksellers whereby all the reports are to be delivered to them for sale at a commission of 12½ per cent, even though, by such contract, the Secretary of State would be relieved of the distribution of the reports directed in section 3635 of The Code, and the State would be saved the expense of the rental of storage rooms for all the unsold reports on hand.

(216) ACTION against the defendant Thompson, as Secretary of State, and A. Williams & Co., to vacate and declare void a certain contract, and for a *mandamus* to compel said Thompson, as Secretary of State, to furnish to the plaintiff certain Supreme Court Reports and for an injunction, heard before *Robinson, J.*, at July Term, 1897, of WAKE, on a motion to dissolve a restraining power theretofore issued. The motion of the action and the ground upon which the injunctions were sought appear in the opinion.

Douglass & Holding for the plaintiff (appellant).
MacRae & Day and Jones & Boykin for defendants.

MONTGOMERY, J. The defendant Thompson, as Secretary of State of North Carolina, entered into a contract with the other defendants, A. Williams & Co., by which all of the Supreme Court Reports then in possession of Thompson as Secretary of State, and all such thereafter to be published, were to be placed in the possession of Williams & Co., to be held by them as the property of the State and be sold by them for the benefit of the State. Monthly returns of the sales were to be reported to the Secretary of State, and payment made to that office at the end of each month for such of the Reports as had been sold during the month, Williams & Co. reserving out of the proceeds of sale a commission of 12½ per cent as compensation for selling and storing, and for taking care of the books. Williams & Co. were to divide the commissions equally (217) between themselves and regular book sellers in North Carolina who might purchase from them as discount upon the prices charged other purchasers. There was another provision in the contract by which it was stipulated that Williams & Co. were to superintend the distribution of the books under the direction of the Secretary of State, and for such service they were to charge only the actual cost of the material used in wrapping the books for shipment and the actual amounts paid for express charges and postage. The contract was determinable by either party upon....days notice, and upon such determination all of the books remaining unsold and not accounted for were to be turned over to the Secretary of State. Under the contract all of the reports belonging to the State (19,000, according to the sworn statement of the Secretary) were delivered to Williams & Co.

The defendant Thompson gave as a reason for making the contract "That affiant found the Reports badly stored in an old warehouse in Raleigh at a rental of $30 per month, and in danger of injury by reason of their exposed and neglected condition; indeed, that some of them had already been injured, this affiant being unable, because of his other duties as Secretary of State, to give his personal attention to the care, preservation, and disposal of the reports, in order to have them properly

stored, arranged and cared for in a safe and convenient place. As compensation for the services to be rendered by Williams & Co., as above set forth, the allowance of 12½ per cent was agreed upon, said commissions to be divided as hereinbefore stated with regular book sellers in this State purchasing said books; that by said arrangement there is saved to the State the storage charges of $360 per year, the books are better cared for, protected, and preserved, and are subject (218) to any order which may be made by this Court; affiant is further informed and believes that Williams & Co. are entirely reliable and proper persons to act as his agents as aforesaid, and that a substantially similar agreement or arrangement as that just made was heretofore in effect between former Secretaries of State and the old firm of Alfred Williams & Co. (which firm went into liquidation), and affiant has made now a similar arrangement with Williams & Co., their successors; affiant denies that said arrangement created any monopoly, but simply employs said firm to act for affiant in the custody and disposition of said books."

In the argument here it was insisted by the counsel of the defendants that the contract appeared, from the affidavits filed in the cause, to have been executed in good faith and was greatly for the benefit and advantage of the State. This may be taken as true, and the reasons assigned by Thompson for entering into the contract may be admitted to be good ones, but they are not the questions brought up by the appeal for our decision. The question presented for our consideration is whether or not the contract was one which the defendant Thompson had the right under the law to make.

Section 3635 of The Code provides that the Supreme Court Reports shall be distributed to certain officers and institutions, named therein, by the Secretary of State, and sold at the price of $2 per volume, and that the Secretary shall pay to the Treasurer monthly the moneys arising from such sales, less 5 per cent, which he may retain for his services. Section 5, chapter 473, Laws 1889, authorizes the Secretary to allow to regular book sellers in this State such discount as to him may seem reasonable and just from the prices fixed by law. The Secretary derives his power to dispose of the reports from the provisions (219) of the law above referred to. He is the public officer designated by the law to make sale of the books, and his compensation for such service is fixed by law at 5 per cent on the amount of sales—he being required to distribute the books to those named in section 3635 without extra compensation, but of course without expense to him. If the Secretary shall appoint an agent to sell these books, which he clearly would have a right to do, the agency to be revoked at his pleasure, he could not allow out of the proceeds of sale a greater compensation to the agent than the law allows him for such service. It is perfectly clear, too, that the

law contemplates that the sale of the reports shall be made for the cash money. "He shall pay to the Treasurer monthly the moneys arising from said sales, less 5 per cent, which he may retain for his services," is the explicit language of the law.

Now, if these principles be applied to the facts in the case, it will be seen that the contract between Thompson, the Secretary of State, and A. Williams & Co. was made without authority of law. There has been no sale. The books are still the property of the State in the hands of the agent of the defendant Thompson under a contract by which Williams & Co. are to receive and are receiving, as they sell them, 12½ per cent commissions on the sales, whereas the law allows Thompson himself only 5 per cent for such sales if made by him.

The statute, Laws 1889, ch. 473, sec. 5, authorizes the Secretary to allow book sellers in this State such discount as to him may seem reasonable and just on sales made to them, but the contract in this case
(220) is not a sale in any sense of the word. The discount is to be upon sales and must be of the same as to all book sellers.

It may be proper to add that if the State does not own a building suitable for the storage of these books then, certainly, a proper place must be secured for that purpose, and, upon the necessity for such an expense being made to appear to the proper authorities, an appropriation out of the public funds will doubtless be made to meet that extreme.

There was error in the ruling of the Court below dissolving the restraining order theretofore made in the cause, and the same is

Reversed.

J. E. HOUSE, EXECUTOR OF C. NICHOLS, v. W. M. ARNOLD, EXECUTOR OF BENJAMIN KING.

(Decided 8 March, 1898.)

Statute of Limitations—Burden of Proof.

1. Where the statute of limitations is pleaded the burden is upon the plaintiff to show that the cause of action accrued within the time limited.

2. Where a party upon whom the burden of proof rests fails to offer evidence to sustain it, it is proper for the trial judge to direct a verdict against him.

ACTION, tried before *Robinson, J.*, and a jury, at October Term, 1897, of WAKE.

(221) *Jones & Boykin for plaintiff (appellant).*
Argo & Snow for defendant.

CLARK, J. The statute of limitations having been pleaded, the burden was upon the plaintiff to show that the cause of action accrued within the time limited. *Parker v. Harden,* 121 N. C., 57; *Graham v. O'Bryan,* 120 N. C., 463; *Koonce v. Pelletier,* 115 N. C., 233; *Hobbs v. Barefoot,* 104 N. C., 224; *Moore v. Gardner,* 101 N. C., 374; *Hussey v. Kirkman,* 95 N. C., 63. The evidence was that the plaintiff's (222) testatrix was adjudged restored to sanity in 1889, and after demand made by her on her guardian, defendant's testator, for her estate, an order was made to restore the same to her; and it was further in evidence that the said guardian was indebted to his ward in the sum of about $500, which has never been paid. It is not necessary to decide whether the statute began to run from the termination of the trust upon the adjudication of sanity in 1889 or upon the demand and failure to pay, for if it began to run only from the latter, the plaintiff, having failed to show that it was within three years before the action begun (in May, 1906), is barred. *Kennedy v. Cromwell,* 108 N. C., 1, and cases therein cited. The burden being upon him, there was no error in his Honor's intimating that he would instruct the jury to find against him. *Spruill v. Ins. Co.,* 120 N. C., 141; *Collins v. Swanson,* 121 N. C., 67; *Bank v. School Committee, ibid.,* 107; *White v. R. R., ibid.,* 484.

No error.

Cited: Houston v. Thornton, post, 375; *Dunn v. Beaman,* 126 N. C., 769; *Hooker v. Worthington,* 134 N. C., 285; *Dunn v. Dunn,* 137 N. C., 534; *Sprinkle v. Sprinkle,* 159 N. C., 82; *Ditmore v. Rexford,* 165 N. C., 621.

J. C. MARCOM, ADMINISTRATOR OF A. S. POLLARD, v. J. Q. ADAMS.

(Decided 8 March, 1898.)

Trial—Improper Remarks of Trial Judge—Evidence—Recital in Deed —Character of Defendant.

1. Where, on the trial of an action, the plaintiff objected to the defendant's showing that the recital of payment in a deed introduced by himself was untrue, the trial judge remarked to defendant's counsel, "The plaintiff seems to have put you in a hole; I would be glad to help you if I could": *Held,* that such remark was objectionable under section 413 of The Code, forbidding any expression upon the weight of the evidence.

2. The acknowledgment in a deed of the payment of the purchase money, not being contractual but only a receipt, is only *prima facie* evidence, and evidence to contradict it may be offered by a party introducing the deed.

3. Where a defendant in an action has neither been examined as a witness nor his character has been called into question by the nature of the action, the plaintiff will not be allowed to impeach his character either generally or by specific charges of criminal or corrupt acts tending to impeach it.

(223) ACTION, tried at April Term, 1897, of WAKE, before *Adams, J.*, and a jury.

Battle & Mordecai for plaintiff.

(225) *J. H. Fleming for defendant (appellant).*

CLARK, J. The plaintiff objected to the defendant's showing that the recital of payment in a deed introduced by himself was untrue. His Honor remarked to counsel for defendant, "The plaintiff seems to have put you in a hole. I would be glad to help you if I could." The remark was excepted to by the defendant and was objectionable under the act of 1796 (now section 413 of The Code), which forbids any expression upon the weight of the evidence. Besides, the evidence was admissible, for the acknowledgment in a deed of the payment of the purchase money is not contractual but is merely a receipt, and therefore only *prima facie* evidence. *Shaw v. Williams,* 100 N. C., 272; *Barbee v. Barbee,* 108 N. C., 581; cited with approval in *Cheek v. Nall,* 112 N. C., 370.

It was also error to permit evidence of the defendant's character when he had neither been examined as a witness nor his character called in question by the nature of the action. On that state of facts in a civil case the defendant even will not be allowed to put in evidence his good character. *Heilig v. Dumas,* 65 N. C., 214; *McRae v. Lilly,* 23 N. C., 118. *A fortiori* the plaintiff could not introduce evidence of the defendant's bad character. In a criminal action in which necessarily the defendant's character is to a certain extent called in question, the defendant can put in evidence of his good character if he wishes, but, when he does not do so, the State cannot offer evidence of his bad character
(226) unless he is examined as a witness in his own behalf, in which case the impeaching evidence is only allowed to go to his credibility as a witness, and is not allowed otherwise to affect the question of his guilt or innocence. *S. v. Traylor,* 121 N. C., 674.

The plaintiff was further allowed to ask the witness if he had not "heard that defendant had committed forgery"; also, "if he did not know that the defendant had been indicted for forgery." These questions would have been incompetent even upon the cross-examination of a witness put up by the other side to prove the defendant's good character. *S. v. Bullard,* 100 N. C., 486, and *S. v. Hairston,* 121 N. C., 579, in which the rules governing the examination of character witnesses are clearly stated and authorities cited.

There are other exceptions, but it is unnecessary to consider them as they may not arise on another trial.

Error.

Cited: S. v. Cloninger, 149 N. C., 579; *S. v. Holly,* 155 N. C., 493; *Edwards v. Price,* 162 N. C., 245; *Lumber Co. v. Atkinson, ibid.,* 302; *Walters v. Lumber Co.,* 165 N. C., 392.

W. W. VASS, EXECUTOR OF W. W. VASS, v. JOHN B. BREWER ET AL.

(Decided 15 March, 1898.)

Action on Note—Endorser—Practice—Frivolous Answer.

1. A frivolous answer is one that raises no issue or question of fact or law pertinent or material in the action.
2. Where the endorser of a note was sued thereon and in his answer, not denying the execution of the note or his endorsement, averred that in another action in the same court, to which plaintiff was not a party, a referee had reported that defendant was liable for the same debt as endorser and that certain property involved in such other action should be applied before judgment was granted on his complaint: *Held,* that such answer was frivolous and the plaintiff was entitled to judgment on his verified complaint.

ACTION, heard before *Robinson, J.,* at October Term, 1897, of WAKE, on a motion for judgment upon the ground that the answer was frivolous.

The plaintiff moved for judgment upon the ground that the answer filed by the defendant J. B. Brewer was frivolous. The (228) defendant Brewer moved that the Raleigh Paper Company be made a party to the action. Motion overruled. Exception by defendant Brewer.

The defendant Brewer also moved that the action be dismissed because the complaint did not state facts sufficient to constitute a cause of action, in that the complaint did not allege that the semi-annual installments of interest on the notes mentioned in the complaint had not been paid. Motion overruled. Defendant Brewer excepted.

His Honor granted judgment as prayed by the plaintiff, and defendant Brewer excepted and appealed.

Spier Whitaker for plaintiff. (229)

Shepherd & Busbee for defendant.

FAIRCLOTH, C. J. This action is on a note payable to plaintiff's testator and endorsed by the defendant Brewer. The defendant, not denying the execution of the note nor his endorsement thereon, answering, says that in another action in the same court (*Belvin v. Paper Co.,* 123 N. C., 138), to which the plaintiff is not a party, a referee has reported that defendant is liable for the same debt as endorser, and that certain property involved in the Belvin suit should be applied before plaintiff is entitled to judgment in this action. Whether the referee's report will be confirmed or not and whether any judgment will be rendered thereon does not appear, nor is it alleged, and, whether the matter pleaded is true or not, it does not concern the plaintiff, who is not a party thereto. The plaintiff's cause of action is admitted, and the special plea does not raise a material issue, and the answer was properly held to be frivolous.

A frivolous answer is one that raises no issue or question of fact or law pertinent or material in the action. *Weil v. Uzzell,* 92 N. C., 515. The answer being of no effect, the motions of defendant cannot be allowed and plaintiff was entitled to judgment on his verified complaint. Code, 388.

Affirmed.

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(230)

D. I. FORT v. M. C. PENNY, ADMINISTRATOR OF SETH PENNY.

(Decided 15 March, 1898.)

Contract—Express and Implied Contract—Action on Contracts—Jurisdiction—Plea in Abatement—Splitting Accounts.

1. Where, in the execution of an express contract under which plaintiff was to receive compensation for his services, the plaintiff advanced money at the request of the defendant, the former may sue separately on the contract and for the money so advanced.
2. Where the subject-matter is within the jurisdiction of a justice of the peace, the fact that the demand arose out of an indivisible contract which was split for jurisdictional purposes must be taken advantage of by a plea in abatement before pleading to the merits.
3. A demand arising out of an indivisible contract cannot be split for jurisdictional purposes.

ACTION, tried before *Robinson, J.,* and a jury, at October Term, 1897, of WAKE.

Judgment of nonsuit and appeal by plaintiff.

Jones & Boykin for plaintiff (appellant).

(232) *Argo & Snow and W. N. Jones for defendant.*

FORT *v.* PENNY.

FAIRCLOTH, C. J. On 7 June, 1897, plaintiff sued defendant before a justice of the peace for $199.57 on a contract for cutting, hauling, and selling wood, taken from defendant's land. On the same day the plaintiff sued the defendant for $75.83 before some justice of the peace for money advanced, at the defendant's request, in executing said contract. The defendant pleaded the general issue to each action; no plea to the jurisdiction was filed, and by consent the two cases were tried together. After trial, an appeal was taken, and in the Superior Court the two cases were consolidated by consent. The defendant then moved for a nonsuit on the ground that the justice of the peace had no jurisdiction, since the account was one transaction arising out of an indivisible contract and could not be split for jurisdictional purposes. His Honor held that the justice of the peace had no jurisdiction and entered a nonsuit, and the plaintiff appealed to this Court.

It is true that the same contract cannot be divided for such purposes, but the defendant's difficulty is that the summons, the proof, and the facts stated in the "case" by his Honor show two contracts, one express and the other implied, one for services and the other for money advanced at the defendant's request for executing said (express) contract, each one within a justice's jurisdiction. The order of nonsuit was therefore erroneous.

If the proofs had shown as matter of fact that the two demands appearing in the two summonses were one and the same transaction, and therefore indivisible, the defendant would have been confronted with the rules so well pointed out in *Branch v. Houston,* 44 N. C., 85. (233)

One of these rules is thus stated: "If the allegations bring the case within the jurisdiction, so that the defect is not apparent, and the general issue is pleaded, the proof not sustaining the allegation, there is a fatal variance which is ground of nonsuit . . . unless affidavit be made according to the statute."

"If the subject-matter is within the jurisdiction and there be any particular circumstance excluding the plaintiffs or exempting the defendants, it must be brought forward by a plea to the jurisdiction; otherwise, there is an implied waiver of the objection, and the court goes on in the exercise of its ordinary jurisdiction."

If the defective jurisdiction is apparent on the face of the record, the court stops at once, if necessary, on its own motion, and refuses to countenance a usurpation of jurisdiction and to render a void judgment, *coram non judice.*

The special plea in abatement must be made before pleading to the merits, and in a case like this must have been made in the justice's court. *Blackwell v. Dribbrell,* 103 N. C., 270.

The question of dividing accounts for jurisdictional purposes was fully considered in *Magruder v. Randolph,* 77 N. C., 79.

Reversed.

Cited: Copeland v. Tel. Co., 136 N. C., 12.

(234)

A. J. SCARBORO ET AL. v. J. H. SCARBORO ET AL.

(Decided 15 March, 1898.)

Partition—Adverse Possession—Evidence—Trial.

1. Where land was conveyed by parents to children but remained for more than twenty years in possession of the grantors, who exercised ownership and rented parts of the land to some of the grantees: *Held,* that if the grantees ever had title under the deed, the title was reinvested in the parents by the twenty years possession.

2. Where, in proceedings for partition, the defendants claimed under a deed executed by their parents more than twenty years before the proceedings were commenced, and it appeared that during the said twenty years the parents remained in possession, it was not error to admit evidence of the declarations of defendants adverse to their interest in the land.

3. The estate of a wife in land occupied by her husband before his death is in elongation of her husband's estate, and when assigned by the heir or otherwise, relates to the death of the husband.

SPECIAL PROCEEDING for the partition of lands, instituted before the clerk of WAKE Superior Court and transferred to term for trial of the issue of *sole seizin* raised by certain of the defendants. The case was tried at October Term, 1897, of WAKE, before *Robinson, J.,* and a jury, upon the following issues:

1. Are the plaintiffs owners with the defendants of the land described in the complaint as tenants in common?

2. Is the plaintiffs' action barred by the statute of limitations?

The facts sufficiently appear in the opinion. Both issues were found in favor of the plaintiffs, and the defendants appealed from the judgment rendered.

J. H. Fleming and W. N. Jones for plaintiffs.
Douglass & Holding for defendants.

FAIRCLOTH, C. J. The plaintiffs contend that they and the defendants are tenants in common and the defendants claim to be sole seized.
(235) The common ancestor was the owner of the land, and by deed in 1868 conveyed the same to the three defendants. He continued

in possession until his death in 1878, and his wife continued in possession until her death in 1896. The daughter defendant remained with her father and mother until their deaths. The defendant E. J. Scarboro rented a part of the land from his father while he lived and then rented a part from his mother until her death. S. H. Scarboro did not live on the land after 1870. There was much evidence introduced to show whether the father and mother or the defendants were in possession after the deed was executed in 1868; also as to declarations of the defendants disclaiming any more interest in the land than the plaintiffs had. The evidence was conflicting and contradictory. The jury returned a verdict in favor of the plaintiffs' contention.

The court charged the jury that, if they should find that the father and mother were in the adverse possession, they should answer the first issue "Yes," but if they should find that the defendants were in possession and permitted their father and mother to remain with them in order to give them support, then they should answer the first issue "No." The defendants excepted to proof of their declarations as to their interest, etc., in the land, on the ground that title could not be established or divested by such declarations. That probably is true, but surely their own declarations were *competent* against them to show the nature of their possession or actual presence on the premises. The *bona fides* of the defendants' deed was not in issue, and the trial did (236) not turn upon that question. That was a collateral matter, incidentally referred to by witnesses in connection with their evidence as to the defendant's declarations. According to the finding of the jury, the father and mother were in possession under claim of ownership, occupying and renting the land to some of the defendants, more than twenty years, which reinvested the title, if the defendants had had it under their deed.

The exclusion of the evidence of S. H. Scarboro and Fleming was not error, because it tended to prove the *bona fides* of the deed, which was not in issue, and the evidence was immaterial.

It is too late now to discuss whether the estate of the wife is a continuation of that of the husband or whether she takes under the heir. It is an elongation of the husband's, and when assigned by the heir or otherwise, it relates to the death of the husband. *Norwood v. Marrow,* 20 N. C., 442.

In the present case it was the possession of the husband and wife for more than twenty years, after the date of the deed, that defeats the claim of the defendants.

Affirmed.

Cited: Wilson v. Brown, 134 N. C., 403; *Brown v. Brown,* 168 N. C., 15.

(237)

A. B. MARSHBURN v. D. D. LASHLIE ET AL.

(Decided 22 March, 1898.)

Execution— Judgment— Variance—Homestead—Allotment—Estoppel.

1. Where a judgment was rendered against H. for $182.20 and against other defendants, separately mentioned, for various amounts, and an execution was issued reciting only the judgment against H. for $182.20, and commanding the sheriff to satisfy it out of H's property: *Held*, that the execution sufficiently conformed to the judgment (sections 448 and 1347 of The Code), and the variance was technical and immaterial.

2. A purchaser at a judicial or execution sale has a *prima facie* title, and the defendant in an action of ejectment who seeks to avoid such title on the ground of homestead rights must specifically plead the facts upon which the homestead right depends.

3. Where a homestead is allotted to a judgment debtor in one tract of land and he files no exceptions thereto, he cannot claim a homestead in other land after a conveyance thereof by him has been set aside as fraudulent.

DOUGLAS, J., dissents.

ACTION to recover land, tried before *Robinson, J.*, and a jury, at October Term, 1897, of WAKE. The plaintiff claimed under a sheriff's deed following an execution sale of the land as the property of H. C. Lashlie. The plaintiff offered the deed in evidence, as also the execution, which was as follows:

"Whereas judgment was rendered 10 November, 1894, in the Superior Court of Wake County, in an action between B. Liles, Wm. Watts *et al.*, plaintiffs, and J. Rowan Rogers, John Upchurch, James Ennis, J. P. Sorrell, J. D. Pearce, Loftin Harrison, R. B. Ellis, and J. W. Pernell, defendants, in favor of S. Watts, A. B. Marshburn *et al.*, against the defendant H. C. Lashlie for the sum of one hundred and eighty-

(238) two dollars and twenty cents, as appears to us by the judgment roll filed in the office of the clerk of the Superior Court of said county:

And, whereas, the judgment docket in this county on 21 November, 1904, and the sum of one hundred and eighty-two dollars and ninety cents is due thereon, with interest on same from 1 October, 1891, and the further sum of seventy-six dollars and ten cents for costs and disbursements in said suit expended, whereof the said H. C. Lashlie is liable.

You are therefore commanded to satisfy the said judgment out of the personal property of the said defendant within your county; or, if sufficient personal property cannot be found, then out of the real property in your county belonging to such defendant, etc.

The judgment was one rendered on the report of a referee in an action against a defaulting sheriff and his sureties, the amount of the judgment against H. C. Lashlie being for $182.20, and various amounts against the other defendants separately stated.

The appraisers summoned by the sheriff had allotted to the defendant H. C. Lashlie, as a homestead, a tract of land of 32 acres, valued at $40. No excess was reported. The sheriff, under the direction of the plaintiff, sold the land sued for, which had been conveyed by the defendant H. C. Lashlie to his son D. D. Lashlie, at which sale plaintiff bought. The tract so sold contained 109 acres.

It was in evidence that at the time of the issuance of the summons herein the defendant D. D. Lashlie was in the possession (239) of the land in controversy; H. C. Lashlie was living on it also.

In the argument on the issues counsel for defendant insisted that before the rendition of plaintiff's judgment, H. C. Lashlie, being largely indebted, conveyed the land to his son D. D. Lashlie, and contended that the issue was whether said conveyance was in fraud of creditors, the plaintiff being one of his said creditors.

Upon this evidence the court nonsuited the plaintiff, who excepted and appealed.

Jones & Boykin and Battle & Mordecai for plaintiff.
Argo & Snow for defendants.

CLARK, J. The execution sufficiently conforms to the judgment. The variance is technical and immaterial. *Rutherford v. Raborn,* 32 N. C., 144; *Green v. Cole,* 35 N. C., 425; *Hinton v. Roch,* 95 N. C., 106; *Wilson v. Taylor,* 98 N. C., 275; Code, secs. 448 and 1347.

A purchaser at a judicial or execution sale has a *prima facie* (240) title, and a defendant in an action of ejectment, who seeks to avoid such title on the ground of homestead rights, must specifically plead the facts upon which the homestead right depends (*Allison v. Snider,* 118 N. C., 952; *Fulton v. Roberts,* 113 N. C., 421; *Dickens v. Long,* 109 N. C., 165; *Edwards v. Taylor, supra*) unless they are admitted or appear in the plaintiff's evidence. *Mobley v. Griffin,* 104 N. C., 112. Here the defense of the homestead is not set up in the answer. It appeared, however, in the evidence offered by the plaintiff that the homestead of the defendant H. C. Lashlie was allotted in another tract of land and that he did not except to such allotment. It is contended, however, for the defendants that if the conveyance of the tract of land in dispute by H. C. Lashlie to D. D. Lashlie is found by the jury to be fraudulent, H. C. Lashlie can still set up his claim to homestead therein. *Crummen v. Bennett,* 68 N. C., 494; *Arnold v. Estis,* 92 N. C., 162; *Rankin v. Shaw,* 94 N. C., 405; *Dortch v. Benton,* 98 N. C., 190. But those de-

cisions apply only where no homestead was set apart, in which case, when the land is adjudged to be the property of the fraudulent grantor, he is entitled to his homestead therein. *Crummen v. Bennet, supra,* did not meet the hearty approbation of the profession when rendered, and though it is now too well settled to be shaken, the courts have never gone beyond it. Accordingly, a line of cases has equally as well settled the principle that where the homestead is allotted and no exception is filed thereto, if other land is adjudged to have belonged to the debtor at the time of the allotment and to have been conveyed by him in
(241) fraud of creditors, there is an estoppel of record against such debtor which prevents him from claiming a homestead in the land, when the fraudulent conveyance is set aside in an action brought by the purchaser at execution sale. *Whitehead v. Spivey,* 103 N. C., 66; *Spoon v. Reid,* 78 N. C., 244; *Burton v. Spiers,* 87 N. C., 87, which are cited with approval in *Springer v. Colwell,* 116 N. C., 520. In the first two cases, as in the present one, the homestead allotted was less than $1,000. *Whitehead v. Spivey, supra.* Here the homestead allotted was 32 acres of land with dwelling and buildings thereon, but valued at only $40. Whether this was the true value or not, the homesteader had had his day in court, his homestead was allotted, and the return of the allotment filed and recorded, he did not claim it in the land now in controversy, he filed no exception, and the allotment is *res judicata.*

When the case goes back, and the defendant D. D. Lashlie shall set up his deed from H. C. Lashlie, it will be open to the plaintiff to attack it for fraud. Upon that issue the result of the action must depend, for H. C. Lashlie in any event is estopped to assert a homestead therein.

In no aspect of the case can the nonsuit be sustained, and it must be set aside.

Error.

DOUGLAS, J., dissents.

Cited: McGowan v. McGowan, ante, 169; *Cawfield v. Owens,* 130 N. C., 643.

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(242)

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

(Decided 29 March, 1898.)

Lien—Trust—Breach of Contract.

Where a corporation, in pursuance of an agreement with plaintiff, retained from the wages of its employees the price of supplies furnished to the latter by him and became insolvent, and a receiver was appointed before

the money was paid to plaintiff: *Held*, that no equitable trust or lien was created or attached to the funds in the hands of the receiver, the proceeds of collections of book accounts, so as to entitle plaintiffs to a preference over other creditors.

ACTION to have the defendant declared a trustee for the plaintiff of certain funds held by the defendant as receiver of the Park Lumber Company, heard before *Robinson, J.*, at October Term, 1897, of WAKE. The facts appear in the opinion.

On the trial, upon the offer of witnesses by the plaintiff to prove the allegations of the complaint, his Honor intimated that the plaintiff could not recover if such allegations should be fully established, and in deference to such intimation the plaintiff took a nonsuit and appealed.

Shepherd & Busbee for plaintiff (appellant).
Jones & Boykin for defendant.

FAIRCLOTH, C. J. The Park Lumber Company, through its proper officers, agreed with the plaintiff as follows: The plaintiff was to furnish the employees of the defendant with an amount of supplies not to exceed their monthly wages, and did so furnish supplies. The lumber company agreed to retain from the employees' monthly wages the amount of their supply accounts and pay the same to the plaintiff, and pay balance of wages to the employee. The company retained enough of the wages to pay the plaintiff, but failed to pay the plaintiff. The (243) company became insolvent, and the defendant Porter was appointed its receiver. The case sent here by his Honor states that "the plaintiff admitted that the funds now and which had been in the hands of said receiver had come into his hands since his appointment as receiver from collections of book accounts, etc."

The plaintiff alleges that the employees of the lumber company agreed to the arrangement above referred to. Several material parts of the complaint are denied by the answer. After reading the pleadings his Honor held that if the plaintiff's allegations were fully established he could not have a trust declared in his favor on the funds in the hands of the defendant Porter.

The plaintiff claims a lien or priority on the funds now in the hands of the receiver, which came to his hands from collections of the book accounts, etc., since his appointment. It does not appear from the complaint when the receiver was appointed nor when the lumber company became insolvent. For the present the complaint must be taken as true. The defendant admits that the plaintiff is entitled to a personal judgment against the lumber company, but denies his right to a lien or priority on the funds in the receiver's hands.

We have no direct authority on the question and must resort to reason and principle.

Where property or money is impressed with a trust in the hands of an agent, bailee, etc., the beneficial owner may recover it, as such, and may follow it into any other kind of property, securities, or negotiable instruments, if it can be distinguished or identified, because the original trust character follows it. *Whitley v. Foy,* 59 N. C., 34. And any lien
(244) attaching to it will be enforced, except against *bona fide* purchasers for value and without notice. And where there is no proof of a trust, either by writing or word, the law will not imply, and the court will not presume a trust, except in a case of absolute necessity. 2 Story Eq. Jur., sec. 1195 n. At law, a lien is the right to possess and retain a thing until some charge upon it is paid or removed. An equitable lien is not a *jus in re* or a *jus ad rem.* It is not a property in the thing itself, but is a charge upon the thing. 2 Story, *supra,* secs. 1215 and 1216. "It is simply the right to have a demand satisfied out of the property of another." *Thigpen v. Leigh,* 93 N. C., 47.

The nearest approach to an authority furnished us is *McLeod v. Evans, assginee,* 66 Wis., 401. Plaintiff left a draft on New York with a banker for collection. The banker collected the money (by credit on his correspondent's books) and before paying the plaintiff made an assignment for creditors. It was held by a divided Court that the proceeds of the draft were a trust fund in the hands of the banker, and that the plaintiff was entitled to full payment against other creditors out of the funds in the hands of the assignee. This differs from the case before us, because the plaintiff's draft and money went directly into the hands of the bank, and for collection.

In the case before us, the plaintiff has put nothing in the hands of the lumber company, and the employees have paid nothing into the hands of the lumber company, so there is nothing to which any lien can attach. It is at most a breach of personal contract on the part of the lumber company with the plaintiff, and that entitles him to a personal judgment.

True, the employees agreed to the arrangement between the
(245) plaintiff and the company, and received a part of their wages in the hands of the company, leaving the balance with their employer, and the latter is still liable to them for the balance.

The case states that the money now in the hands of the receiver came from the book accounts, etc., since his appointment, but it is not alleged that the retained wages constitute any part of the book accounts, and we are unable to see or say that that is so. The company was in a failing condition and for aught that appears the retained wages may have gone otherwise. It is not alleged that the contracting parties *intended* that a lien should be created, and we cannot say that such was the intention.

We see nothing to which the lien could attach at the time of the agreement. It was an executory contract, which has been broken by one of the contracting parties.

We fail, then, to see any principle or reason why the plaintiff should be preferred to the other creditors.

Affirmed.

Cited: Garrison v. Vermont Mills, 154 N. C., 5.

STATE EX REL. M. H. HOLT v. L. A. BRISTOL.

(Decided 17 May, 1898.)

Office—Vacancy in Office—Appointing Power of Governor—Qualification by Appointee.

1. Under chapter 399, Laws 1891, plaintiff was elected a director of the N. C. School for the Deaf and Dumb for the term of six years and until his successor should be elected and qualified. The General Assembly of 1897 failed to elect a successor to plaintiff but the Governor of the State, assuming that there was a vacancy, appointed the defendant to fill the same. *Held,* that the appointment by the Governor was invalid since there was no vacancy as contemplated by section 3320 of The Code.
2. In such case, the fact that the defendant appointee was qualified and inducted into the office did not of itself terminate the office of the plaintiff, since both an election by the Legislature and a qualification of the successor were required to effect such termination.

ACTION by the State, on the relation of M. H. Holt, to try the title to the office of director of the North Carolina School for the Deaf and Dumb, heard before *Timberlake, J.,* at February Term, 1908, of WAKE, on complaint and demurrer.

R. O. Burton for plaintiff (appellant). (247)
Avery & Strong and J. C. L. Harris for defendant.

FURCHES, J. The Legislature of 1891, chapter 399, established a school for the white deaf and dumb of North Carolina at Morganton. The plaintiff alleges in his complaint that in March, 1891, he was duly elected a director of said school, under said act establishing the same, for a term of six years and until his successor should be elected and qualified; that the term of six years expired in March, 1897, but the act provides that his successor shall be elected by the Legislature; and the Legislature

having failed to elect his successor, his term is extended—that he holds over—and is the rightful occupant of said office; that, as he was the rightful and legal occupant of said office, there is and has been no vacancy in said office since his election thereto in March, 1891. But the Governor, supposing said office to be vacant on account of the Legislature's failing to elect, and six years from the date of his election having expired, appointed the defendant to fill this supposed vacancy; that under
(248) this appointment of the Governor, the defendant has taken possession of said office and now wrongfully holds the same, exercising its powers and functions and receiving the fees and emoluments thereof.

To this complaint the defendant demurs upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

It is contended by the plaintiff that there was no vacancy for the Governor to fill, and that if there was a vacancy it was not such a vacancy as the Governor had the power to fill; that it was not a vacancy caused by "death, removal, or otherwise" leaving an *unexpired* term to be filled by the Governor.

But we are of the opinion that if there was a vacancy the Governor had a right to fill it under the provisions of the act of 1891 establishing the school and under section 3320 of The Code. *Battle v. McIver,* 68 N. C., 467.

But the Governor only had the right to appoint when there was a vacancy, and not the right to appoint a successor before the office was vacant, whose qualification would end the term of the incumbent at any time after his six years had expired. This the Legislature could do, as it was the primary source of power of electing directors. The Legislature created the office of director in this institution, and fixed his term of office at six years and until his successor should be *elected* and qualified. It could as well have fixed it at eight years or ten years as at six years. But it was fixed at six years, when it was to terminate, provided a successor had been *elected* and qualified. The very object of this provision, that the person elected should hold over until his successor
(249) should be *elected* and qualified, was to prevent a *vacancy* until such *election* and qualification should take place.

If this be true, as it seems to us that it must be, there was *no vacancy* in the office to be filled when the Governor appointed the defendant. And as there was no vacancy, the Governor had no power to appoint the defendant, and his appointment being without authority, the fact that defendant was qualified and inducted into office did not, of itself, terminate the office of the plaintiff, as it required both an election (which we must take to be by the Legislature) and a qualification by the successor to do this. This view of the case is sustained by *Battle v. McIver, supra.*

This case comes before us on complaint and demurrer, and we decide it as we understand the law arising upon the pleadings. But we do not suppose the *plaintiff* or *defendant* feels much interested in the case. The plaintiff, it seems, did not commence his action for about a year after he alleges he was wrongfully ousted of his office; and though it seems he prayed an appeal at February Term when the case was tried, he gave no bond for the appeal until April Term. The defendant filed no answer, but filed a general demurrer. If he had filed an answer setting up the plaintiff's abandonment, facts might have developed which would have presented another question for our consideration, under the decision of this Court in *Williams v. Somers,* 18 N. C., 61, and *Ward v. Elizabeth City,* 121 N. C., 1.

There is error in the judgment of the court, and the plaintiff is entitled to the relief demanded.

Error.

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(250)

L. A. GARNER, CLERK OF SUPERIOR COURT OF CARTERET COUNTY,
v. W. H. WORTH, STATE TREASURER.

(Decided 15 March, 1898.)

Mandamus—State Treasurer—Collection of Debt Against the State—Expenses of State Government—"Oyster Claims."

1. The courts cannot direct the State Treasurer to pay a claim against the State, however just and unquestioned, when there is no legislative appropriation to pay the same; and when there is such an appropriation, the coercive power is applied not to compel the payment of the State liability but to compel a public servant to discharge his duty by obedience to a legislative enactment.
2. Incidental bills of cost devolved upon the State by the failure of actions authorized by it (other than those specified in sections 742 and 3373 of The Code) are not "expenses of the State government" within the meaning of section 1 of chapter 168, Acts of 1897, which provides that certain taxes shall be applied to the payment of such expenses.
3. Where the State Treasurer denies the correctness of a claim audited by the State Auditor and alleges fraud in the creation of the indebtedness or that the services for which a warrant was issued were not rendered, mandamus will not lie to compel him to pay it, the question raised by such claim being for the Legislature, and not the courts, to determine.

ACTION by the plaintiff, as Superior Court Clerk of CARTERET, to obtain a *mandamus* directing the State Treasurer to pay certain claims against the State, heard before *Robinson, J.,* at October Term, 1897, of WAKE.

(252) *Allen & Dortch and Simmons, Pou & Ward for plaintiff.*
McRae & Day for defendant (appellant).

CLARK, J. Providing for or directing payment of legal liabilities incurred by or on behalf of the State is a matter for the legislative, not the judicial branch of the government, for by virtue of its sovereignty the State cannot be sued. When the decision in *Chisholm v. Georgia,* 2 Dallas, 419, rendered it possible that the Federal Judiciary would violate this immunity of sovereignty, a wide-spread alarm promptly forced through the adoption of the XI Amendment to the Constitution of the United States forever prohibiting the Federal Courts from entertaining jurisdiction of any action against any State brought by the citizens of another State, or citizens or subjects of any foreign State. The State Constitution also effectually bars any judicial action to enforce collection of liabilities against the State by providing in the Constitution Article XIV, section 3, that "no money shall be drawn from the treasury but in consequence of appropriations made by law," *i. e.* by legislative authority. The qualified jurisdiction given this Court by Article IV, section 9, is specially limited, the decision being "merely recommendatory" to the General Assembly, and the Court being forbidden to issue any process thereon. *Baltzer v. The State,* 104
(253) N. C., 265, 277.

The plaintiff's claim against the State is for bills of costs taxed against the State in actions instituted under the authority of Laws 1893, ch. 287, sec. 4. In *Blount v. Simmons,* 119 N. C., 50, the State was adjudged liable for costs, but the Court was careful to add that "the application to the Court cannot result in a judgment for the claim of the citizen. . . . How the judgment will be satisfied is a question not now before us." There is a wide difference between the liability of a State and the right to enforce it by judicial process. Take an admittedly valid State bond: It is issued by authority of the General Assembly, signed by the Governor and public Treasurer and evidenced by the broad seal. But the judicial branch of the government cannot direct a mandamus to the Treasurer for the payment of principle or interest. The plaintiff's claim, based upon a warrant of the Auditor, can certainly be of no higher dignity. Indeed, the Auditor's warrant would be no protection to the public Treasurer unless there was that "appropriation" to pay it, which is required. Constitution, Article XIV, sec. 3; *Bank v. Worth,* 117 N. C., 146. It is only when the legislative department has appropriated a certain fund to the payment of a liability incurred or to be incurred and the Auditor or Treasurer refuses to obey the legislative mandate that the Court can issue its mandamus to com-

pel him to do so. The Court cannot direct him to pay a claim, however just and unquestioned, when there is no legislative appropriation to that purpose.

This raises the sole question in this case. Has the General Assembly made any appropriation to pay this claim? This is not done by simply authorizing the liability to be incurred, for if so, judicial process to enforce payment of any and all State indebtedness could (254) be invoked, and the State forced to pay the same by the simple process of issuing a mandamus to the custodian of the State's money instead of an execution to the sheriff. The only authority that can be invoked as a legislative appropriation to pay this liability is the usual provision in the revenue act, to be found in Laws 1897, ch. 168, sec. 1—"That taxes hereinafter designated are payable, etc., and shall be collected and assessed, etc., and applied to the payment of the *expenses* of the State government, the appropriations to charitable and interest on the 4 per cent consolidated debt of the State." It is argued that, as the State authorized these actions to be brought, and as the legal liability to pay the costs devolved upon the State on the failure of the actions (Code, section 536), therefore this claim is a part of the "expense of the State government." This reasoning would make any other liability incurred by the authority of law an "expense of the State government." It will be noted that the act above quoted especially recognizes that appropriations to charitable and penal institutions are not a part of the "expenses of the State government," but come in with *"other* specific appropriations" and the interest on the public debt. If these are no part of the State governmental expenses, upon what ground can we view as "expenses of the government" costs unexpectedly devolved upon the State by the failure of actions incidentally brought by its permission in the Superior Court by the solicitor upon the affidavit of five inhabitants. If this is an "expense of the State government," where shall we draw the line? Such costs are, in truth, simply an unforeseen liability for which the General Assembly made no ap- (255) propriation, and now that it has been incurred to the extent of $6,000 or $7,000, it is for the Legislature, not the Courts, to make provision for its payment. Now there are Court costs for which the General Assembly has seen fit to provide. The Code, section 3373, provides that costs in civil actions brought by or against any of the officers of the State, when such action is brought or defended pursuant to the advice of the Attorney-General and the same is decided against such officers, shall be paid by the State Treasurer upon the warrant of the Auditor, and section 742 provides that costs incurred by any county in prosecuting charges of bribery against any State officer, etc., shall be paid in like manner. This makes such costs an expense of the State govern-

ment, but these sections do not cover the costs embraced in the present action. *Expressio unius, exclusio alterius.* It is not necessary in this case to define what are "expenses of the State government." It is sufficient to say that incidental bills of costs devolved upon the State by failure of actions authorized by it are not such expenses when they are not embraced in the class of cases provided for by the Code, sections 742 and 3373. Instead of Court costs being an expense of the State government ordinarily when the State incurs liability for Court costs, the statute directs payment by the county (Code, sections 739, 740, 747) but those sections do not cover these costs (*Blount v. Simmons,* 118 N. C., 9, and not being within sections 742 and 3373, there can be no payment unless the Legislature sees fit to provide for it. *Merrimon v. Commissioners,* 106 N. C., 369; *S. v. Shuffler,* 119 N. C., 867; *Guilford v. Commissioners,* 120 N. C., 23. The revenue act recognizes that the expenses of charitable and penal institutions and the interest on the public
(256) debt are not a part of the governmental expenses. There are many other liabilities authorized by law for which specific appropriations are made before they are incurred. There are many others which are left to be provided for after they are incurred, and the present claim is one of them, and, like all such, provisions for its payment must be sought at the hands of the General Assembly and not by invoking the coercive powers of this branch of the government against the officer in whose hands the legislative department has placed the funds it has raised and appropriated. He can pay them out only on legislative appropriation and the Court can compel him to pay only when he refuses to execute the legislative mandate—and this not to coerce payment of a State liability but to compel a public servant to discharge his duty by obedience to a legislative enactment.

And there is still another ground: The Treasurer denies the correctness of the claim. If there was an appropriation for this specific claim or of a specific sum, a mandamus might issue to the Treasurer to pay it. But in the absence of such legislation, the judgment taxing the costs is no more obligatory upon the State as to the amount taxed than is our ruling that the State is liable for the costs, the judgment having only a recommendatory effect either as to amount or liability. *Bledsoe v. State,* 64 N. C., 392; *Clements v. State,* 77 N. C., 142. Besides, it was admitted that the costs in this action have not been reduced to conform to the ruling of this Court in *Blount v. Simmons,* 120 N. C., 19, having in fact been taxed before that decision was rendered. While the auditor's warrant is usually a protection to the treasurer as to the correctness of the amount (though not as to the legal duty to
(257) pay. *Bank v. Worth,* 117 N. C., 146, 155). Here, the treasurer in his answer denies the correctness of the bill and also avers

that the claim has not been duly audited by the former auditor, who issued this warrant. Whether the Court under such circumstances can ever invade the province of a coördinate department (Constitution, Article I, section 8), adjudged that the claim is just and was duly admitted and direct the public treasurer to pay, it is certain it cannot do so in a case like this where there is a contest as to the rendition of the services charged for and there is no appropriation by the Legislature. To do so would not be to compel an officer to perform a purely ministerial duty, but to try a case, involving disputed facts, with the State as the real defendant. *Reynolds v. State,* 64 N. C., 460; *Reeves v. State,* 93 N. C., 257. The only investigation as to facts which we could make would be in an original proceeding as prescribed by The Code, section 948, which authorizes no judgment. The taxation of costs is only a ruling that such and such services under the statute entitles the officer to such and such fees, but are not conclusive on the State that those services were rendered, as would be the case as to any party against whom the Court could render a judgment. Even when a claim is "an expense to the State government" or other subject of appropriation, as an expense of a charitable or penal institution, for instance, the Court can only issue a mandamus when the amount is admitted or ascertained or stated by the statute, as a salary or other sum certain, *i. e.,* when the act to be done is merely ministerial (*Cotton v. Ellis,* 52 N. C., 545, 550; *Kendall v. U. S.,* 12 Peters, 834; *Boner v. Adams,* 65 N. C., 639; *Burton v. Furman,* 119 N. C., 166), and not even then unless the money is in the treasury for that purpose. The courts cannot coerce the payment of a claim against the State as if it were a private (258) citizen, but the matter must be left to the legislative department, whose duty alone it is to ascertain and provide for payment of claims against the State. As was said by *Pearson, C. J.,* in *R. R. v. Jenkins, Treas.,* 68 N. C., 499, 504: "This excludes the idea that any creditor of the State can have a mandamus against the Treasurer, for there is no express command of the General Assembly that the public Treasurer shall pay all the debts of the State, and if a claim is presented to him it must be left to his official discretion as to the time, condition of the treasurery etc., when he will pay it; the Court could not interpose in such a case without encroaching upon the powers of the executive department of the government."

Reversed.

Cited: State Prison v. Day, 124 N. C., 392; *Printing Co. v. Hoey, ib.,* 795; *White v. Hill,* 125 N. C., 200; *White v. Auditor,* 126 N. C., 584, 599, 600, 612.

W. H. WORTH, STATE TREASURER, v. M. I. STEWART AND J. C. STEWART.

(Decided 29 March, 1898.)

Public Printers — Accounts for State Printing — State Examiners — Finding—Estoppel—Recovery of Money Paid Through Mistake—Pleading—Demand.

1. The examiners provided for in section 3622 of The Code, whose duty it is to examine and certify to the correctness of accounts for public printing, are not arbitrators or a special tribunal with such powers and jurisdiction as to make their certificate of correctness of the accounts a judgment binding, as an estoppel, upon the State.
2. The State may, like an individual, recover money wrongfully paid under a mistake of fact; and hence, where examiners of public printing, through a mistake of fact, certified to the correctness of accounts for public printing and the State Auditor, in ignorance of the facts, issued warrants therefor, and the State Treasurer, in like ignorance, paid the same, the State may maintain its action to recover the money so paid.
3. Where a complaint in an action by the State to recover money wrongfully paid to the defendants through mistake, alleged that the defendants "wrongfully, unlawfully, and unjustly withhold from the State" the large amount alleged to be due: *Held*, that a demand on the defendants and their refusal to pay were substantially and sufficiently alleged.

(259) ACTION by W. H. Worth, as State Treasurer, against defendants, former public printers, to recover money erroneously paid in settlement of incorrect accounts for public printing, heard on complaint and demurrer before *Robinson, J.*, at October Term, 1897, of WAKE. The substance of the complaint and the grounds of demurrer are set out in the opinion. His Honor overruled the demurrer and defendants appealed.

Douglass & Holding and W. N. Jones for plaintiff.
R. O. Burton for defendants.

FURCHES, J. Under an act of the General Assembly of 1895, the defendants on 27 February, 1895, entered into a contract with the State, as public printers, by which they were to do the public printing for the State at specified prices therein stated. The plaintiff being the public Treasurer of the State, on 28 June, 1897, commenced this action against the defendants, in which he alleges that, owing to mistakes as to the facts, the parties selected to examine and pass upon the work of the defendants were induced to pass upon and to certify to the correctness of a large number of accounts by the defendants that were incorrect; that said accounts having been thus certified, the auditor was induced

to issue warrants thereon in ignorance of the false accounts of (260) the defendants, and the public treasurer, in ignorance of the facts, paid the same.

To this complaint the defendants demurred upon the ground that the complaint does not state a cause of action, and assign as grounds: For that it appears that said accounts were presented to the two practical printers as provided in section 3622 of The Code; that said two practical printers were arbitrators or a special tribunal provided by law for the purpose of passing upon said accounts, and in either event their action was final—*res judicata*—and cannot be reviewed by the courts: For that said complaint does not allege that the action of the two practical printers was procured by fraud and misrepresentation of the defendants, and that there was no demand before bringing action.

The grounds of the demurrer are more elaborately stated than we have stated them. But this statement covers all the grounds of error assigned. The argument before us took a much broader scope on both sides than that contained in the complaint or the demurrer. The plaintiff stated that the reason he did not make more direct and positive averments in his complaint than he did, was the fact that the defendants were public officers and he did not think it proper to do so. Of course we cannot take notice, in giving our judgment, of matters outside of the record. And while we do not think a pleader is ever justified in using invectives, we know of no rule or reason why he should not state his case in a plain, business-like manner—saying in words what he would like to have it understood he meant. If the plaintiff had stated in his complaint what he alleged the facts to be in his argument before us, we have but little idea that this case would (261) now be before us on demurrer.

We do not agree with the defendants that the two examiners were arbitrators, nor do we agree with them that they were a special tribunal provided by law for the trial of these or any other matters between the State and the defendants, with such powers and jurisdiction as to make their certificate of correctness a judgment that would amount to an estoppel—*res judicata*. It could be no more than a prerequisite to the action of the auditor in issuing his warrant. We cannot say but what the complaint is to some extent liable to the criticism made upon it by the defendants, "a little hazy." But it says that by a mistake of facts and ignorance of the same (which facts must have been furnished by the defendants) these examiners were induced to approve erroneous accounts of the defendants; and the auditor, in ignorance of these erroneous facts, was induced to issue his warrants, and the treasurer, in ignorance of these erroneous facts paid the warrants. This is admitted to be true by the defendants' demurrer—that under a mistake of facts

the defendants have imposed upon the State, and have thereby collected out of the State several thousand dollars they were not entitled to. Money wrongfully paid under a mistake of fact between individuals may be recovered back. *Pool v. Allen,* 29 N. C., 120; *Newell v. March,* 30 N. C., 441; *Adams v. Reeves,* 68 N. C., 134; *Lyle v. Siler,* 103 N. C., 261. And if it can be recovered back between individuals, why can it not be recovered back by the State?

The objection that there was no demand made before suit was brought cannot be sustained. It is true that the plaintiff does not in
(262) direct terms, as most pleaders would have done, state that a demand had been made and payment refused. But it seems to us that he has substantially done so. After stating the large amount due from the defendants to the State, he says, "which they wrongfully, unlawfully and unjustly withhold from the State, and the defendants admit this to be true, but say, "we are not asked to pay." We cannot allow this objection to protect the defendants from an investigation of this transaction.

Nor can we sustain the defendants' objection to the plaintiff's second cause of action. As it appears to us there is a cause of action stated, and if it is not sufficiently specific the defendants had a right to demand a bill of particulars.

It seems to us that the defendants' demurrer depended upon the assignment that alleged that the action of the examiners in passing the accounts was a final adjudication of the matter, and an estoppel. And when they failed to sustain this defense, the defendants' whole demurrer failed. The judgment is

Affirmed.

Cited: Commissioners v. White, 123 N. C., 537; *Simms v. Vick,* 151 N. C., 80.

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(263)

STATE EX REL. W. H. WORTH, STATE TREASURER, v. M. I. STEWART ET AL.

(Decided 29 March, 1898.)

Pleading—Fraud—Allegations of Fraud, Sufficiency of.

Where a complaint, in an action by the State to recover money wrongfully paid by it to the defendants under a contract for public printing, alleged that the defendants, by falsely printing a copy of the contract and exhibiting it to officials whose duty it was to examine and approve the bills for printing, procured the approval of the accounts whereby they drew more money from the State than they were entitled to, and, by exhibiting sample

sheets of work, obtained the approval and payment of bills for work that did not come up to the samples: *Held*, that such complaint is good on demurrer, although fraud is not specifically alleged, since the facts, if true, constitute fraud.

ACTION by the State on the relation of W. H. Worth, State Treasurer, against M. I. and J. C. Stewart, public printers, and the surety on their bond, heard before *Robinson, J.*, at October Term, 1897, of WAKE, on complaint and demurrer. The demurrer was overruled and defendants appealed. The facts sufficiently appear in the opinion.

Douglass & Holding and W. N. Jones for plaintiff.
R. O. Burton for defendants (appellants).

FURCHES, J. In the statement of facts in the complaint, this case is almost the same as that between the same parties at this term, except that this case is brought (by the State *ex rel.*, etc.) on the bond of the defendants and W. B. Ellis, their surety thereon; and the defendants in this case, as they did in that, demurred to the plaintiff's complaint, assigning substantially the same grounds of demurrer in this case that they did in that. We therefore do not feel called upon to (264) enter into a full discussion, in this case, of the matters discussed and passed upon in that case; but we will say that the complaint in this case is subject to the same criticism as was the complaint in the other case. And still it seems to us that the averments are sufficient to sustain the action, that it is a case of an imperfect statement of a good cause of action.

We will not undertake to repeat all the averments in the complaint showing fraud and deception on the part of the defendants by which they were enabled to get a large amount of money which they were not entitled to, according to the allegations of the complaint.

But the plaintiff alleged that the defendants procured a copy of their contract with the State, which they caused to be erroneously printed, and that they exhibited and used this falsely printed contract to procure the approval of the accounts whereby they were enabled to draw more money from the State than they were entitled to; that they exhibited sample sheets of their work upon which they procured the approval of the examiners of bills upon which they were entitled to procure warrants, and payment thereon, when in fact their work did not come up to the samples, but was done upon much smaller forms; and by this means they were enabled to collect and receive a much larger sum of money from the State than they were entitled to. This, to our minds, constitutes fraud, whether it is called fraud in the complaint or not.

And it is a little remarkable that gentlemen would admit the truth of such allegations as these, even in a demurrer. It seems to us that

such allegations as these, made against a public officer of the State, demand an investigation. They may not be true, but for the pur-
(265) poses of this case the demurrer admits them to be true, and they must be so considered by us. The judgment overruling the defendants' demurrer is

Affirmed.

W. E. ROSS, ADMINISTRATOR OF CHARLES ROSS, v. R. C. DAVIS ET AL.

(Decided 15 March, 1898.)

Action for Breach of Warranty—Warranty in Deed—Breach—Life Tenant—Equitable Lien.

1. No action can be maintained for a breach of covenant of warranty against the heirs of a life-tenant who, together with the remaindermen, conveyed land to a purchaser, with general warranty of title, when the grantee had notice of the life tenancy and was not ousted until after the death of the life-tenant.

2. Where a *feme covert* and her husband conveyed the wife's land with covenant of general warranty, but the privy examination of the wife was not taken and the proceeds of the sale were invested by the wife in other lands, and after her death her heirs recovered the land so sold and conveyed by their ancestor: *Held*, that equity will follow the proceeds of the sale and declare the heirs trustees of the land in which such proceeds were invested to the extent of such investment.

ACTION, heard on complaint and demurrer, before *Allen, J.*, at April Term, 1897, of GRANVILLE. The demurrer was overruled and the defendants appealed. The facts appear in the opinion.

Winston, Fuller & Biggs and T. T. and A. A. Hicks for plaintiffs.
A. W. Graham and J. W. Graham for defendants.

(266) FURCHES, J. By the will of Chesley Qualls, Eliza Qualls, the widow of Chesley, and Frances Blackley wife of J. H. Blackley and daughter of Chesley Qualls, were the owners of 84 acres of land in Granville County—the said Eliza owning a life estate therein and Frances, the remainder in fee simple. In 1875, Eliza and Frances sold this land to Charles Ross at the price of $400, and, upon payment of this sum to them, the said Eliza and Frances and her husband, J. H. Blackley executed to said Charles Ross a deed, a form conveying said land to him in fee simple, with warranty, and Charles took possession of the land under this deed and held the same until 1885, when he sold and conveyed it to one Wyche in fee simple with warranty. Wyche held the land until 1895, when he was ousted by the defendants in this

action, who are the children and grandchildren of the said Frances Blackley. After Wyche was ousted as above stated, he brought suit on the warranty contained in the deed of Charles Ross to him, and recovered thereon from the plaintiff in this action (*Wyche v. Ross,* 119 N. C., 174). Charles Ross is dead and the plaintiff is administrator *c. t. a.* Frances Blackley died on 9 December, 1889, leaving the defendants her heirs at law, and Eliza Qualls died in January, 1893, leaving the defendants her heirs at law. At the time of making the deed to Charles Ross, the said Eliza was sole, but the said Frances was under the disability of coverture; and, as her privy examination was not taken, the deed failed to convey her estate in the land, and this was the ground upon which the defendants were enabled to recover the land and to oust Wyche, the purchaser of Charles Ross. Upon the sale to Ross and the payment of the purchase money by him, the said Eliza and Frances invested the money received from him in the purchase of other lands from one Canady, lying in Granville County, known as (267) the "Morgan lands" and described in the plaintiff's complaint. One half of this tract so purchased of Canady was conveyed to Eliza Qualls and the other half to Frances Blackley, ancestor of the defendants.

The plaintiff's complaint contains two counts—one for breach of warranty, and the other, in which he asks to follow the fund into the "Morgan lands." We see no ground upon which the count upon the warranty can be sustained. It was known to Ross that Eliza had only a life estate in the land. This fact was declared by the will of Chesley Qualls under whom Eliza held, and we must presume was acted upon in this transaction, as the deed was signed by Frances Blackley and her husband. And as the purchaser Ross and his assignee Wyche held the undisturbed possession of this land until after the death of Eliza and the termination of her estate therein, the plaintiff has no right to complain of her. But as it would be unconscionable for the defendants to hold the land, bought by their ancestor, Frances, with the money received from Charles Ross, after having repudiated her sale to Ross, and after they have rocovered the land sold by her to Ross (*Edwards v. Culberson,* 111 N. C., 342; *Scott v. Battle,* 85 N. C., 184), and it being admitted by the demurrer of the defendants that the land conveyed to Frances by Canady was bought with the money she got from Ross, equity will follow this fund and declare the defendants trustees of said land so conveyed to *Frances* for the repayment of that part of the money she got from Ross, and invested in the "Morgan land." They will not be allowed to hold both the land she sold and the land she bought. *Edwards v. Culberson* and *Scott v. Battle, supra.* But it will not do so as to the part conveyed to Eliza Qualls. (268)

It was claimed that other money in the hands of Mr. Fleming and in the hands of the guardian of the defendants should be held liable. But this cannot be done.

The judgment of the Court below overruling defendant's demurrer is Affirmed.

R. R. HOLMES ET AL. v. E. G. DAVIS.

(Decided 24 May, 1898.)

Action on Note—Jurisdiction—Special Proceedings—Final Decree—Abatement.

A final order was made in an *ex parte* proceeding for the sale of land for division confirming the sale and directing the commissioner to collect the purchase money and make a deed to the purchaser and distribute the proceeds among those entitled to it, and the money was so collected and paid to the parties excepting to plaintiff's wife. No deed was executed to the purchaser. About twenty years thereafter defendant executed his note to the plaintiff for his wife's share, expressly reciting that, upon payment of the note, the commissioner should execute a deed. *Held*, that the original proceeding was ended, and it was error to dismiss an action on the note upon the ground that plaintiff's remedy was by motion in such original proceeding. (*Council v. Rivers*, 65 N. C., 54, distinguished.)

ACTION by the husband, and others, as next of kin, of Amanda Holmes, deceased, to recover the amount of a note executed by the defendant, and to have the amount of the recovery declared a lien upon land, heard before *Adams, J.*, at November Term, 1897, of GRANVILLE. The facts appear in the opinion. From an order dismissing the action the plaintiffs appealed.

(269) *Edwards & Royster and J. B. Batchelor for plaintiffs.*
J. W. Graham for defendant.

FAIRCLOTH, C. J. The plaintiff and others had an *ex parte* proceeding to sell land for division and in the due course of this action, land was sold and purchased by the defendant, who gave his note for the purchase price. The sale was confirmed in 1875, and the commissioner was ordered to make a proper deed to defendant as soon as the purchase money was paid, and to pay the money out to the parties entitled. All the other petitioners were paid off, and several years after the decree of confirmation was recorded and order for title and distribution, the defendant, in 1893, executed his note to plaintiff for the share of his

wife, which had not been paid, promising to pay the balance of the purchase money belonging to the plaintiff's wife, expressly reciting "when this note is paid in full said commissioner shall execute a deed" for the land, and this action is on that note. Defendant contends that plaintiff's remedy is by motion in the *ex parte* petition above referred to, and moved to dismiss this action. His Honor allowed the motion and plaintiff appealed. This is the only question.

The defendant relies upon the principle announced in *Council v. Rivers,* 65 N. C., 54, and numerous similar decisions since. There can be no doubt about the power of the Court to enforce the sale contract by orders in the cause. That means the contract made with the Court through its commissioner and the parties are not allowed to harass each other with actions. In the present case the facts found by his Honor are that a final judgment had been rendered in the original action, an order to make title as soon as the money was paid, that the commissioner collected and paid to the parties all that was due (270) them, except his wife's share, and after nearly twenty years plaintiff and defendant entered into a new contract as to the unpaid share. No one, therefore, had any further interest in the original proceeding except plaintiff and defendant. They were *sui juris* and the new note was executed to suit their own convenience, as we assume, reciting such particulars as were agreed upon. This we think differs the case from that of *Council v. Rivers, supra.* This view was taken in *Thompson v. Shamwell,* 89 N. C., 283, and *Causey v. Snow,* 120 N. C., 279, where the original cause was ended and the cases are referred to. They are also found in Clark's Code, pages 645, 650. His Honor's conclusion in the case was upon the ground that the remedy was in the original petition, which we think was an erroneous conclusion.

Reversed.

W. H. GOOCH v. G. H. FAUCETT.

(Decided 22 March, 1898.)

Action on Note—Wagering Contract—Illegal Consideration—Conflict of Laws—Statute Laws of Another State—Comity Between States.

1. What is the statute law of another State is a question of fact to be proved like any other fact.

2. In the absence of proof to the contrary, it will be presumed that, in a State once under the jurisdiction of England, the common law still prevails.

3. Comity between States, as to the recognition of the laws of one by another, is the voluntary act of the State offering it, but it is inadmissible when contrary to its policy or prejudicial to its interests.

4. A note given in consideration of a bet won on a horse race cannot be enforced in this State (sections 2841 and 2842 of The Code), although given in a State where wagering contracts are not invalid.

(271) ACTION, tried at April Term, 1897, of GRANVILLE, before *Allen, J.*, and a jury, on appeal from judgment of a justice of the peace. There was a verdict followed by judgment for the defendant and plaintiff appealed. The facts are stated in the opinion.

Edwards & Royster for plaintiff.
A. A. Hicks for defendant.

FAIRCLOTH, C. J. C. H. Morton and defendant agreed to have a horse race and it was also agreed that the winner should have the other's horse. The race was run and Morton was the winner, and they valued defendant's horse at $100 and instead of delivering the horse he gave his note to Morton for $100. All this occurred in the State of Virginia. Subsequently the defendant renewed said note for principal and interest and gave the note sued on, which was assigned to plaintiff after maturity. The renewal took place in North Carolina. Without deciding whether the renewal was a North Carolina contract we will treat it as a Virginia contract according to plaintiff's contention.

The defendant pleads and relies upon The Code, sections 2841, 2842. These sections declare that all wagers, bets or stakes, depending upon any race, lot or chance, etc., shall be unlawful, and all contracts, etc., on account of money or property, so wagered, bet or staked, shall be void.

It does not appear whether there is any statute in Virginia denouncing betting on races as illegal. The statute law of another State
(272) is a question of fact to be proved like any other fact. In the absence of such proof in those States, once under the jurisdiction of England, from which they severed their connection, it is presumed that the common law prevails. *Griffin v. Carter,* 40 N. C., 413: *Cade v. Davis,* 96 N. C., 139. This presumption arises from the rules of comity among the States. This is not a right of either State, but is permitted and accepted by the States from mutual interest and convenience, from a sense of the inconvenience which would otherwise result, and from a moral necessity to do justice in order that justice may be done in return. Without this rule the law of one State can have no force in another. But there is no comity among the courts of different States. They administer the law in the same way and by the same reasoning by which all other principles of the municipal law are ascertained and

guided. It is the duty of every State to look into the interest of its own subjects. Comity, being voluntary and not obligatory, cannot supersede all discretion on the subject. Vattel at p. 61, says, "It belongs exclusively to each nation (State) to form its own judgment of what it prescribes to it—what is proper or improper for it to do, and it will examine and determine what it can do for another without neglecting the duty which it owes to itself." No State can demand the recognition of its laws in another, if they are deemed by the latter to be impolitic or unjust, of bad morals, or injurious to the rights and interests of its citizens, or against its public policy.

In *Bank v. Earle,* 13 Pet., 519, 589, *Chief Justice Taney* said: "The courts of justice have always expounded and executed them (contracts) according to the laws of the place in which they were made, *provided* that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it (273) is offered, and is inadmissible when contrary to its policy or prejudicial to its interests."

Story on Conflict of Laws, p. 35, section 38, says: "In the silence of any positive rule . . . Courts of justice presume the tacit adoption of them (foreign laws) by their own government, unless they are *repugnant* to its policy or prejudicial to its own interest."

Many other authorities to the same effect might be cited. *Thrasher v. Everhart,* 3 Kill & Johnson (Md.), 244; *Pope v. Horke,* 155 Ill., 617.

There is a difference between the right and a remedy. The courts will look to the *lex loci contractus,* to construe the contract but will not look there for the remedy. Bishop on Contracts, section 1371 (Enlarged Ed.).

We are now to the question whether gaming, betting on horse races, etc., are contrary to public policy and injurious to the interests of the citizens of the State. If so, as we have said above, it is not obligatory on the State to recognize, nor the duty of the courts to enforce such forbidden contracts. The statute (Code, section 2841) having existed in force nearly a century, affords pregnant proof that our Legislature and people have considered that the acts prohibited would be dangerous to the public policy and interest of the State. "The vice aimed at is not only injurious to the person who games, but wastes his property to the injury of those dependent on him, or who are to succeed to him. It has its more public aspect, for if it be announced that a trustee has been false to his trust, or a public officer has embezzled public funds, by common consent the first inquiry is whether the defendant has (274) been wasting his property or gambling." *Flagg v. Baldwin,* 28 N. J., Eq., 219. The habit of gambling and betting is very seductive

and when indulged in seems to seriously disturb the reason and prudence of the actors. We know as public information, that many dealers in speculative stocks depending on future contingencies have found rest in insane asylums, leaving helpless families behind to be cared for by the State. In the case before us the charm for betting induced the defendant to give his note expressly "without offset," and without the "benefit of exemptions." We do not feel it to be our duty to enforce contracts fraught with such consequences and expressly forbidden by our own State law and policy, in deference to the presumed law of the *lex loci,* recognizing such contracts as valid. By the common law contracts of wager were not considered objectionable. When, however, the subject tended to encourage acts contrary to sound morals, the courts refused to enforce such contract. *Gilber v. Sykes,* 16 East, 150. And when the act was against public policy or public duty the Court withheld its hand. *Atherford v. Beard,* 2 Term, 610. The case of *Flagg v. Baldwin, supra,* is one in point.

The contract for speculation in stocks upon margins was executed in the State of New York where it was presumed to be lawful and enforcible, and it was sought to be enforced in the courts of the State of New Jersey. The statute in the latter State is in substance and almost *verbatim* the same as ours. The subject is thoroughly and ably considered in the opinion and it was held that such contracts could not be enforced in New Jersey, because it would violate the plain public policy of the State on the subject of gambling and betting, and
(275) the Court said: "In this respect, such contracts are excepted from the rule of comity which requires the enforcement by the courts of one State of contracts made in another, if valid by the *lex loci contractus.*" Such contracts as we have before us are *unlawful* and void, and are beyond the protection of law or the right of appeal to courts of justice. This Court respects the usury laws of other States, but there is no likeness between our statutes forbidding usury and gaming, betting, etc. The former only affects the individual, for his benefit and protection, and the statute does not avoid the contract but only forfeits the interest.

We have examined *Scott v. Duffy,* 14 Pa. St., 18, and find it does not apply here. The defendant in error loaned the plaintiff money in Jersey to bet on an election and he recovered it in a Pennsylvania Court. The Court said the loan did not arise out of the bet or any bet, nor to carry any specific bet into execution. The loan was independent of and before any bet was made. The lender neither played nor bet. Honor and good faith required that it should be repaid, and it did not appear that any statute in either State prevented it.

Affirmed.

CLARK, J., concurring. The note sued on was executed in this State. It was given in renewal of one executed in Virginia the consideration of which was a bet lost upon a horse race. It is held that against a judgment upon a note given since 1868, in renewal of one executed before that date, the debtor is entitled to claim his homestead. *Wilson v. Patton,* 87 N. C., 318; *Arnold v. Estis,* 92 N. C., 162. These are cited and the reason given for them in *Blanton v. Commissioners,* 101 N. C., 532, "because the creditor must enforce the contract sued on with the incidents attaching to it when it was made, under the then (276) existing laws, *i. e.,* laws existing at the time of the renewal. The same rule is applicable as to laws existing at the place of renewal. The first note was only evidence of the original contract, the new note is given in this State, but upon the original consideration (*Hyman v. Devereux,* 63 N. C., 624), and when the attempt is made to enforce such new contract in our courts, we are confronted with The Code, section 2841, which provides that all debts and wagers are unlawful and all contracts on account of any money so bet or wagered are void. Of course no action can be maintained upon a contract whose consideration makes it void.

Cited: Banking Co. v. Tate, post, 317; *Terry v. Robbins,* 128 N. C., 142; *Cannady v. R. R.,* 143 N. C., 444; *Woods v. Tel. Co.,* 148 N. C., 7; *Williamson v. Tel. Co.,* 151 N. C., 229; *Burrus v. Witcover,* 158 N. C., 385; *Pfeifer v. Israel,* 161 N. C., 412; *Bluthenthal v. Kennedy,* 165 N. C., 374; *Fineman v. Faulkner,* 174 N. C., 15.

G. W. DAVISON ET AL. v. WEST OXFORD LAND COMPANY.

(Decided 17 May, 1898.)

Upon a petition to rehear the case between same parties decided at September Term, 1897, of this Court (121 N. C., 146 and 690), the Court deems it proper, under all the circumstances, to order a new trial on the motion of the defendants.

A. W. Graham, J. W. Graham and P. C. Graham for defendants (petitioners).

A. J. Feild, contra.

PER CURIAM. Without deciding the question of practice raised by the petition to rehear this case, we deem it proper under all circumstances to

order an unrestricted new trial of the action. In using the words "under all circumstances" we do not intend to intimate that there was (277) anything like unfair conduct on the part of either suitors or counsel on either side (for none existed), but that substantial justice will be done more certainly by a new trial of the whole matter than by a partial new trial.

J. Y. McGEHEE v. A. F. BREEDLOVE ET AL.

(Decided 17 May, 1898.)

Action of Claim and Delivery—Jurisdiction—Nonsuit.

1. Where, on the trial of an action brought in the Superior Court by a landlord against his tenant and the purchasers of the latter's tobacco crop to recover the crop or its value, it appeared from plaintiff's testimony that the tenant's contract was to pay him one-fourth of the crop or $200, it was error to nonsuit the plaintiff upon the ground of a want of jurisdiction, since the action was not on the contract but for the possession of the crop.

2. Under the provisions of sec. 1754 of The Code, a landlord who has agreed to take a portion of the crop or a specified sum of money as rental, and has received a part of the rental in money, is entitled to the possession of the whole crop until his rent is satisfied.

CLAIM AND DELIVERY, tried before *Adams, J.*, and a jury at November Term, 1897, of GRANVILLE. The facts appear in the opinion. On the trial the plaintiff's attorney admitted that the action was to enforce the payment of the sum of $200 due plaintiff for rent, less $35 paid before the commencement of the action. Thereupon, defendants moved to dismiss the action on the ground that the Superior Court did not have original jurisdiction of the same. The motion was allowed and plaintiff appealed.

(278) *R. C. Gulley and N. Y. Gulley for plaintiff.*
Edwards & Royster and A. A. Hicks for defendants.

FURCHES, J. The plaintiff rented his farm in Granville County to the defendant Breedlove for the year 1895, for which, he says in his complaint, said defendant was to pay him one-fourth of the crops raised thereon; that one-fourth of said crop in his opinion was worth four hundred dollars; that one of the crops raised thereon was tobacco, and that the defendant Breedlove, without paying the rent as he contracted to do, sold said tobacco to the defendants, Hunt & Williams, amounting

to $700. The plaintiff claims that, under the landlord and tenant act (section 1754 of The Code), he is the owner of the crop (in this case the tobacco) until his rents are paid, and entitled to the possession thereof. He therefore demands possession of the defendant Breedlove and the defendants Hunt & Williams, who purchased the tobacco from Breedlove.

On the trial the plaintiff, as a witness, testified that the defendant Breedlove was to pay him one-fourth of the crop or $200, and that defendant Breedlove had paid him $35. Upon this testimony of the plaintiff, defendant moved to nonsuit the plaintiff upon the ground of a want of jurisdiction. The Court sustained this motion, nonsuited the plaintiff and he appealed. In this judgment there was error.

The Court and defendants' counsel seem to treat this as an action on contract—an action on debt—and relied on *Hargrove v. Harris,* 116 N. C., 418. In this mistake lies the error that led to the judgment of nonsuit.

This is not an action upon contract, but an action for the *possession of the tobacco.* It is true the plaintiff's right to the tobacco grew out of the contract of rental to the defendant Breedlove; but the (279) action is not to enforce the contract, but to recover possession of property belonging to plaintiff, resulting from said contract. A buys a horse from B for which he pays $100, and B is to deliver the horse to A at the end of six months. But B instead of doing so, sells him to C, and A brings his action for the horse, as the title of the horse was the result of his contract with B; but his action for the horse is not to enforce that contract. Indeed, it seems difficult to understand how this action could be considered an action on the contract with Breedlove, when the defendants Hunt & Williams, who bought the tobacco, are also made party defendants.

It makes no difference so far as the question of jurisdiction is concerned, whether the defendant Breedlove was to pay $200 and had paid $35, as the rental of said farm, or was to pay one-fourth of the crop, as the statute made the plaintiff the owner of the crop until the rent was paid. So *Hargrove v. Harris* is not in point.

If plaintiff had brought his action for $200, due by contract, as to the rental of this farm for 1895, and had taken out claim and delivery proceedings, *Hargrove v. Harris* would have been in point and authority to sustain the judgment of the Court.

There is error in the judgment of the Court dismissing plaintiff's action, which will be restored to the docket for trial.

Error.

Cited: Kiser v. Blanton, 123 N. C., 403.

(280)

ANNIE STEIN v. W. S. COZART ET AL.

(Decided 24 May, 1898.)

Attachment—Intervenor—Action on Indemnifying Bond—Estoppel—Practice.

1. Where property was seized and sold by a sheriff as the property of I. under attachment proceedings, and, upon the intervention of A., the latter was adjudged to be true owner and entitled to receive the proceeds of sale paid into court by the sheriff, less his costs and expenses: *Held*, that A. was not estopped thereby from recovering in a separate action against the sheriff and his sureties the value of such property, less the amount so received by her as intervenor in the attachment suit.

2. A sheriff who, in attachment proceedings, wrongfully seizes and sells property which is subsequently adjudged to belong to an intervenor, cannot retain the costs and expenses of the seizure and sale.

3. One who intervened in attachment proceedings and, upon being adjudged owner of the property seized, brought an action against the sheriff and the makers of an indemnifying bond to recover the property or its value, is not entitled to recover, in such action, the per diem and mileage of a witness, in her behalf, in the suit in which she intervened. Such costs should have been taxed in the suit in which she intervened.

4. Under the present procedure it is not necessary for the owner of property wrongfully seized and sold by a sheriff to first obtain a judgment against the sheriff and then institute another action on his indemnifying bond; on the contrary, the rights of all the parties can be adjudged in a single action against the sheriff and the maker of the indemnifying bond.

ACTION to recover damages for the unlawful and wrongful conversion of a stock of goods belonging to plaintiff, brought by the latter against the defendant Cozart, as sheriff, and the other defendants, as makers of an indemnifying bond, and tried before *Adams, J.*, and a jury at November Term, 1897, of GRANVILLE. The facts appear in the opinion. There was a verdict for the plaintiff, and from the judgment thereon the defendants appealed.

(281) *Hicks & Minor and T. T. Hicks for plaintiff.*
Shaw & Shaw for defendants.

CLARK, J. The plaintiff's goods were taken by defendant Cozart, as sheriff of Granville County, on certain attachments issued at the instance of defendants Baker, Ginsberg, and others, in an action begun by them in Vance County against I. Stein. The defendant Cozart, being informed that the plaintiff here (Annie Stein) claimed to own the goods, refused to attach them till an indemnifying bond was given by the Fidelity and Deposit Company of Maryland as surety (who is a defendant herein).

The plaintiff intervened in said action and was adjudged the owner of the goods, and they having been sold *pendente lite,* by order of the court, recovered judgment for the proceeds of said sale and the costs. The defendant Cozart paid into court, in Vance, the net sum of $236.53, being the proceeds of the sale by him, $295, less $52.47 expended for the expenses of the seizure and sale. Of this $236.53 the plaintiff was paid $229.43 by the clerk of Vance Superior Court.

This action is for the wrongful seizure of goods by the defendant Cozart. The plaintiff is entitled to recover the value of the goods (less the sum of $236.53 paid into the office of Vance Superior Court by Cozart) and the costs of this action. The court properly held that, as against the plaintiff, the true owner of the goods, the defendant Cozart could not retain the $52.47, which he had deducted out of the proceeds for expenses of seizure and sale, but erred in permitting the plaintiff to recover $9.95 for per diem and mileage of a witness in her behalf in the Vance County case. This seems to have been allowed on the ground that though taxed in that case it had not been collected, but the costs of intervening and proving her title in the suit in Vance was not the direct and necessary consequences of the wrongful seizure of the (282) plaintiff's goods by the defendant Cozart. The plaintiff might have relied solely upon this action for her redress. *Davis v. Garrett,* 25 N. C., 459. She chose also to intervene and assist her title to the goods in the Vance County case, but she must look to the judgment in that case and to the defendants therein who resisted her recovery for the costs of that trial. Such costs cannot be taxed against Cozart, who did not resist her recovery of judgment in that case and who is in no wise responsible for the costs she incurred therein. He is only responsible for the value of the goods less the sum he paid in and the costs of the present action.

The plaintiff, by accepting in that case the net sum paid into court from the sale, is not estopped from proceeding in this action to recover the actual value of the goods wrongfully seized, less so much of the proceeds of the sale as were paid over to her, and the judgment in the case where she intervened awarding the net proceeds of the sale to her is not *res judicata* of her cause of action in this case, and, in fact, the judgment in that case, out of abundant caution, expressly reserves and excepts her right to bring this action for damages in the wrongful taking of the goods. The sheriff not being a party to the former action she is not estopped to proceed against him for the actual value of the property taken, and he is only entitled to a deduction for the value of the property returned or the net proceeds thereof paid over into the court for her.

The defendant, the Fidelity and Deposit Company, being surety to the indemnifying bond executed to Cozart, sheriff, to seize the plaintiff's goods, she is entitled to judgment against them in this action. It is not

necessary under the present procedure to obtain judgment against
(283) the sheriff and then institute another proceeding to obtain the benefit of the bond he took for his own indemnity, but the rights of all the parties will be adjudged in this action.

The error in instructing the jury, if they believe the evidence, to include the sum of $9.95 disbursed for plaintiff's witness in the other suit can be corrected by eliminating that sum from the judgment. There being no other error, the judgment will be thus

Modified and affirmed.

W. H. BLALOCK v. H. Q. STRAIN.

(Decided 15 March, 1898.)

Claim and Delivery—Chattel Mortgage—Agreement Between Mortgagor and Mortgagee for Substitution of Other Property for Property Mortgaged—Conditional Sale—Notice—Registration.

1. An agreement between a mortgagor and a mortgagee for the substitution of other property for that conveyed in the mortgage, while good as between the parties and enforcible in equity, is not a mortgage so as to give a lien in preference to creditors and purchasers for value. *Semble*, that in the absence of an agreement between the mortgagor and mortgagee the latter may follow and subject property for which the mortgaged property has been exchanged before third parties have acquired rights therein.

2. Where registration of an instrument is required, no notice, however full and formal, will supply the place of registration.

3. Where A., as mortgagee of personal property, agreed that the mortgagor might exchange the mortgaged property for other property which should stand as security in place of the former, and the mortgagor executed to B. a mortgage upon the property so received in exchange: *Held*, that the mortgage to B. is superior to that of A., although B. had notice of the agreement between A. and his mortgagor.

4. In such case, even if the mortgagor had acted as the agent of the mortgagee in the prior mortgage in making the exchange, the agreement that the property received in exchange should stand in the place of that described in the mortgage, made it a conditional sale and invalidated it as to creditors and purchasers for value notwithstanding they had notice of the agreement.

(284) CLAIM AND DELIVERY, tried before *Adams, J.*, and a jury at August Term, 1897, of ORANGE. There was a verdict for the defendant, and from the judgment thereon the plaintiff appealed. The facts appear in the opinion.

C. D. Turner for plaintiff.
J. W. Graham and S. M. Gattis for defendant.

CLARK, J. The defendant Strain, in 1884, executed a mortgage on two horses to Burch, which was registered. Subsequently in 1888 Burch gave Strain the following paper-writing: "This is to certify that I, A. P. Burch, grant H. Q. Strain the privilege to exchange one bay mare and one bay horse (which I, A. P. Burch, hold a mortgage on) for two black mules, which shall stand in the place of the above mentioned horses as security. 4 August, 1888. A. P. Burch. (Seal.)" This was not registered. Thereafter in 1890 Strain executed a mortgage on these two black mules to the plaintiff, and the mortgage was duly registered.

This action was brought to recover the mules in order to sell them and apply the proceeds to the debt secured by plaintiff's mortgage. Burch interpleaded and claimed them under his mortgage on the horse and mare and his agreement with the mortgagor, above set out, that the mules received in exchange for the horse and mare should be substituted in their stead. There was a conflict of evidence whether the plaintiff had notice of this agreement between Burch and Strain, and his Honor told the jury that if the plaintiff knew of this agreement (285) between Burch and Strain when he took the mortgage on the mules, the claim of Burch was superior to his, and that the agreement need not have been registered, but that if he took the mules without notice of such agreement, then the plaintiff's claim was superior. The plaintiff excepted, and this raises the point which is decisive of the case.

The agreement between the mortgagor and mortgagee was good as between themselves and enforcible in equity, but it was not a mortgage. Parties cannot thus, by side agreements between themselves, substitute from time to time other property for that described in the mortgage and claim a lien on it in preference to "creditors and purchasers for value." Code, sec. 1254. To do this would destroy the whole purpose and tenor of our registration laws and restore the evils they were enacted to prevent. *Sharpe v. Pearce,* 74 N. C., 600; *Powers v. Freeman,* 2 Lans. (N. Y.), 127; 1 Cobbey Chat. Mort., sec. 158. It is true that in *Sharpe v. Pearce, supra,* it was held that the agreement for substitution was invalid as to third persons without notice. The defendant there bought without notice, and it was not necessary to decide, and it was not decided, what would have been the effect if he had bought such substituted property with notice. But our courts have repeatedly held that where registration is required "no notice however full and formal will supply the place of registration." *Quinnerly v. Quinnerly,* 114 N. C., 145; *Bank v. Mfg. Co.,* 96 N. C., 298; *Todd v. Outlaw,* 79 N. C., 235; *Blevins v. Barker,* 75 N. C., 436; *Robinson v. Willoughby,* 70 N. C., 358; *Fleming*

v. Burgwyn, 37 N. C., 584; *Barber v. Wadsworth,* 115 N. C., 29.
(286) If this were not so, a piano could be named in a mortgage and a subsequent purchaser or mortgagee from such mortgagor of a pair of mules, or any other property, would be liable to have it taken from him by proof of an agreement between the mortgagor and mortgagee for the substitution of the mules for the piano, and would be dependent upon the uncertainties of oral testimony as to whether or not he had knowledge of such agreement. This would destroy, as we have said, the very object and the efficacy of our registration laws. His Honor was correct in saying that it was immaterial that the agreement for the substitution was not registered. Not being a new mortgage, the constructive notice from registration, if any, would not have added to its validity, though essential to a mortgage.

Hubbard v. Winborne, 20 N. C., 137, relied on by the defendant's counsel, has no bearing. There, a debtor conveyed a horse and other property to a trustee to pay certain debts, the property being left in the hands of the trustor until the day of sale. Soon after the registration of the deed the debtor exchanged the horse for a mare, and the trustee accepted the substitution. The court held that the trustee, having power to sell or exchange the trust property, could constitute the debtor his agent for that purpose, and having ratified his action and received the mare before the levy of an execution against the debtor, the title had passed to the trustee. This may be true as between a trustor and his trustee, for no lien was acquired as to the substituted property before title passed to the trustee, but the doctrine does not apply as to mortgagor and mortgagee, between whom the relation of mortgagee is not that of one intrusted with the property to apply it for the benefit of the
(287) mortgagor. On the contrary, the mortgagor is in possession and, except for the purposes of the security for debt, is the real owner of the property with right to sell it or mortgage it free from any encumbrances not on record. Acts of 1829, ch. 20, now Code, sec. 1254. Whether, if directly brought into question, *Hubbard v. Winborne, supra,* could be now sustained, in view of the numerous later decisions above cited as to the registration law passed in 1829, which was then new and had not been construed, it is very certain it is not authority as to the relation between mortgagor and mortgagee, and it was so held in *Sharpe v. Pearce, supra.*

The learned counsel for the defendant ingeniously argued, further, that in the exchange of the horse and mare for the two mules by the permission of the mortgagee Burch, the mortgagor Strain was acting as agent for Burch, who thus in fact became the purchaser and received the title. If we concede that this was so, Strain took possession of them and the agreement provides that they should "stand in place of the horses

as security"—that is, that Strain should have a clear title to them (as he would have had to the horses) upon payment of the mortgage debt. This made it a conditional sale and invalid as to creditors and purchasers for a valuable consideration without registration; The Code, sec. 1275, which places such sales on same basis as mortgages, and hence "no notice, however full or formal, would supply the want of registration." *Brem v. McDowell,* 93 N. C., 191; *Clark v. Hill,* 117 N. C., 11; *Bostic v. Young,* 116 N. C., 766; *Glasscock v. Hazell,* 109 N. C., 145; *Kornegay v. Kornegay, ibid.,* 188; *Harrell v. Goodwin,* 102 N. C., 220; *Butts v. Screws,* 95 N. C., 215. (288)

We have already said that as between the parties (if rights of third persons had not intervened) the mortgagee by virtue of his agreement could compel the application of the property received in exchange for the mortgaged property to his debt, and it may be, though we need not pass upon the question, that if, without a mortgagee's consent, other property is received in exchange for the mortgaged property, he might follow up and subject the fund or substitute property before third parties have acquired any rights in respect thereto.

Error.

Cited: Gorrell v. Alspaugh, post, 562; *Harris v. Lumber Co.,* 147 N. C., 633; *Piano Co. v. Spruill,* 150 N. C., 169; *Wood v. Lewey,* 153 N. C., 403; *Burwell v. Chapman,* 159 N. C., 212; *Buchanan v. Clark,* 164 N. C., 71; *Hinton v. Williams,* 170 N. C., 117; *Springs v. Cole,* 171 N. C., 419.

M. A. McCAULEY, ADMINISTRATOR OF M. W. McCAULEY, v. W. M. McCAULEY.

(Decided 24 May, 1898.)

Clerk of Superior Court—Jurisdiction—Void Judgment.

1. A judgment rendered by a court having no jurisdiction is absolutely void, and any acts or proceedings following it are invalid.

2. A clerk of the Superior Court has no jurisdiction to render a judgment on a report of arbitrators appointed by the court, in term, against heirs to whom a decedent conveyed land prior to his death, for the amount of their respective shares of a widow's year's allowance and make payment of such sums a lien on the land, and a judgment so rendered is void.

ACTION pending in ORANGE and heard before *Robinson, J.,* at Chambers in DURHAM, on 25 January, 1898, on a motion to set aside a judgment which the clerk of the court assumed to enter therein against the defendants. The motion was allowed, and plaintiff appealed. (289)

J. W. Graham and S. M. Gattis for plaintiff.
Winston & Fuller for defendant.

FURCHES, J. Matthew McCauley died intestate in the county of Orange, June, 1890, and M. A. McCauley administered on his estate. There being a deficiency of personal assets to pay debts and costs of administration, the administrator instituted a special proceeding in the Superior Court of Orange, before the clerk, for license to sell land for assets. The children and heirs of said intestate answered, admitting that there was not a sufficiency of personal assets to pay debts, but alleged that the said intestate before his death had conveyed all the lands described in plaintiff's complaint to them by separate deeds and in different amounts. But they suggested that said intestate died seized of other lands not mentioned in plaintiff's complaint, of sufficient value to pay the debts and costs of administration, and asked that they should be sold; that upon the coming in of these answers the court ordered a sale of this piece, not conveyed, under which it was sold, reported to the court, and sale confirmed. But it did not bring enough to pay the debts and costs, and the clerk transferred the case to the Superior Court Civil Issue Docket for trial; that the case came on for hearing at a succeeding term before Whitaker, J., when it appears that a judgment by consent of plaintiff and defendants was rendered. In this judgment it is held that

(290) all the lands mentioned in plaintiff's complaint are liable for sale for the payment of debts and costs of administration, and that plaintiff have a license to sell the same. An account is ordered for the purpose of ascertaining the amount for which the estate is still liable; also, to ascertain the relative values of the lands conveyed to the defendants by plaintiff's intestate, and the proportionate amount for which each of the grantees would be liable.

It is further stated in this judgment (section 4) that said commissioners (called arbitrators) shall ascertain what amount Nancy McCauley, widow of plaintiff's intestate, is entitled to as a yearly support, and what part of this sum each one of the children should pay.

These commissioners ascertained the balance necessary to pay debts and costs of administration to be $224.74, which amount the defendants paid. They found that the widow should have $100 a year for her support, which they proportioned among the defendants, fixing the part to be paid by defendant Williams at $19.74 a year.

This report, it seems, was made to the clerk. The last appearance the case has in court, in term, is the order of Judge Whitaker, spoken of above. Upon the return of this report, John Manning, who had been acting as counsel of the plaintiff, moved for the judgment, when the clerk finds that there has been no exception filed to these parts, and

proceeds as follows: "Now, on motion of John Manning, attorney for said administrator and for Nancy McCauley, it is adjudged (this being the first time that Mrs. McCauley's name appears in the case in any capacity) that the administrator's accounts are correct, and the report is confirmed as to him; that as the heirs have paid the outstanding claims, a sale of the land is not necessary." He then proceeds to find the amount for which each one of the children be liable for the support of the widow Nancy, to be paid the first of December of each and every (291) year, and fix the amount of the defendant Williams at $19.74. These sums so charged against the different defendants he makes a specific lien on the different tracts of land conveyed to them by the intestate Matthew McCauley, and gives judgment therefor. This judgment the defendant Williams moves to have vacated and stricken from the records, and to have the execution issued thereon recalled and vacated.

This motion is resisted by the plaintiff administrator and W. R. Lloyd, who had become purchasers of a part of defendant Williams' tract of land, under an execution issued by the clerk upon his judgment fixing the defendant Williams with the yearly sum of $19.74 for the support of the widow Nancy. They (the respondents to this motion) say that said judgment is a final judgment, taken according to the regular course and procedure of the court; that more than one year has elapsed since its rendition, and that the court has no power to set it aside. And it is almost wonderful to see the number of authorities cited by both sides to support their contention—which shows how dangerous a thing it is to depart from the known and approved way and to undertake, by new methods and doubtful means, to procure the judicial sanction of the court. This was done, we doubt not, in the supposed interest of time and economy. But it has proved not to be in the interest of either, but to be the source of delay, litigation, and loss to both sides.

The argument took a much broader range than it was necessary to reach the point upon which the case must turn. There was a great deal said as to whether the widow Nancy was a party or not; whether the administrator who brought the proceeding was a party when (292) this judgment was rendered. But the view we take of the case makes it unnecessary for us to say how this was. We put our judgment on the ground of a want of jurisdiction in the clerk to render such a judgment.

If such a judgment as this could be rendered, it must be done by a court of equity or a court having equitable jurisdiction, when all the parties are properly before it, and not then unless the matters of equity are properly pleaded before the court.

But the clerk is a court of very limited jurisdiction—only having such jurisdiction as is given it by statute. It has no common-law juris-

diction, nor does it have any equitable jurisdiction. *Bragg v. Lyon,* 93 N. C., 151; Code, secs. 1903 and 1904. The clerk had no power to render a personal judgment against the defendant Williams and declare it a lien on her land. And such a judgment is absolutely void and may be so declared at any time. Freeman on Judgments, sec. 120. This is bound to be so upon principle. A judgment rendered by a court having no jurisdiction is no judgment. It is absolutely void, and any execution issued on it is void, and gives no force or validity to acts of the sheriff done thereunder.

This is so, without calling to the aid of defendants the doctrine of *Green v. Ballard,* 116 N. C., 144, and *McLeod v. Williams, post,* 451, it appearing that the defendant Williams, against whom this judgment was rendered, was a married woman at the time said judgment was rendered, and this appeared of record.

Respondents cited such cases as *Harrison v. Hargrove,* 120 N. C., 96; *Sutton v. Schonwald,* 86 N. C., 198. But they are not in point.

(293) There the judgments were not void for want of jurisdiction in the court, but only voidable. This distinguishes them from the case now before the Court.

There is no error, and the judgment is

Affirmed.

M. A. McCAULEY ET AL. v. A. B. WILLIAMS ET AL.

(Decided 24 May, 1898.)

Action to Recover Land—Execution Sale—Void Judgment.

1. Under a void judgment, the execution, sale, and sheriff's deed are nullities, and the purchaser obtains no title to the property sold.

2. The judgment of a clerk of a Superior Court, assumed to be rendered by him on a report of arbitrators appointed by the court, in term, against heirs to whom a decedent conveyed land prior to his death, for the amount of their respective shares of the widow's year allowance, and making such sums liens upon the land, is void for want of jurisdiction.

ACTION to recover land, tried before *Adams, J.,* and a jury, at October Term, 1897, of ORANGE. There was a verdict for the defendants, and plaintiffs appealed.

J. W. Graham and S. M. Gattis for plaintiffs.

Winston & Fuller for defendants.

FURCHES, J. This is an action of ejectment to recover possession of 72 acres of land, and damage for the wrongful detention thereof by defendants. The land originally belonged to Matthew McCauley, who died intestate in 1890, and the plaintiff, M. A. McCauley, administered on his estate. The *feme* defendant is a daughter of the intestate Matthew, to whom he made a deed conveying this land before he (294) died. The personal assets of the intestate's estate were insufficient to pay the debts and costs of administration, and the administrator, M. A. McCauley, brought a special proceeding in the Superior Court of Orange County to sell lands for assets. After some other lands that had not been conveyed by the intestate were sold, and the case had been transferred to the Civil Issue Docket for trial, it was held that this land and other lands conveyed by the intestate to his other children were liable for sale for assets. But a reference was ordered to ascertain what amount was still wanting for that purpose. This amount was thus ascertained and paid by the children and grantees of said intestate, and no sale for assets was had. In the same order of reference to ascertain the amount still necessary to pay debts and costs of administration, the matter was submitted to said commissioner to inquire and report what amount should be paid to Nancy McCauley, widow of the intestate, as her yearly support, and in what proportion it should be paid by the children and grantees of the said Matthew. This was done, and they found that she ought to have $100 a year, and that the *feme* defendant's part of that sum was $19.74 per year.

This report was not made to the Superior Court in term, but to the clerk out of term, and he proceeded to enter up judgment against the defendant and the other children and grantees for the yearly allowance so reported against them, and to declare it a lien on their lands. Under this judgment of the clerk, an execution issued to the sheriff of Orange County under which he sold, and the plaintiffs M. A. McCauley and W. R. Lloyd became the purchasers of 72 acres of defendant's land at $1 per acre. The plaintiff M. A. McCauley was the administrator that instituted the proceedings to sell the lands for assets. (295) He was also one of the commissioners appointed by the court to assess the lands and report their value, and the amount they should pay the widow yearly. And it appears that in this report he assessed the defendant's land at $6 per acre; that he bought the same (having the line run to suit him) at $1 per acre; that defendant had offered to repay him the amount he had paid out for the land, and that he had refused this offer; that he claimed, and the jury had found, that the yearly rental value of said lands (that he had paid only $72 for) were worth $40, being more than 50 per cent on the price he paid. These matters were

all commented on by counsel for defendants, but we will not comment upon them, as our judgment is put upon other grounds.

In another proceeding between the same parties, styled *"McCauley v. McCauley," ante,* 288, we have discussed the validity of this judgment, under which plaintiffs purchased and claim title to the land in controversy, and have held that it was utterly void for want of jurisdiction in the court; and, as the judgment was void, the execution issued thereon was void and the sale under which plaintiffs purchased was a nullity, and the deed of the sheriff to them is also void and conveyed no title to the plaintiffs.

As plaintiffs have shown no title to the land, they can recover neither possession nor damage. There is

Error.

(296)

ELIZABETHTON SHOE COMPANY v. JOHN K. HUGHES, SHERIFF OF ORANGE COUNTY.

(Decided 15 March, 1898.)

Action Against Sheriff—Personal Property Exemptions—Assignment—Trial—Issues.

1. Where a firm made an assignment for benefit of creditors, reserving their personal property exemptions, and after a suit was begun to set aside the deed as fraudulent and the stock had been seized by the sheriff and the partners arrested, a new assignment, without reservation of exemptions, was made to the same trustee, which provided that the attacking creditors should accept 33⅓ per cent of their claims in full satisfaction and discharge the warrants of arrest against the partners, and that the assignee should sell the goods as the agent of the sheriff to whom he should account, and that the money should be applied by the sheriff in a manner entirely different from the mode prescribed in the original assignment: *Held*, that the partners were not entitled to personal property exemptions because of the reservation in the first assignment, notwithstanding the second assignment stated that the trustee should proceed to sell the property as provided in the first assignment.

2. Where, upon the seizure by a sheriff of a stock of goods attached in the hands of a trustee in a suit by creditors to set aside a deed of assignment as fraudulent, a new assignment, without reservation of exemptions, was made to the same trustee providing that the latter should sell the goods as agent of H., who was sheriff, and account to him for the money which should be applied by H. in a manner specified, and no judgment was taken against the assignors: *Held*, that H. did not act as sheriff and, hence, had no right to assign to the partners personal property exemptions reserved in the original assignment.

3. In the trial of an action, only such issues should be submitted as arise out of the pleadings and as will plainly and intelligibly present to the jury the contentions of the parties.

ACTION, tried before *Allen, J.,* and a jury at May Term, 1897, of ORANGE. The facts appear in the opinion and in the report of the case between the same parties as contained in the 116 N. C., 426. There was a verdict followed by a judgment for the defendant, (297) and the plaintiff appealed.

Manning & Foushee and C. D. Turner for plaintiff.
Graham & Graham and S. M. Gattis for defendant.

FURCHES, J. This case has been here before and is reported in 116 N. C., 426. When it was here before it stood on complaint and demurrer. Since then an answer has been filed, and the case was tried on complaint, answer, evidence, and issues to the jury. The case now presented differs somewhat from the case when here before. But, upon examination of the case as now presented, we find that almost every material allegation presented in this appeal was passed upon in the former opinion.

The record contains quite a number of errors, but we only propose to notice such of them as seem to be necessary for the guidance of the court, when tried again.

If the agreement of 1 July, 1893, is an appropriation of the goods therein named to the payment of the debts therein named, to the amount therein agreed to be paid, it must follow that Ellen, Koplon & Co. were not entitled to any personal property exemption out of that property until said debts were paid, unless their right to the same comes from some other agreement of trust, as no reservation is contained in the contract of 1 July, 1893. We do not understand the defendant to contest this proposition. But he contends that the firm of Ellen, Koplon & Co. made an assignment of this property to T. A. Faucett on 23 June, 1893, in which they reserved their personal property exemptions, and that the exemptions allowed them were made under this deed to Faucett. This cannot be so. (298)

After the execution of the assignment to Faucett the plaintiff commenced an action against Ellen and the Koplons to set aside the Faucett deed for fraud, and upon allegations of fraud had these parties arrested. This being so, Ellen, Koplon & Co., and Faucett, trustee, and the creditors (plaintiffs in the action of fraud) made and entered into the new assignment of 1 July. This assignment provided that Faucett, who was then in the possession of the goods under the former assignment, should sell the goods not as trustee but as agent of the defendant Hughes, to whom he should account and pay over the money; and that

the proceeds of these sales should be applied by defendant Hughes to the debts due the plaintiff creditors, until 33⅓ per cent of their debts should be paid, and then the balance of plaintiff's debts were to be assigned for the benefit of Ellen, Koplon & Co., as their attorney should direct. It is true that the assignment of 1 July says that Faucett, trustee, shall proceed to sell the goods as provided in the trust. But he is to pay the proceeds to the defendant as is provided in the assignment of 1 July, which is entirely different from the application provided for in the assignment of 23 June. In the assignment of 23 June to Faucett, he was to reserve $60, then to pay Graham, attorney, $50, then he was to pay Lena Ellen, wife of one of the members of the firm, $8,000; and, after these parties were paid, the other creditors of the firm were to be paid *pro rata*. As the consideration of the new assignment of 1 July, the plaintiffs agreed to take 33⅓ per cent on their debts in full satisfaction, and to discharge the warrants of arrest against Ellen and the
(299) Koplons. This makes it manifest that the goods were being sold under the assignment of 1 July and not under that of 23 June. If they were to be sold under the assignment of 23 June, then there was no need of the assignment of 1 July.

The erroneous claim of the defendant that he was acting as sheriff leads him into other errors, as will appear. If the assignment of 23 June was still in force, there was nothing to levy the attachments on that defendant claims to have acted under. As everything had been assigned to Faucett and belonged to him as trustee, except the personal property exemptions, and no attachment could be levied on them, so it is out of the question to say the defendant was acting as an officer. If Ellen and the Koplons were entitled to these exemptions by virtue of the reservation in the assignment to Faucett, it was his (Faucett's) duty to have them assigned, and not that of the defendant. There was no judgment, and no executions ever had on the claims against the assignor. There being no such judgments or executions, there could be none in the defendants' hands. And he had no right to assign to these parties personal property exemptions, as sheriff.

This assignment of 1 July took the place of the assignment of 23 June, by the agreement of all the parties, Ellen, the Koplons, and Faucett, trustee, who was a party to the same. This was an appropriation of these goods in the hands of the defendant to the payment of the debts therein named, in which no personal property exemptions were reserved, and they were entitled to none.

But the defendant contended that the horses and wagons, and a part of the goods (that part brought from Rockingham) were no part of the goods entrusted to the defendant for the payment of the plain-
(300) tiff's debts; while the plaintiff claims that they were, and offered

evidence tending to show that they were. These were important contentions that should have been determined by proper issues found by the jury under proper instructions from the Court. But this was not done.

There are quite a number of decisions of this Court as to what are proper issues. There has been no positive rule laid down, nor can there be. The most that can be done is to prescribe general rules by which the trial judge should be governed. It has been said that if the party excepting could present every phase of his contention arising out of the pleadings, that is sufficient. This is very broad, but if faithfully and intelligently observed by the trial judge, it will most generally be sufficient. But the trial judge should keep it in mind that the very object of submitting *written issues* to the jury is that they should find the *facts* and then the Court would apply the law. It was found by experience that the old mode of submitting but one issue to the jury, where there were several *issues* of fact raised by the pleadings, was not satisfactory. The old mode of *one issue,* which means to find for the plaintiff or for the defendant, gave rise in many cases to what were called vicious verdicts. If it could be so, the jury ought to find the *issues* submitted to them without knowing whether their findings were for the plaintiff or the defendant.

As to what issues shall be submitted must depend upon the careful and intelligent consideration of the trial judge. There should never be an issue submitted as to a *question* of fact as distinguished from an *issue* of fact. There should only be such issues of fact submitted, as arise out of the pleadings. There should not be too many issues submitted, as this tends to confuse the jury. But there should al- (301) ways be such issues submitted as will plainly and intelligently present to the jury the contentions of the parties. This has not been done in this case. The single issue, "Is the defendant indebted to the plaintiffs, and, if so, in what amount?" did not properly present the contentions of the parties, and plaintiff's exception is sustained. There is error.

New trial.

Cited: Hatcher v. Dabbs, 133 N. C., 241; *Tuttle v. Tuttle,* 146 N. C., 487; *Busbee v. Land Co.,* 151 N. C., 515; *Gross v. McBrayer,* 159 N. C., 374.

W. F. READE v. T. H. STREET.

(Decided 17 May, 1898.)

Appeal—Exceptions to Judgment—Prayer for Judgment—Practice—Partial Payments on Note—Interest, Computation of.

1. An appeal from a judgment is, *per se*, an exception thereto and there need be no other exception in the record.
2. The prayer for judgment does not bind the plaintiff who is entitled to such judgment as the pleadings and proofs justify; hence, if a judgment is for a greater amount than, or of a different nature from, the prayer for judgment, but is justified by the pleadings and proof, it is immaterial that it is not in conformity with the prayer of the complaint.
3. It is only where the payments made on a note exceed the interest due at the time they are made that a balance can be struck and a new principal created.
4. The amount of a judgment should be calculated up to the first day of the term at which it is rendered, and the principal thereof should bear interest from such time until paid.
5. Where a judgment is rendered for an improper amount by reason of an erroneous computation of interest, the error will be corrected by a modification of the judgment on appeal.

(302) ACTION tried before *Adams, J.*, and a jury, at November Term, 1897, of PERSON. The facts sufficiently appear in the opinion. There was a verdict, followed by a judgment for the plaintiff, and defendant appealed.

A. L. Brooks for plaintiff.
Merritt & Merritt for defendant.

CLARK, J. The only ground of error relied on in this Court, the others being abandoned, is that the judgment is for $457.72 with interest at 8 per cent from the 8th of June, 1896, whereas the prayer for judgment is only for $423 with 8 per cent interest from 8 June, 1896. There is no exception of this kind in the record, but it arises from the appeal itself, which is *per se* an exception to the judgment. *Sutton v. Walters,* 118 N. C., 495, 502.

If the judgment is for a greater amount than, or of a different nature from, the prayer for judgment it is immaterial, when the matter alleged in the complaint and proved justifies the judgment. *Knight v. Houghtalling,* 85 N. C., 17; *Johnson v. Loftin,* 111 N. C., 319. The prayer for judgment does not bind the plaintiff, as he may have mistaken the relief to which he is entitled upon his pleadings and proof. *McNeill v.*

Hodges, 105 N. C., 52; *Jones v. Mial,* 82 N. C., 252, and numerous cases cited in Clark's Code, under section 233 (3). Indeed, where the proof is of a greater sum than that alleged in the complaint, the Court below might permit an amendment of the complaint even after judgment. Clark's Code, section 273, and cases cited on page 226 (2d Ed.); *King v. Dudley,* 113 N. C., 167.

In the present case the note in suit was for $650 with 8 per cent interest from 5 August, 1889. The payments alleged in the complaint and admitted in the answer were, $50 22 July, 1890; $50 (303) 27 May, 1895, and $500 8 June, 1896. As neither of the first two payments exceeded the interest due at the time the payments were made, the note bore interest from 5 August, 1889, to 8 June, 1896, and should then have been credited with the accumulated payments of $600, leaving a balance of $405.76, with 8 per cent interest from 8 June, 1896. The error does not require a new trial, but simply a modification of the judgment. The plaintiff's error consisted in calculating interest up to the date of payment of $50, 27 May, 1896 (the first payment 22 July, 1890, being equal to interest then due), and deducting the payment. But, as the payment was less than the interest then due, this was improper, as it would simply be allowing interest upon interest. It is only when the payment or a series of payments comes to more than the interest then due that a balance can be struck and a new principal created. *Bunn v. Moore,* 2 N. C., 279. The judgment is also informal. The amount should be calculated up to the first day of the term at which judgment is rendered (here 15 November, 1897), and the principal thereof should bear interest. The judgment should have been that "the plaintiff recover of the defendant $452.34, of which $405.76 is principal money and bears interest at 8 per cent from the first day of this term till paid." This is the usual and regular form which should be followed, though the form used in this case is not material error.

Each party will pay half the costs of this appeal. Code, sec. 527.

Judgment modified.

Cited: Comrs. v. Fry, 127 N. C., 261, 262; *Wilson v. Lumber Co.,* 131 N. C., 164; *Davis v. Smith,* 144 N. C., 298; *Mershon v. Morris,* 148 N. C., 51; *Register v. Power Co.,* 165 N. C., 235.

(304)

P. P. O'BRIANT v. J. W. WILKERSON ET AL.

(Decided 17 May, 1898.)

Action for Damages—Sale Under Execution—Liability of Sheriff—Liability of Execution Creditor—Validity of Execution—Pleading—Burden of Proof—Nonsuit Under Chapter 109, Acts of 1897.

1. Where a sheriff acts under an execution regular in form and issued by a court of competent jurisdiction, he incurs no liability to the judgment debtor for the seizure and sale of his property, although the judgment on which the execution issued may have been invalid.

2. Where, in an action by a judgment debtor against the judgment creditors to recover damages for procuring the sheriff to wrongfully seize and sell plaintiff's property, the complaint alleged that the sheriff sold his property under an execution, it was incumbent on the plaintiff to show on the trial that the seizure and sale were unlawful, and upon his failure to offer any evidence as to the invalidity of the judgment, it was not error to nonsuit the plaintiff under Hinsdale's Act (chapter 109, Acts of 1897).

ACTION, tried before *Adams, J.*, and a jury, at October Term, 1897, of DURHAM. The facts appear in the opinion. From a judgment for the defendant under chapter 109, Laws 1897, the plaintiff appealed.

Manning & Foushee for plaintiff.
Winston & Fuller and Boone & Bryant for defendants.

MONTGOMERY, J. In the seventh allegation of the complaint the plaintiff declared that the defendant Rigsbee, as sheriff, under an execution issued against the plaintiff in this action in favor of the other defendants, Wilkersons, took the property described in the complaint from his possession and sold it to satisfy the execution; but it was further
(305) alleged that the judgment on which the execution was issued was void because the summons in the action was not served upon the plaintiff and neither did he appear on the trial. Rigsbee in his answer averred that the execution was regular on its face and was issued to him from a court of competent jurisdiction; and the other defendants averred that the judgment was regular in all respects and that the plaintiff in this action, the defendant in that, made an appearance on the trial at which the judgment was procured. At the conclusion of the plaintiff's evidence, the now almost usual motion for judgment, as in case of nonsuit, was made under chapter 109, Laws 1897.

The plaintiff was the only witness, and he testified as follows: "I was the owner of a brick machine of the make of H. C. Bruner & Co.; it was made of iron, and was the ordinary machine for making brick. The defendant Rigsbee took the machine in the fall of 1895 from a shed on

my father's land. I forbade the sheriff from taking it. I was not using the machine the day it was taken. Sheriff Rigsbee sold the machine."

There could be no liability on the part of the defendant Rigsbee under any aspect of the case, for his acts were performed under an execution regular in form and issued from a court of competent authority. *Farley v. Lea,* 20 N. C., 169. As to the other defendants, before a recovery could be had against them, the plaintiff was compelled to show that the judgment on which the execution was issued was void for the reason that the admission having been made that the defendant Rigsbee acted as sheriff under an execution in his hands, there was a presumption of the law that the judgment was regular. That allegation of the complaint could not be regarded as surplusage, as a statement of (306) evidentiary matters. The complaint, it is true, might have been sufficient without it, and if the defendants, other than the sheriff, had undertaken to justify their action by an introduction of the execution or judgment as evidence, the plaintiff could have shown a lack of summons and that he made no appearance at the trial, if such was the fact. But, it having been alleged in the complaint that the sheriff sold the property under an execution, it became incumbent on the plaintiff to show that the seizure and sale were unlawful. This the plaintiff failed to do. No part of his testimony had any reference to the nature of the judgment. He relied upon the proof of the fact that the property was once his, and waited for the defendants to prove the regularity of the judgment on which the execution was issued, just as if he had left out the seventh allegation in his complaint. There was no error in the ruling of his Honor.

No error.

(307)

HOWELL COBB v. COMMISSIONERS OF DURHAM COUNTY.

(Decided 24 May, 1898.)

Corporation — Franchise — Taxation — Privilege Tax—Uniformity of Taxation.

1. The franchise tax imposed by section 37, chapter 168, Laws 1897 (Revenue Act), upon every corporation doing business in the State is a tax upon the privilege of being a corporation, and its payment does not relieve it, or its lessee, from the payment of a tax imposed upon the privilege of carrying on the particular kind of business for which the corporation was chartered; hence,

2. Where a corporation chartered for the purpose of owning and conducting a hotel has paid the franchise tax imposed by section 37 of the Revenue

Act of 1897, the lessee of such corporation is not relieved thereby from paying the tax imposed by section 35 of said Revenue Act upon the business of conducting a hotel.

3. Under the provisions of section 35, chapter 168, Laws 1897 (Revenue Act), hotels whose gross receipts are between $1,000 and $2,000 inclusive, per annum, must pay a tax of $10, and hotels whose gross receipts are over $2,000 must pay a tax of one-half of one per cent upon such receipts.

4. A tax is uniform and consistent with the Constitution when it is equal on all persons in the same class, and hence the graduated tax imposed on hotel-keepers by section 35 of the Revenue Act of 1897, which exempts from taxation those whose yearly receipts are less than $1,000, is not unconstitutional.

CONTROVERSY, submitted without action to test the validity of section 35, chapter 168, Laws 1897, and to restrain the defendants from collecting the tax therein imposed, heard before *Robinson, J.*, at January Term, 1898, of DURHAM. His Honor granted the injunction prayed for, and defendants appealed.

Guthrie & Guthrie and Boone & Bryant for plaintiff.
Manning & Foushee and Cook & Green for defendants.

(308) MONTGOMERY, J. The Carr-olina Hotel Company, a company duly incorporated by the General Assembly of North Carolina, has paid for the year 1897 the tax of $100 imposed upon its franchise as a corporation, according to the amount of its capital stock, under section 37, chapter 168, Laws 1897. The sheriff of the county has, in addition to that tax, demanded of the plaintiff, who is the lessee of the hotel company, the license tax of $10 imposed under the provisions of section 35 of the act, and one-half of one per cent on all gross receipts by the lessee plaintiff from the hotel business over and above $2,000 for the privilege of carrying on the business of hotel keeper during the same year 1897. Upon a case agreed, his Honor, being of the opinion that the plaintiff lessee was not liable for the last mentioned tax imposed under section 35, and that the same was illegal, ordered that the collection of the tax from the plaintiff be perpetually enjoined and that the sheriff do not report the plaintiff as a delinquent to the proper authorities. The plaintiff's first ground of resistance of the tax, that because the hotel company has paid the tax imposed upon the corporation under section 37 of the Revenue Act, he cannot, therefore, be compelled to pay the tax imposed under section 35 for the privilege of conducting the business of a hotel keeper; that is, that the payment of a tax on the corporation carries with it the privilege of conducting the hotel business without the payment of a license tax for the conducting of the same. The question for decision, then, on that point is, Is it lawful for the

General Assembly to impose a tax on the franchise of a corporation simply as a privilege tax for being a corporation, and at the (309) same time to impose a tax for the privilege of conducting the business contemplated by the charter of the corporation; and, if lawful, has the Legislature in section 35 imposed the tax on the business in section 37 the tax on the corporation? We are of the opinion that both taxes are lawful, and that the General Assembly in the sections above referred to has imposed them.

There are many advantages, in a business way, accruing to those persons who associate themselves in the formation of private corporations, and for such benefits and advantages the State has the right to receive in return compensation in the way of taxes for the privileges conferred. As was said by the Supreme Court of the United States in the case of *Insurance Co. v. New York,* 134 U. S., 594:

"By the term 'corporate franchise or business,' as here used, we understand is meant . . . the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and *not* the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to a corporation, or to do business as such body, is one generally deemed of value to the corporation or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person with a succession of members, without dissolution or suspension of business, and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and of course, when granted, may be accompanied with such conditions as the Legislature may judge most befitting to its interest and policy. (310) It may require as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe."

The counsel of the plaintiff called our attention to section 1, Schedule B of the Revenue Act, which reads, "That the taxes in this schedule shall be imposed as a license tax for the privilege of carrying on the business or doing the act named." But this plainly has reference to the right to tax the various trades and professions named in the act in addition to the right to tax *property,* for in the same section it is declared that "nothing in this schedule contained shall be construed to relieve any person from the payment of the *ad valorem* tax on his property as required in the preceding (A) schedule; and, besides, the intention of the Legislature is made manifest by the following language used in section 38:

"Every person who shall practice any trade or profession or *use any franchise* taxed by the laws of North Carolina, without having paid and obtained a license as required in this act, shall be deemed guilty of a misdemeanor . . . " If the owners of the stock of the hotel company had not had themselves incorporated the tax mentioned in section 37 could not have been imposed, and the license tax on the business of hotel keeping under section 35 would have been the only privilege tax that could have been laid by law. The other point of resistance to the license tax imposed by section 35 is that it is opposed to section 3, Article V, Constitution of North Carolina, in that it makes a discrimination among persons engaged in the same class of business. The lan-
(311) guage of section 35 is as follows: "On all hotels, boarding or lodging houses, restaurants, or eating houses of any kind . . . whose gross receipts are over $1,000 and less than $2,000, the sum of $10 and one-half of one per centum on all gross receipts over and above $2,000 dollars." We agree with the counsel that the syntax of the sentence is not of the highest order, but still we think that its reasonable and fair construction is that on all hotels whose gross receipts are between $1,000 and $2,000, inclusive of both, there is laid a license tax of $10; and on those hotels . . . whose gross receipts are over $2,000, a tax of one-half of one per cent on such gross receipts.

The counsel of the plaintiff at one time argued that, as nothing was said in so many words in the section about that class of hotel keepers whose gross receipts were less than $1,000, therefore that class could not be included in the act, and that, as those whose receipts were over $2,000 were not embraced, according to a reasonable construction of the language used, there was therefore left for taxation only one class, viz., those whose incomes were between $1,000 and $2,000, and that, as a consequence, they were discriminated against in the act. But the irresistible inference from the imposition of taxes upon those hotels, etc., whose gross receipts amount to $1,000 or more is that the hotels whose gross receipts are less than $1,000 are exempt from the payment of the license tax; and in such exemption the plaintiff's counsel insisted that there was a discrimination between those engaged in the same business. But when the counsel came down to the real point in the case, that is, whether the exemption of hotels whose gross receipts did not amount to
(312) $1,000 and the taxing of others whose receipts were more than $1,000, he had to admit that the act exempted the former from the payment of the tax. On this point in our minds there is no doubt that the General Assembly may in its discretion impose either a specific tax or one graduated to the extent of the business done—the gross receipts derived from the business. *S. v. Powell,* 100 N. C., 525, and that such tax is uniform and consistent with the Constitution when it is equal

on all persons in the same class. *Gatlin v. Tarboro,* 78 N. C., 119. But in our case the additional element enters of an exemption from the operation of the general rule of certain hotels whose yearly receipts are less than a certain amount. We have no decisions on the question, but we are of the opinion that the General Assembly has the right to make such an exemption, provided the exemption is not palpably against the spirit of the Constitution.

In Cooley on Taxation, pages 170, 172, the author says:

"Every statute for the levy of taxes is, in a sense, a statute making exemptions, that is to say, it leaves many things untaxed which it would be entirely competent to tax if the Legislature had deemed it wise or politic. In each case there is such selection of subjects as the Legislature's wisdom has determined upon, and the determination is conclusive. When, however, the selections have been made, and the general rule determined upon, it has been customary for the Legislature to make certain exemptions of either persons or property coming within the general rule, but which for reasons of general policy it is deemed wise not to tax. Some of these, such as the exemption of household furniture, tools of trade, etc., and the limited personal property which very poor persons may be possessed of, are to be looked upon rather as in the nature of limitations of the general rule than as exceptions from (313) it, the taxation being only of all that is possessed over and beyond what has been left out as absolutely needful to the owner's support."

It may be of interest to observe that in the case of *Hyde v. Trust Co.,* 15 U. S., 673, the question as to whether the exemption of income less than $4,000 invalidated the tax is not decided, the Court was equally divided. And on the rehearing of the case, 158 U. S., 601, no reference was made to the point.

There was error in the judgment of the court below and the same is Reversed.

Cited: Lacy v. Packing Co., 134 N. C., 572; *Dalton v. Brown,* 159 N. C., 179; *Mercantile Co. v. Mount Olive,* 161 N. C., 124; *Smith v. Wilkins,* 164 N. C., 140.

MOREHEAD BANKING COMPANY v. A. TATE ET AL.

(Decided 24 May, 1898.)

Action on Bond—Corporation—Branch Bank—Bond of Cashier of Bank—Validity—Defenses.

1. Whether a banking company, chartered to do business in a certain place and without express authority to establish and conduct a branch at another place, can do so, is a matter for the State, through the Attorney-General, to have determined by an action to vacate its charter.
2. Where a banking company established a branch bank in a place other than where the corporation was chartered to conduct its principal place of business, and placed it in charge of a cashier who gave bond for the faithful discharge of his duties: *Held*, in an action on such bond, that the defendants could not plead as a defense that the bond was invalid because the company had no power to establish such branch.
3. Where, in the trial of an action on a bond executed to the "Morehead Banking Company of Burlington," and given by the defendants to the Morehead Banking Company the jury find that the bond was given for the benefit and protection of the latter, and there was no appeal from such finding: *Held*, that equity will treat the words "of B." as surplusage.
4. A bond given by a cashier of a branch bank for the faithful performance of his duties is not void by statute nor is it against public morals because the parent corporation may not have had the express authority to establish a branch bank.

(314) ACTION, tried before *Adams, J.*, at October Term, 1897, of DURHAM. There was a judgment for the defendants, and plaintiff appealed. The facts appear in the opinion.

Winston & Fuller and Graham, Green & Graham for plaintiff.
J. A. Long, C. E. McLean and Shepherd & Busbee for defendants.

FURCHES, J. It is admitted that the plaintiff is a regularly chartered banking institution, having its place of business at Durham, N. C. Early in the year 1890 the plaintiff undertook to establish an agency or a "branch bank," as it is sometimes called, at Burlington, N. C. The defendant A. Tate was selected as the cashier of this agency at Burlington, and on 19 May, 1890, entered into a bond in the penal sum of $15,000 for the faithful performance of all his duties as such cashier, to account for and pay over all moneys received by him, etc., as such cashier to the plaintiff, then said bond and obligation to be void, but otherwise to be and remain in full force and effect.

Plaintiff brings this action and alleges that the defendant A. Tate has not faithfully discharged this duty and has not kept faith with the

plaintiff; that he has not accounted for and paid over the moneys and effects which came into his hands as such cashier, and has broken the condition of his said bond and obligation. (315)

Defendants admit the execution of said bond, deny any breach of the conditions, and allege that the bond was given to the Morehead Banking Company "of Burlington"; that the Burlington concern was unauthorized, that it is against the policy of the State to allow a banking business to be done at Burlington without a charter, or to allow the Morehead Banking Company of Durham to do a banking business, under its charter, at Burlington.

It seems that the charter of the Morehead Banking Company states that its principal place of business shall be at Durham, N. C. It does not in express terms provide for the establishing of branch banks or agencies as the charter of the Bank of New Hanover did. If it had, the case of *Worth v. Bank,* at this term, would have been direct authority for holding that the Burlington concern was not unlawful.

There was much discussion before us as to the rights pertaining to *de facto* corporations, and as to the rights and duties of parties dealing with such corporations. But none of the learning brought to our attention on this subject is in point, as it is admitted that the Morehead Banking Company is a regularly organized corporation, under and in conformity to legislative authority—its charter. It is therefore not only a *de facto* but a *de jure* corporation, and the defendants are all *natural* corporations, *sui juris.* So we have a plaintiff capable of contracting and being contracted with, and we have defendants capable of contracting and being contracted with, and we have a contract that these parties have made and entered into. The question then is, shall this contract be enforced? (316)

We are not prepared to say that the expression in the plaintiff's charter that its "principal place of business shall be at Durham" by implication authorized the establishment of a branch bank or agency at another point. In our opinion the matter of allowing banks to establish branch banks or agencies is at least of doubtful if not bad policy. We have recently seen very damaging results growing out of such policy, in the case of the Bank of New Hanover. We know it has been the policy of the State to allow branch banks from almost our earliest history. This was allowed in the Bank of Cape Fear, the State Bank, and others. And our reported cases will show that the Bank of New Hanover is not the only warning we have against this policy. *Bank v. Locke,* 15 N. C., 529. This Court would not be willing to sanction this practice of establishing branch banks or agencies to do banking business unless they are *expressly* authorized by legislative authority contained in the charter. And any bank without having this express grant, undertaking

to establish such branch establishment, will lay itself liable to have its charter vacated; but this is a matter for the State, the Attorney-General, and not for the defendants in an action in which they are trying to avoid the obligation of their contract with the plaintiff.

It is claimed that this bond states that defendants "are held and firmly bound unto the Morehead Banking Company, 'of Burlington, N. C.'" But the jury have found that it was given to the plaintiff for its protection, and there was no appeal from this finding. This being so, equity will treat the words "of Burlington" as surplusage, and hold the defendants to the same degree of liability as if these words (317) were not in the instrument. *Armistead v. Bozman,* 36 N. C., 117.

So, the only question remaining to be considered is as to whether this bond is void on the ground of public policy. Usurious contracts are against public policy, and at one time the courts would not enforce them (*Shober v. Hauser,* 20 N. C., 222); but this was because they were declared void by statute. The policy of the State is the same now that it was then. But now, the contract is not void, but only the interest is forfeited. This is so, because it is so declared by our statute. Code, section 3836; *Carter v. Ins. Co., post,* 338. Gambling contracts are void, but this is so because they are so declared by statute. Code, secs. 2841, 2842. *Gooch v. Faucett, ante,* 270. There are other contracts, not only contrary to the policy of the State but also to the *public morals* of the State, that the court will not enforce.

But this contract is not one of those declared void by statute, nor is it one that affects the public morals of the State, which call upon the courts to withhold its process and judgment from enforcing it.

There is another question involved in this case that this Court does not care to encourage—bad faith.

The matters discussed disposes of the appeal, and other questions presented are not considered. There is error.

New trial.

Cited: Mining Co. v. Lumber Co., 173 N. C., 595.

(318)

MOREHEAD BANKING COMPANY v. MRS. L. L. MOREHEAD ET AL.

(Decided 24 May, 1898.)

PLAINTIFF'S APPEAL.

Action on Note—Note by Executor—Personal Liability—Trial—Instructions.

1. Where, in the trial of an action on a note executed by an executrix, there was no evidence of any agreement that she should be held liable in her representative capacity only, it was not error to instruct the jury to answer in the negative an issue submitted to them as to whether a provision that she should not be personally liable was omitted by mistake.

2. The promissory note of an administrator or executor, as such, founded upon the consideration of forbearance or the possession of assets, will bind him in his individual capacity; hence,

3. Where an executrix, as such, executed a new note to a bank in consideration of its taking up and paying the old note, she is individually liable thereon.

ACTION, tried at June Special Term, 1897, of DURHAM, before *Timberlake, J.*, and a jury. The facts appear in the opinion. Upon the verdict rendered by the jury, his Honor rendered judgment as follows:

"This cause coming on to be heard before E. W. Timberlake, judge presiding, and a jury, and the jury having answered the first issue 'in her representative capacity only,' and the second issue 'No,' it is considered, ordered, and adjudged that plaintiff take nothing by its action against Mrs. L. L. Morehead personally, and that she go without day.

"It is further considered, ordered, and adjudged by the court, she as such executrix assenting thereto, that plaintiff recover of Mrs. L. L. Morehead, executrix of Eugene Morehead, but not personally, the sum of $5,000 with interest upon said sum at 8 per cent per (319) annum from 19 September, 1893, till paid, and the costs of this action, to be taxed by the clerk."

Before the signing of the judgment the defendants Duke and Green (sureties on the note sued on), tendered the following to be signed as the judgment:

"In this action, upon the issues submitted, the jury having found that the note was understood and intended to be made by the defendant, Mrs. L. L. Morehead, in her representative capacity, and that the provision that she should not be personally bound was not omitted by mistake, it is now adjudged, in accordance with the opinion of the Supreme Court filed in this action, that the *feme* defendant is answerable in her individual capacity, and that the plaintiff, Morehead Banking Company,

recover of Mrs. L. L. Morehead individually the sum of $5,000 with interest at 8 per cent from 19 September, 1893, and the costs of this action, to be taxed by the clerk."

From the judgment as rendered the plaintiff and the defendants Duke and Green appealed. (For reports of former appeals in same case, see 116 N. C., 410, and 121 N. C., 110.)

Boone & Bryant and Graham, Green & Graham for plaintiff.
Manning & Foushee for appellant Duke.
Burwell, Walker & Cansler and Winston & Fuller for Morehead.

MONTGOMERY, J. The facts of this case are few and simple, and when the findings of the jury are considered the law as applicable seems to be settled by the decisions of this Court. The undisputed facts are these:

On 20 December, 1888, Eugene Morehead, who afterwards died
(320) in the earlier part of 1889, Lucius Green, and B. L. Duke executed their promissory note, payable to the order of themselves at the Commercial National Bank, New York, for $6,000, due six months after its date, and the note was discounted by the bank upon its endorsement by the makers. After its maturity the note was sent to the plaintiff bank for collection, and on 22 June, 1889, the defendant Lucy L. Morehead, as executrix of her deceased husband, Eugene Morehead, paid to the plaintiff bank on the note $1,000 and the interest due, and executed her note, signed as executrix, together with B. L. Duke and Lucius Green, to the plaintiff bank in the sum of $5,000, payable four months after date with interest at 8 per cent, the plaintiff bank paying off the original note of $6,000 owned by the Chemical Bank in $5,000 of its own money and the amount paid to the plaintiff bank by the executrix. The note executed to plaintiff bank was renewed from time to time until 16 March, 1893, when the note upon which this action was brought was executed. It was in the following words and figures:

"$5,000. Durham, N. C., 16 March, 1893—Six months after date we or either of us, L. L. Morehead, executrix of Eugene Morehead, B. L. Duke and Lucius Green, promise to pay to the order of the Morehead Banking Company five thousand dollars with interest at 8 per cent per annum thereafter until paid, interest to be paid semi-annually in advance, negotiable and payable at Morehead Banking Company, Durham, N. C., for value received. The parties agree to take no advantage of any agreement for indulgence after maturity. (Signed) Lucy L. Morehead, executrix of Eugene Morehead, B. L. Duke, Lucius
(321) Green."

In her answer, Lucy L. Morehead admitted the execution of the note, but insisted that it was understood and intended by all parties

to the note that her signature as executrix did not bind her personally, and that the note should only have effect as evidence of the indebtedness of her testator; that she never received any benefit or consideration for the execution of the note, and that the note was executed through mistake or fraud, the ninth section of the answer averring "that it was not intended by her or the plaintiff that said note should bind her personally, and if it was so written it could not have that effect. It was made by mistake or fraud, and she asks that it may be rescinded or reformed." Under exceptions made by the plaintiff his Honor submitted two issues: 1. "Was the note intended and understood to be made by the defendant, Mrs. Morehead, personally or in her representative capacity only? 2. Was the provision that she should not be personally bound omitted by mistake?" The jury answered the first issue, "In her representative capacity only," and the second issue "No." The second issue ought not to have been submitted in the form in which it was, because, by its language, it assumed that there was in fact an agreement between the parties at the time of the execution of the note that the executrix should not be personally bound. But, notwithstanding the incorrect form in which the issue was submitted, his Honor committed no error in instructing the jury that they should answer that issue "No." The undisputed testimony went to show that there was not one word said at the time of the execution of the note as to whether or not Mrs. Morehead assumed any personal liability on the note. She testified on the trial that she signed the note sued on just as she intended to sign it, and the (322) cashier of the bank (Morgan) on that point testified as follows: "The note is written just as I had instructions to write it. There was no agreement that Mrs. Morehead should not be held personally liable; there was nothing said about it." So there was absolutely no evidence tending to prove that there was any agreement between the parties to the note at the time of its execution that Mrs. Morehead should not be personally liable, and that such agreement was omitted by mistake of both parties or by the fraud of the bank from being put in the bond, and there was no pretense that the bond did not state the whole of the transaction. In this connection we deem it proper to notice the indirect charge of fraud made against Morgan, the cashier of the bank, as to his conduct in this transaction. There was not a particle of proof tending that way. In fact the whole evidence goes to exclude any idea of fraud, and to show clearly that Morgan's part in the matter was frank, sincere, business-like, and that his feelings were friendly and kind to Mrs. Morehead. Since the execution of the bond and about the time the suit was commenced, Morgan, the cashier, has given as his *legal* opinion that the note did not bind personally Mrs. Morehead, and that all matters con-

nected with the transaction with her have been with her *as executrix,* and on the trial he testified that at the time the note was executed he did not think she was liable in law.

It is certain then that this is not a case in which only a part of the contract was reduced to writing and where parol evidence is invoked to prove the balance of the contract, for the language of Mrs. Morehead,

"I also signed the note sued on just as I intended to sign it," and
(323) Morgan testified that the note was written just as he had instructions to write it, and that there was nothing said about whether Mrs. Morehead should be held personally liable or not.

The only question for decision then is, "Does the signer of a note in his capacity of executor or administrator render himself personally liable to perform the obligation of the note? In *Hailey v. Wheeler,* 49 N. C., 159; *Devane v. Royal,* 52 N. C., 426; *Beatty v. Gingles,* 53 N. C., 302; *Kessler v. Hall,* 64 N. C., 60, and *Hall v. Craige,* 65 N. C., 51, it is decided by this Court that an executor or administrator cannot make liable the estate of his testator or intestate for a debt created by the executor or administrator arising wholly out of matters occurring after the death of the decedent. The expression, "it is not possible to conceive how a debt of the testator can be created by matter occurring wholly in the executor's time," taken from *Hailey v. Wheeler, supra,* has been often quoted with approval in later decisions. In each and all of the cases cited *supra,* the attempted contract of the personal representative was wholly an obligation created by the personal representative himself, and not an acknowledgment of a liability of a decedent, or a ratification of some act of his, or a reducing to a note or bond of an open account or of other liability of a decedent. The case before the Court is not identical with those cases, but we have later decisions which seem to be similar in all respects with the one here, that is, so far as the simple legal construction of a contract, like the one before us, is concerned.

In *McLean v. McLean,* 88 N. C., 394, the fact was that the defendant McLean as administrator executed the bond sued on, and the bond was given in consideration of an open account due by the defendant's
(324) intestate to the plaintiff's intestate. In that case the Court said "as a general proposition of law an administrator cannot make any contract to bind the estate of his intestate. If he gives his promissory note to pay a debt due by his intestate, it will be binding on him individually or not at all. If the note is founded upon a sufficient consideration, as of assets applicable to the debt, or forbearance, he will be individually liable; but if there is no consideration, it will be *nudum pactum.*" In that opinion it is further said, "It is well settled by the almost unvarying current of authorities that the promissory note of an

administrator or executor, founded upon the consideration of forbearance or the possession of assets, will be binding upon him in his individual capacity, although he should sign the note as executor or administrator." In that case numerous authorities are cited in support of that position.

In our case there was constant forbearance on the part of the plaintiff, and there were assets in the hands of the executrix at the time of the execution of the note and at the time of the trial.

In *Kerchner v. McRae,* 80 N. C., 219, the facts were these: "The defendants, as executors of John McCallum, executed a sealed note to Charles McRae for the amount of an account due by their testator at the time of his death to Charles McRae. A counterclaim was set up by the defendants for less than the alleged debt in the complaint, and allowed; and for the balance against the defendants personally a judgment was refused by the Judge of the Superior Court. On appeal, however, this Court decided that there was error and that "executors are responsible in their representative character on contracts originating in the testator's lifetime, but in causes of action wholly (325) occurring after the testator's death the executors are liable individually."

In the case before us, when it was before the Court at February Term, 1895 (116 N. C., 410), the case was treated as one where the liability of Mrs. Morehead was one created by her and arising wholly out of matters occurring after the death of the testator. The debt due originally by Eugene Morehead, her testator, to the Chemical Bank was paid, and the executrix having borrowed from the plaintiff the money to the extent of five thousand dollars to pay it, and given her note for it as *executrix,* the transaction became thereby a new contract and obligation. The Court in the last mentioned case, under these circumstances, decided further that the rule is not modified by the fact that the note is given, as in this case, by an executrix for money which the creditor knows at the time is to be used in payment of the debts of the testator; but the law assumes that she consents to incur the risk of reimbursement out of the assets on her final settlement. This is unquestionably a liability governed by this general principle. The *feme* defendant is answerable in her individual capacity."

Under the decisions of this Court on this subject as a matter of law, the defendant, Lucy L. Morehead, is personally liable on the note, and upon the verdict his Honor should have given a judgment against her for the debt and the costs of the action. For this error the judgment is

Reversed.

APPEAL by the defendants, Duke and Green, in the same action:

MONTGOMERY, J. For the reasons given in the plaintiff's appeal, the judgment tendered at June Special Term, 1897, by these defendants, ought to have been rendered by his Honor. Judgment was en-
(326) tered against these defendants at the June Term, 1894, of DURHAM, and of course that judgment is not intended to be disturbed by this decision.

Error.

CLARK, J., did not sit on the hearing of these appeals.

Cited: S. c., 124 N. C., 622; *S. c.,* 126 N. C., 284; *LeRoy v. Jacobsky,* 136 N. C., 450; *Kelly v. Odum,* 139 N. C., 282; *Craven v. Munger,* 170 N. C., 427.

NANNIE L. CAUSEY v. W. H. SNOW ET AL.

(Decided 15 March, 1898.)

Action on Note—Demand Note—Statute of Limitations—Estoppel.

1. A note payable on demand is due on the day of its date.
2. The purchaser of a note after its maturity takes it subject to all defenses available against it in the hands of the payee.
3. Where a married woman takes a note after maturity, her coverture does not stop the running of the statute of limitations.
4. Where commissioners of a court having a fund in their hands from the sale of property ordered to be sold, lend it and take a note therefor, the note is not a fund in the hands of the court so as to enable the court to order its payment, and, hence, is not protected against the running of the statute of limitations.
5. Where, in a creditor's bill against an insolvent corporation to wind up its affairs, the court directed that S., to whom had been assigned a bid on property sold by the commissioners of the court, and who had paid the money into court and received a deed, should be loaned the money on proper security, and a final decree was afterwards rendered under which a creditor received a note taken by the commissioners for the money and signed by S. and others: *Held,* in an action on the note, that S., not being a party to the action, was not estopped by the order or decree from showing that he signed the note as security for another party to whom the money was loaned.

(327) ACTION, tried before *McIver, J.,* and a jury, at July Special Term, 1897, of GUILFORD. The facts appear in the opinion. There was a verdict for the defendant, and plaintiff appealed.

J. A. Barringer, L. M. Scott and Shaw & Scales for plaintiff.
R. R. King for defendant.

MONTGOMERY, J. An action was commenced by the plaintiff, a married woman, for herself and other creditors, against the Willow Brook Manufacturing Company and others in the nature of a creditor's bill to wind up the affairs of the corporation, at February Term, 1886, of Guilford Superior Court. On 15 April following, J. A. Barringer and R. R. King were appointed commissioners to sell the real and personal property of the company, and at February Term, 1887, of the Superior Court an order was made in the following words: "Whereas, E. A. Snow has had the bid of Dr. J. J. Cox on the cottage sold by Barringer and King, commissioners, assigned to him, and has paid the money into court and received a deed therefor, and whereas said Snow is willing to pay 6 per cent interest on the money: It is now ordered that Messrs. King and Barringer, commissioners aforesaid, loan to said E. A. Snow the sum of his bid and take such security as they may see fit."

On 21 March following a sealed promissory note was executed to the commissioners, Barringer and King, by W. H. Snow, E. A. Snow, O. S. Causey and Ellwood Cox for the sum of $600, payable on demand. Six hundred dollars was the amount bid by Dr. Cox for the cottage sold by the commissioners.

The present action, commenced on 10 August, 1893, is upon that note, the same being the property of the plaintiff. Judgment has been had against the defendants, W. H. Snow and O. H. Causey. The (328) defendants, E. A. Snow and Ellwood Cox, admitted the execution of the note, but set up as a defense that they executed it as surety, and that the payees, Barringer and King, commissioners, knew of that fact at the time of its execution, and that the three years statute of limitations was a bar to the action. The plaintiff replied that E. A. Snow was estopped by the decree of February Term, 1887, and also by the final decree made in 1889 in the action of *Causey v. Willow Brook Manufacturing Company* from denying that he executed the note as principal. Under the objection of the plaintiff, testimony was received on the trial tending to prove that W. H. Snow was the principal debtor; that Cox and E. A. Snow were sureties and received no part of the money, and that the commissioners, Barringer and King, knew these facts at the time of the execution and delivery of the note.

His Honor refused upon the request of the plaintiff to instruct the jury as follows: "When a note is passed by delivery (or transfer) the law presumes it was transferred before the maturity of the note; and this being so, the plaintiff being the holder for value, which is not denied, whether before or after maturity, and without notice of the fact,

alleged that E. A. Snow and Cox signed as sureties, even if they did so sign, is not affected by such proof, and is entitled to recover in this action against said Snow and Cox. *Lewis v. Long,* 102 N. C., 206. That the note having been made to King and Barringer, as commissioners, under the order of the Court, to loan the fund under the charge of the Court, the statute of limitations does not run against the same in the hands of the plaintiff. That the defendant, E. A Snow, is estopped by the record introduced in the case of *Causey v. Manufacturing*
(329) *Company* from denying that he is principal in the note sued on."

The Court committed no error in its refusal to give the instructions prayed for. The note was payable to the commissioners *on demand* and was due, therefore, on the day of its date, 21 March, 1887, and the statute began to run at once. *Caldwell v. Rodman,* 50 N. C., 139; *Ervin v. Brooks,* 111 N. C., 358. The plaintiff, therefore, having received the note after its maturity took it subject to all defenses and infirmities to which it was open in the hands of the payees. The statute of limitations had begun to run before she received it and her coverture did not stop it.

The facts in this case are very different from those in *Lewis v. Long,* 102 N. C., 206, to which our attention was called by the plaintiff's counsel. In that case it did not appear *when* the payee endorsed the note, and the presumption of law was that the endorsee took it for value and before dishonor in the regular course of business. The endorsee, there, had no notice of the suretyship of the defendant, and although she assigned the note to the plaintiff after maturity, it was held that the second endorsee was unaffected by the defense set up of the statute of limitations on the ground "that a purchaser after maturity from a *bona fide* holder who took the paper for value before maturity is entitled as a *bona fide* holder before maturity to the rights of his endorser." The commissioners, Barringer and King, lent the money, as we have said before, under the order of the Court, and the plaintiff insists on that account that the note is a *fund* in the hands of the Court, and that the statute of limitations cannot successfully be pleaded in this action. But the $600 lent by the commissioners to the defendants, and which was the consideration of the note, cannot be called, with propriety,
(330) a fund in the hands of the Court. The fund was disposed of when the money was lent, and the note simply represented the fund. As conclusive of that proposition it is only necessary to say that the note could not have been collected by an order of the Court to pay it on notice to the debtors. Neither principal nor surety could have been punished for contempt upon refusal to obey an order to pay it into court. It could only be collected, unless voluntarily paid, in a civil action in the regular course of the courts; and that being so, the defendants had the right to set up any defense they may have had in an action brought to collect the note.

Our statutes of limitation make no distinction between actions brought by commissioners or receivers against those who borrow funds in the hands of such receivers or commissioners and actions in favor of individuals against individuals. Statutes of limitations are remedial only.

Commissioners and receivers who may lend money under the direction of the Court are required to exercise both good faith and due diligence. They must look after the security of the loan and see to it that the debt does not become stale. But, in addition to what has been said, a final decree was entered long before this action was brought, in the case in which this fund was realized, and the plaintiff claims the note as her individual property under that final decree. The plaintiff's contention that the defendant, E. A. Snow, is estopped from denying that he is the principal debtor by the record in *Causey v. Manufacturing Company* cannot be sustained. He was not a party to that proceeding, nor was he in privity with the plaintiff or the commissioners in any sense of that word. It is true that the decree of February, 1887, de- (331) clared that E. A. Snow was the purchaser of the property, had paid the purchase money and taken a deed, and was ready to borrow the money and pay 6 per cent interest therefor; but that arrangement was not carried out, for the jury found upon evidence submitted to them that E. A. Snow and Ellwood Cox were sureties on the bond which the commissioners took for the loan of the money; that W. H. Snow was the principal, and that the commissioners knew these facts when the bond was executed. The evidence which the Court admitted to prove these facts was objected to by the plaintiff, but it was properly received. So far as the objection to the evidence may have been founded on the matters to which the prayers for instruction were directed, they have been already discussed. As to the objection to the testimony, so far as it affected the rights of the defendants to prove that they were sureties, the same has been settled as properly overruled in *Welfare v. Thompson,* 83 N. C., 276; *Capell v. Long,* 84 N. C., 17, and *Coffey v. Reinhardt,* 114 N. C., 509.

His Honor instructed the jury that if they believed the evidence (there was no conflict in the evidence) they should find the first and second issues "Yes" and the third issue "Nothing." The first issue was to the payee's knowledge of the suretyship of the defendants, E. A. Snow and Ellwood Cox at the time of the execution of the note. The second issue was as to whether the action was barred by the statute of limitations, and the third issue was as to whether E. A. Snow and Ellwood Cox were indebted to the plaintiff. There was no error in the instruction.

No error.

Cited: Graves v. Howard, 159 N. C., 600; *Sykes v. Everett,* 167 N. C., 608.

(332)

CORNELIA J. MITCHELL v. ALICE B. MITCHELL.

(Decided 22 March, 1898.)

Trial—Verdict—Clerk of Superior Court—Jury—Separation of Jury—Practice.

1. The clerk cannot take a verdict in the absence of the judge unless expressly authorized by him to do so.
2. Where, in the absence of the court, an irregular verdict is entered or inconsistent or contradictory responses appear on which a judgment agreeable to law cannot be awarded, the only remedy is to set the verdict aside.
3. After adjournment of court for the day, a jury, by consent, rendered a verdict to the clerk responding to all the issues, and the verdict was recorded in the minutes. The next morning, after the minutes were signed, the jury were recalled and the court recommitted two of the issues with directions to the jury to retire and make up their verdict thereon, which they did: *Held*, that the verdict as to the two issues will be set aside and a new trial ordered thereon, but the verdict on the other issue, which was not affected by the new verdict, will not be disturbed.

ACTION, tried before *McIver, J.*, and a jury, at August Special Term, 1897, of GUILFORD. A verdict was rendered for the plaintiff under the circumstances detailed in the opinion, and from the judgment thereon defendants appealed.

R. R. King for plaintiff.
John A. Barringer for defendant.

FAIRCLOTH, C. J. The seven issues were submitted to the jury just prior to the adjournment of court in the afternoon. By consent of counsel on both sides, the judge directed the jury to retire and return their verdict to the clerk and be discharged until the next morning, which they did after the court had adjourned until next morning, responding to each issue. The jury separated for the night and the
(333) clerk recorded their verdict in the minutes that night. Next morning the judge on his own motion had the jury called into the box and called their attention to the evidence bearing upon the issues No. 4 and No. 5 and the law relating thereto, and recommitted the issues to the jury and instructed them to retire and make up their verdict, which they did, rendering a different verdict on the fourth and fifth issues, which the judge instructed the clerk to record as the verdict, and approved the same. The defendant's counsel objected to the recommitting of the issues to the jury. The counsel excepted to the judgment as unwarranted in law, and because the judge had signed the minutes, including the first verdict, before the second verdict was rendered. The exception is well taken.

The clerk cannot take a verdict in the absence of the judge unless expressly authorized by the court to do so. When he does so without authority, and the verdict is irresponsive to all the issues, the judge has the power to order the jury to retire and finish their verdict, they not having dispersed and there being no allegation that they have been tampered with. *Petty v. Rousseau,* 94 N. C., 355. And so, after verdict entered, the court may permit the jury before separation to correct their verdict and make it express what they have agreed to and intended. *Cole v. Laws,* 104 N. C., 651.

There are many instances in which the court may permit and require juries to change or correct their verdicts in the presence of the court before they have separated, so as to make the findings consistent and harmonious, and authorize a judgment to be entered. In such cases the court determines whether the jury has tendered or returned a verdict, and may call them into the box for a proper verdict, or discharge them in his discretion under the existing circumstances. *Robinson v. Lewis,* 73 N. C., 107; *Willoughby v. Threadgill,* 72 N. C., 438. (334) If, however, in the absence of the court an irregular verdict is entered, or inconsistent or contradictory responses appear, on which a judgment agreeable to law cannot be awarded, the only remedy is to set the verdict aside. *Houston v. Potts,* 65 N. C., 41; *Porter v. R. R.,* 97 N. C., 66.

In the case at bar, the jury having responded to all the issues, and having been discharged by order of the court and retired for the night, and the verdict recorded, and there being no suggestion of any undue influence operating on the jury, we cannot approve the practice of recalling them and allowing them to change the verdict after separation, when an opportunity has intervened for undue and outside influence to operate on their minds. *Wright v. Hemphill,* 81 N. C., 33.

A new trial is ordered on the fourth and fifth issues. We see no reason for disturbing the findings on the other issues, as they were not affected by the second verdict.

Partial new trial.

(335)

W. H. WORTH, STATE TREASURER, v. J. B. WRIGHT.

(Decided 22 March, 1898.)

License Taxes—Action by the State Treasurer for Collection of License Taxes.

1. License taxes are, in effect, assessed by the statute and become due and collectible, as a debt due to the State, as soon as the party assumes to exercise, as a business, the profession, trade, or occupation upon which the tax is imposed.
2. Under section 3359 of The Code the State Treasurer "may demand, sue for, or collect and receive all money and property of the State not held by some person under authority of law."
3. An action for the collection of the license tax imposed by section 25, chapter 116, Laws 1895, on the business of selling pianos, and made payable directly to the State Treasurer, was properly brought by that officer in his own name, although it might have been brought in the name of the State.

ACTION, heard on complaint and demurrer, before *Adams, J.*, at December Term, 1897, of GUILFORD. The demurrer was sustained, and plaintiff appealed.

Attorney-General and Brown Shepherd for plaintiff.
Shaw & Scales for defendant.

DOUGLAS, J. This is an action brought by the plaintiff, as Treasurer of the State of North Carolina, to recover of the defendant the tax imposed by section 25, chapter 116, Laws 1895, upon the business of selling pianos and organs. The defendant demurred for that the complaint did not state a cause of action, in that it appeared that the plaintiff had no interest in the tax sued for, which was due and owing to the State, and that there was therefore a defect of parties plaintiff.

(336) The demurrer was sustained, and the plaintiff appealed.

We think that his Honor erred in sustaining the demurrer. While the suit might have been brought in the name of the State, it was equally competent to be brought in the name of the Treasurer alone. Section 25, chapter 116, Laws 1895, under which this suit is brought, provides that "Every person, company, or manufacturer who shall engage in the business of selling pianos or organs by sample, list, or otherwise in the State, shall, before selling or offering for sale any such instruments, *pay to the State Treasurer* a tax of $250 and obtain a license which shall operate one year from its date, and all such licenses shall be countersigned by the Auditor, and no other license tax shall be required by counties, cities, or towns." This license tax is, therefore, by statute made directly payable to the Treasurer, and he is authorized to demand,

sue for, and collect it under section 3359 of The Code, which provides that he may "demand, sue for, collect, and receive all *money* and *property* of the State not held by some person under authority of law." Section 3765 of The Code, in subsection 6, defines property as follows: "The words 'real property' shall be coextensive with lands, tenements, and hereditaments. The words 'personal property' shall include moneys, goods, chattels, choses in action, and evidences of debt, including *all things capable of ownership* not descendible to the heirs at law. The word 'property' shall include all property both real and personal." This word "property" was held to be *"nomen generalissimum"* in *Redmond v. Comrs.*, 106 N. C., 122, 140. It was held in *Guilford v. Georgia Co.*, 112 N. C., 34, that taxes duly assessed became a debt, and as such could be collected by suit. License taxes are, in effect, assessed by the statute, and become due and collectible as soon as the party (337) assumes to exercise, as a business, the profession, trade or occupation upon which the tax is imposed. The mere fact that the party might be indicted for carrying on any such business, without having paid the tax and obtained the license required by law, does not prevent the State or its lawful officers from collecting the tax by suit. *Guilford v. Georgia Co., supra.*

The authority of the Treasurer to bring the suit in his own name, as Treasurer, was recognized in *Bain v. R. R.*, 105 N. C., 363. That it was the legislative intent that he should collect the taxes is shown by section 49 of the act itself imposing the tax (chapter 116, Acts 1895), which is as follows: "A sum not to exceed $2,500 is hereby appropriated out of any moneys in the treasury, not otherwise appropriated, to be expended by the Treasurer of the State as he may deem best and necessary to secure the proper and prompt collection of the taxes." As the suit at bar was properly brought by the plaintiff in his own name as Treasurer, the judgment of the court below in sustaining the demurrer is

Reversed.

(338)

ABRAM CARTER v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Decided 24 May, 1898.)

Action to Recover Usurious Interest Paid—Usury—Statute of Limitations.

1. Where a life insurance company lent to a borrower a sum of money at the full legal rate of interest, payable monthly, its repayment being secured by a deed of trust, but also required the borrower to take an endowment

policy in said company on his life, the monthly premiums on which for life or a term of years were also secured by the deed of trust: *Held*, that the contract was usurious.

2. Under section 3836 of The Code (which governs contracts prior to 21 February, 1895, the date of the ratification of chapter 69, Acts of 1895), an action to recover twice the amount of usurious interest paid must be brought within two years from the date of the payments of such interest.

ACTION, brought by the plaintiff, under section 3836 of The Code, to recover double the amount alleged to have been paid and received as usurious interest, tried before *Robinson, J.*, and a jury, at January Special Term, 1898, of GUILFORD. The summons was issued 20 January, 1896. The facts appear in the opinion.

Charles L. Stedman for plaintiff.
Robert D. Douglas for defendant (appellant).

FURCHES, J. This is an action to recover double the amount of usurious interest paid by the plaintiff to the defendant. On 25 October, 1890, the plaintiff borrowed of the defendant $200, for which he gave his note at 6 per cent interest. But, to enable him to do this, he was compelled to take an endowment policy on his life in the defendant company, for which he was required to pay $2.40 per month, making his
(339) monthly payments $3.40. The $200 and interest and the monthly installments on the insurance policy were all secured by deed of trust to Steel and Dalton. The plaintiff commenced to pay the monthly installments, which he continued to make up to 24 June, 1893, when they, together with subscription fee and a fine paid by plaintiff, amounted to $113.60. The plaintiff failed to pay anything on this contract after 24 June, 1893, 40 per cent being more than he could stand. The defendant let the matter rest until 12 March, 1894, when it caused the plaintiff's land to be sold by the trustees, Steel and Dalton, claiming that $209 was due at that time. The property sold for barely enough to pay the defendant the amount it claimed ($209) and the cost and expenses of the sale, which amount was paid to the defendant. This action was commenced on 20 January, 1896, which defendant contends was too late.

There appears to be no dispute as to the facts involved, and it seems to us that *Miller v. Insurance Co.*, 118 N. C., 612, and *Roberts v. Insurance Co., ibid.*, 429, are decisive of the law involved in this case. *Miller v. Insurance Co.* decided that this was a usurious contract under which the defendant was entitled to recover no interest. Code, section 3836. *Roberts v. Insurance Co.* decides that the plaintiff can only recover double the interest paid within two years from the commencement of his action. Code, section 3836. The plaintiff made no payment

within two years of the commencement of this action except that made by the trustees, Steel and Dalton—being the proceeds of the mortgaged property. The statute, section 3836 of The Code, does not forfeit the principal of the debt, but only the interest. The principal of this debt is admitted to be $200. This is all that was due the defendant at the sale, and anything paid him by the trustees over $200 was (340) usurious, and the plaintiff is entitled to recover double this amount (claimed to be $9), and if this is correct, judgment should be for $18.

We have not felt called upon to enter into a discussion of the law involved in this case, but have satisfied ourselves by announcing what the law is—as every question involved in this case is fully discussed in *Miller's case* and *Roberts' case, supra,* and any discussion here would be but to repeat what is there said. There are no equities involved in this case, and can be none. It is entirely statutory. There is

Error.

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

Cited: Banking Co. v. Tate, ante, 317; *Tayloe v. Parker,* 137 N. C., 419; *Riley v. Sears,* 154 N. C., 517.

J. E. GAINES v. A. W. MCALLISTER ET AL.

(Decided 19 April, 1898.)

Action on Note—Trial—Instructions—Contract of Corporation.

1. Where, in an action on a note, the answer alleged that the execution of the note was obtained by the fraudulent representations of the plaintiff in selling certain property, and the issue was raised whether the contract of sale was with defendants or with a third party who, plaintiff alleged, had bought from the plaintiff and sold to the defendants, and the testimony on such issue was conflicting: *Held,* that an instruction that, if the jury should find that the *plaintiff* made false representations concerning the property sold to the defendants, the plaintiff could not recover, was erroneous, being, in effect, an instruction that the contract of sale was between the plaintiff and defendants.

2. Whether a contract between "promoters" and stockholders of a corporation is void upon its face because not made by the directors is a question for the court and not for the jury.

3. Where the "promoters" of a corporation held proxies of a majority of the shares of the company and organized the company and voted such shares in making a contract with the promoters by which the latter were to

receive certain non-assessable paid-up stock and a large sum in cash upon certain contingencies: *Held*, that while such facts may have been evidence, as badges of fraud, in an action to set aside the contract for fraud, the contract was not upon its face fraudulent.

4. In the trial of an action on a note given for the price of stock to which the false representations on the part of the seller were pleaded as a defense, an instruction that if the plaintiff had obtained the stock so sold under a void contract with the corporation he could not recover, was erroneous, not being pertinent to the issues.

(341) ACTION, tried before *McIver, J.*, and a jury, at July Special Term, 1896, of GUILFORD. There was a verdict for the defendants, and plaintiff appealed. The facts and grounds of appeal sufficiently appear in the opinion.

R. R. King for plaintiff.
L. M. Scott and Shaw & Scales for defendants.

MONTGOMERY, J. The plaintiff commenced this action to recover the amount alleged to be due on a promissory note executed by J. S. McAllister to A. W. McAllister, and by A. W. McAllister endorsed to the plaintiff, dated 8 January, 1891, and payable on or before 8 December, 1891, in the sum of $500, with interest at the rate of 6 per cent per annum. The execution of the note and its endorsement as alleged were admitted by the defendants, but they aver in their answer that (342) the plaintiff, through his fraudulent representations and practices, procured its execution, and that no value was received by the debtors in the transaction out of which it grew. The facts as they are averred in the answer, and as to which the alleged fraudulent representations of the plaintiff in procuring the execution of the note were made, are substantially these:

In June, 1891, the defendant A. W. McAllister, as trustee for four persons, including the defendant, J. S. McAllister, contracted with the plaintiff for the purchase from him of three-fourths of a promoter's interest, as it was called, in the Virginia Steel, Iron and Slate Company, a corporation incorporated and organized under the laws of Virginia; that the plaintiff represented to A. W. McAllister that a promoter's interest in the concern consisted of one hundred shares of full paid-up stock of the company of the par value of $100 per share, and also that it secured to the owner thereof 55 town lots on the lands of the company in and near the village of Howardsville, in the State of Virginia, and $5,000 in money to be paid to the owner of the promoter's stock out of the first net profits of the company; and that the defendant J. S. McAllister and the three other beneficiaries, represented by A. W. McAllister as their trustee, were to have under the contract of purchase the three-

fourths interest, to wit, 75 shares fully paid up of the plaintiff's stock, three-fourths interest in the 55 town lots, and three-fourths of the $5,000 of the money to be derived out of the first net profits of the company; that for the above consideration the four beneficiaries, or their trustee for them, were to pay to the plaintiff $4,000, $2,000 in cash and $2,000 in their notes; that the $2,000 was paid in cash and the notes executed and delivered, of which the one in suit is one; that the notes were executed by the makers to A. W. McAllister without any consider- (343) ation from him to them, as well known to the plaintiff when he received them, and that the notes were endorsed and delivered by the trustee to the plaintiff at the time the contract was made. The fraudulent representations which the defendants aver were made to them by the plaintiff are as follows:

"That at the time of making the contract the plaintiff fraudulently represented himself to be the *bona fide* owner of said promoter's interest of 100 shares of paid-up stock in the company, which he represented fraudulently and falsely to be of the value of $100 per share, and the company to be prosperous and in good condition and perfectly solvent, when he in fact knew said representations were false and untrue, he being at the time a director as well as the treasurer of the company; and that plaintiff also falsely and fraudulently represented said promoter's interest to consist of 100 shares of paid-up stock of the company, that the stock was worth $100 per share and secured to the owner thereof 55 town lots on the land of the company and $5,000 of the first net profits of the company, well knowing the same were not true; by which false and fraudulent representations the defendant and the other three persons above named who relied upon the truth thereof were induced to enter into the contract and to pay the money, to wit, $2,000, and execute said notes, and to endorse and deliver them to the plaintiff."

The defendant J. S. McAllister also set up a counterclaim against the plaintiff for $500, which he had paid at the time of the making of the contract of purchase.

The plaintiff in his reply denied that he agreed to sell the three-fourths of the promoter's interest described in the answer to A. W. McAl- lister, but alleged that he sold the same to one Watkins, who (344) assigned his interest in the contract of sale to A. W. McAllister, trustee for J. S. McAllister, and three other beneficiaries, on the terms that the four persons should pay to the plaintiff the cash payment of $2,000, and secure the deferred payment of $2,000 by the notes; that he did not know anything of the relation of A. W. McAllister to J. S. McAllister or to the other three beneficiaries in the transaction when the sale was made, but that he believed they composed a syndicate of which A. W. McAllister was the head, formed to make this purchase, and

that the notes passed to him for the deferred payments were executed to cover a part of the purchase price. And the plaintiff in his reply further stated that he never made any representations of any sort to A. W. McAllister in reference to the value of the promoter's interest; that he never had any negotiations with him or any of the beneficiaries; that he sold the stock to Watkins and never knew of McAllister and his associates in the transaction until after the sale had become a finality.

Upon the pleadings the important questions raised were, first: Was the contract of sale of the promoter's interest made by the plaintiff to A. W. McAllister as trustee for the defendant J. S. McAllister and the other three beneficiaries, or was it made with Watkins in the manner and under the terms as alleged by the plaintiff? and, second, if the contract of sale was made to A. W. McAllister, trustee, did the plaintiff make representations which induced the defendant to purchase, and were such representations false within the knowledge of the plaintiff?

The evidence was conflicting on the question whether Watkins was the purchaser of the stock or whether A. W. McAllister bought
(345) for J. S. McAllister and others; and yet his Honor substantially, in number nine of the defendant's prayers for instructions, which he gave and repeated in his general charge, instructed the jury to find that the plaintiff sold to A. W. McAllister as trustee and agent of J. S. McAllister—one of the main points at issue in the case. There was error in this.

His Honor gave Nos. 1 and 2 of the defendant's prayers for instructions, which are in the following words: "1. That the contract entered into by the promoters and stockholders of the Virginia Steel, Iron and Slate Company, made on 15 December, 1890, is void, and the plaintiff obtained no interest thereunder which he could sell or convey, and that no consideration passed from him to the defendants for the note sued on, and plaintiff can recover nothing in this action. 2. That if the jury find from the evidence that the promoters, on 15 December, 1890, held proxies of a majority of the shares of the company and organized the company, and voted the same in making the contract with the promoters under which the promoters were to receive $200,000 in nonassessable, paid-up stock, $100,000 in cash upon the contingencies admitted upon the trial and detailed in the evidence, then the contract is fraudulent in law and void, and the plaintiff had no interest which he could sell or convey, and no consideration passed from him to the defendants upon the note sued on, and the plaintiff cannot recover." They ought not to have been given.

If the contract between the corporation and the promoters, made at the meeting of the company on 15 December, 1890, at Howardsville, Va., was void in law because the *stockholders* made the contract instead

of the *directors,* the court should have ruled the contract to be (346) void and not have submitted the question to the jury.

And the same is true of the second of the defendant's prayers for instruction (given). The matters set out there were admitted to be true in the answer, and in the reply they are emphasized as true; and if they, on their face, made the transaction fraudulent in law and void his Honor should have so held as a matter of law and not have submitted the matter to the finding of the jury. But they did not, upon their face, constitute legal fraud. They may have been evidence, as badges of fraud, in an action to set aside the contract of 15 December, 1890, between the stockholders and the promoters for fraud; but it cannot be said that they constitute fraud in themselves, because, so far as we know (though it is highly improbable), the consideration given by the promoters to the stockholders was of such value as made it a *bona fide* transaction.

The instructions, too, were not pertinent to the pleadings and to the issues. There was no fraud averred by the defendants in the transaction that occurred in the meeting of 15 December, 1890. The defendants charged fraud *only* in the representations made in the sale of the promoter's interest, and there was no pleading or motion on the part of the defendants intimating even that the contract of 15 December, 1890, was made without authority, and void because the stockholders made it and not the board of directors.

Our opinion on the main question in the case being such as we have expressed, we deem it unnecessary to consider the other matters brought up on the appeal.

There was error, for which there must be a

New trial.

DOUGLAS, J., did not sit, having been of counsel.

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(347)

A. H. MOTLEY & CO. v. SOUTHERN FINISHING AND WAREHOUSE CO.

(Decided 17 May, 1898.)

Action for Damages—Warehouse Storage Company—Liability of Warehousemen — Negligence — Corporation — Charter—Exclusive Privileges—Measure of Damages.

1. While warehousemen are not insurers like common carriers they are liable for damages, caused by their negligence, to articles stored with them.

2. A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its

warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional and void.

3. The measure of damages for property damaged while in the care of a storage or warehouse company is the difference between the market value of the property in its damaged condition and what it would have sold for, if undamaged, on the day of its return to the owner.

ACTION for damages, tried before *Robinson, J.*, and a jury, at January Special Term, 1898, of GUILFORD. There was a verdict followed by judgment for the plaintiffs, and defendant appealed.

Shaw & Scales and Bynum & Taylor for plaintiffs.
R. R. King and C. M. Stedman for defendant.

FURCHES, J. Plaintiffs are tobacco dealers and defendant is a chartered warehouse company. Plaintiffs, at the solicitation of defendant, deposited a quantity of leaf tobacco in defendant's warehouse and took the following receipt therefor: "Greensboro, N. C., 16 October, 1894. Received in store from J. S. Cobb & Co., 73 hogsheads of leaf (348) tobacco, subject only to the order hereon of J. S. Cobb & Co. and the surrender of this receipt, and the payment of charges. Southern Finishing and Warehouse Co. J. W. Lindau, Secretary."

This tobacco remained in defendant's warehouse until 1 June, 1895, when it was delivered to the plaintiff in a damaged condition, and this action is for damages.

It does not seem to be disputed that the tobacco was in a damaged condition when delivered to plaintiff in June, 1895. But defendant contends that it is not liable for the damaged condition of the tobacco; that defendant is a corporated company and by the terms of its charter it is exempt from liability for such damages, unless it expressly contracts to become liable, and that this liability must be stated in its warehouse receipt. Defendant also contends that said damage to the tobacco was from defective manipulation and packing by plaintiff and from natural causes after it was delivered to defendant, and not from any default or negligence on the part of defendant.

Upon the trial the defendant offered in evidence an act of the Legislature of North Carolina authorizing its incorporation, called its charter, which contains the following: "Provided, however, that said company shall not be held responsible for losses arising from the act of God or of common enemies, nor for any loss or damage not provided for in its warehouse receipt or contract, and said company may make such stipulations in its warehouse receipts or contracts as to loss or damage arising by fire or other cause as it may deem necessary and proper."

The law as to the liabilities of a public warehouseman is as well defined and understood as is that of common carriers and of public inns.

And while the liabilities of warehousemen are not that of in- (349) surers, as are common carriers, they are liable for damage caused by their negligence. This law is general and applies alike to all warehousemen, whether incorporated or not. It is the law of the land that governs the warehouse business of every individual citizen of the State and must govern in corporations, unless they can have special *contract rights* granted to them that the citizens of the State do not and cannot have. This the defendant claims to have under its charter. Defendant says that all legislative power is granted to and abides in the Legislature, not restricted or prohibited by the Constitution, and cites several text-writers and adjudications from other courts to sustain this contention. But defendant need not have gone abroad for authority to support this contention. It has been so held by this Court in *McDonald v. Morrow,* 119 N. C., on page 666; *Comrs. v. Snuggs,* 121 N. C., 394, page 404. But this does not decide the question at issue. It only brings us to the consideration of the question as to whether this provision in defendant's charter is unconstitutional or not. And we are of the opinion, both upon principle and authority, that it is.

It will not be contended that any citizen of the State—any natural person—has such powers and privileges as those contained in this charter and claimed to be conferred upon the defendant. Nor will it be claimed that the Legislature could confer any such powers and privileges as those contained in this charter and claimed by defendant upon any citizen or natural person of the State. It must, then, be held that this charter attempts to confer upon defendant a special power and privilege that no citizen or natural person in the State has, and such a privilege as the Legislature could not confer on any of its citizens. This is pro- hibited by Article I, section 7 of the Constitution of North Caro- (350) lina, which provides that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

This was held by this Court in a well-considered opinion (written by *Bynum, J.*) to apply to exclusive privileges attempted to be given to the Bank of Statesville, a private corporation, in its charter. *Simonton v. Lanier,* 71 N. C., 498. The same doctrine is announced in the well-considered opinion, by *Shepherd, C. J.,* in *Staton v. R. R.,* 111 N. C., 278.

It was contended for defendant that the Legislature has conferred upon railroads the right to take lands for the benefit of their roads; that it has conferred on some the right of easement of 100 feet on each side of its track, and on others a less amount; that it could not confer upon its citizens this privilege, and yet this is held to be lawful. It is true that the Legislature has granted these privileges to railroads, and

it has been held to be constitutional to do so. But this is under an exercise of the right of eminent domain and for the public benefit. And, then, it does not take the land from the owner and give it to the railroads, but only authorizes the railroads to acquire this easement by paying for it. In other words, it is a forced sale for the benefit of the public. And the same rule obtains as to public mill owners, and for the same reason—the public good.

But we fail to see the analogy between this case and the exercise of the right of eminent domain as in the case stated. This case does not fall under the doctrine of eminent domain, and that doctrine does not apply. But if it did, what benefit is it to the public that the defendant should be clothed with this extraordinary privilege over all the (351) citizens of the State? What public services has it performed to entitle it to be exempt from the general law applying to other warehousemen? What benefit can this privilege be to the public? We must declare that that portion of defendant's charter attempting to exempt it from the same rule of liability that applies to other warehousemen is unconstitutional and void, and the court below committed no error in so holding and declaring.

But we are of opinion that there is error in the instructions of the court submitting the question of damages to the jury. The measure of damage is not the difference between what the tobacco would have sold for, when delivered to defendant, and what it sold for in its damaged condition. This rule involves the fluctuations of the market. It may be that if the tobacco had not been damaged it would not have sold for as much when it was sold as it would have sold for when it was delivered to defendant. If so, it would not be fair to defendant to adopt this rule and make it liable for the depression in the market.

The true rule by which plaintiff's damage should be ascertained (and we are taking it from the finding of the jury that plaintiff is entitled to damage) is to find what this tobacco would have brought on the market at Greensboro on the day it was delivered to plaintiff by defendant, if it had not been damaged, and then find what it would have brought on the same market, on the same day, in its damaged condition. These facts being found by the jury, the amount of damage will be ascertained by subtracting the less amount from the greater. The difference thus found will be the amount of damage. The charge of the court (352) seems to us to have been full and fair to both sides, with this exception. For this error, the defendant is entitled to a New trial.

Cited: Motley v. Finishing Co., 124 N. C., 232; *S. c.*, 126 N. C., 340.

W. D. ANDREWS v. T. W. ANDREWS.

(Decided 15 March, 1898.)

Will, Construction of—Estate Devised—Vesting of Devised Estate—Contract for Support—Entire Contract—Breach of Contract—Use and Occupation of Land—Betterments.

A husband and wife executed a will giving their "landed estate" to their son for life with remainder to his heirs, and, if he should die without heirs, then to their daughter M. or her heirs, in consideration of his supporting his parents and their daughter A. during their lives. The son wrote upon the instrument his acceptance of its terms and went into possession of the land under a verbal contract similar in terms to those contained in the instrument. By reason of the son's unkind treatment the parents quit the premises. *Held*, in an action by the father to recover the land:

(1) That, whether the son went into possession under the written or verbal contract, no estate vested in him and could not vest until the death of his parents.

(2) That the contract contained in the instrument was entire in its nature, and the son having violated it, the father is entitled to recover the land and its rental value for use and occupation.

(3) That the son is not entitled to recover anything for betterments or for the expenses of supporting his parents and sister.

ACTION, tried before *Adams, J.*, at Fall Term, 1897, of CHATHAM, upon exceptions filed by both parties to a report of a referee. The facts are stated in the opinion. Judgment was rendered for the plaintiff, awarding him the land and the rental value of the land from the time the defendant, by his unkindness, caused the plaintiff to quit the defendant's house. To this judgment the defendant excepted and appealed. Judgment was rendered for the defendant for $719 for betterments and expenses incurred in supporting the plaintiff and his family, and from such judgment the plaintiff appealed.

H. A. London for plaintiff. (353)
Womack & Hayes for defendant.

MONTGOMERY, J. The referee found as a fact that the defendant went into possession of the tracts of land claimed by the plaintiff, and described in the complaint, in 1881, under a verbal contract which, in the referee's words, "was very much in line with the requirements made in the Exhibit A as to the defendant towards the plaintiff, and the remuneration to be received by the defendant was nearly the same as stated in Exhibit A." Exhibit A is in the following words:

"We, the undersigned, make the following will, to wit, our landed estate, all except the Welch tract, to our son Thomas Andrews during his life and after his death to his heirs; if he dies without heirs, our landed estate goes to our daughter, Mary E. Ellis, or her heirs, with this consideration: that the said Thomas Andrews agrees to support us and our daughter Maria Antoinette Andrews during our lives, whether or not the said Thomas Andrews survives our daughter Maria Antoinette Andrews, she is to have her support out of our landed estate during her life with our son Thomas and our daughter Mary, or some suitable one of their heirs to see to her during life. All our perishable property, after the decease of both of us, after paying our debts and funeral expenses, to be equally divided with our son Thomas
(354) and Mary. To which we set our hands and seals, this 29 December, 1874.

W. D. ANDREWS. [SEAL]
PRISCILLA F. ANDREWS. [SEAL]

"I accept the above instrument and agree to the terms therein.

THOMAS W. ANDREWS.

"After writing the above we make Thomas Andrews and Archie Ellis executors of our will."

The referee further found "that the defendant complied with the terms of the verbal contract in the way of supporting the plaintiff and his family, but some time during the year the treatment of the defendant toward the plaintiff became to be of such a nature that he, the plaintiff, could not continue to live with the defendant with any satisfaction, and on account of said treatment the plaintiff placed himself beyond the subjection and control of the defendant." The referee adopted a most circumlocutory style of stating the simple fact that the defendant's unkindness drove the plaintiff from the premises. The finding, too, in the language in which it was stated, was made under his Honor's directions after the referee's first report that he ought to have found "that the plaintiff left because of the defendant's unkindness to him." The defendant filed numerous exceptions to the referee's findings of fact, all of which were overruled by the court.

We cannot review the defendant's exceptions to the findings of fact. None of the testimony was sent up in the case, and we must conclude that the findings of fact were made upon sufficient evidence. Indeed, the findings of fact are immaterial, from the view we have of the case, except in one (in substance), that the plaintiff left the defendant's house because of the defendant's unkind treatment of him, and the one
(355) that the rental value of the land was $50 a year. The referee's conclusions of law are as follows:

1. That the paper-writing marked Exhibit A is not a conveyance—not such a contract to convey land as entitles the defendant to specific performance.

2. That the plaintiff is the owner in fee and entitled to the possession of the land described in the complaint.

3. That the plaintiff is entitled to recover of the defendant the sum of $50 a year from July, 1894, as damages for detention of said land, and costs of action.

The paper marked Exhibit A is a contract testamentary in its nature. It clearly was to take effect at the death of the plaintiff and his wife. The lands are described as "our landed estate." The defendant accepts the instrument and agrees to its term, *i. e.*, agrees to support the plaintiff and his wife and daughter during their lives. The closing paragraph of the paper-writing as to the disposition of the personal property is most significant, providing as it does for its equal distribution between the plaintiff's two children after the death of the parents and the payment of their debts and funeral expenses. There is not a word in the paper that points to the immediate vesting of the estate in the defendant. It makes really no difference whether the defendant was in possession under the paper-writing or under a verbal contract similar in character to the written one between the parties.

The question then arises, did the defendant fail and refuse to carry out his part of the contract? The referee found that he did, and his Honor affirmed the finding. That being so, it is clear that the defendant is entitled to nothing on account of betterments and expenses incurred by him in the support of the plaintiff and his family. If the defendant was in possession of the lands under the written contract, he would be entitled to no such damages in his favor, for he has (356) refused to perform his part of the contract—the contract being entire in its nature. If he was in possession under the verbal contract, the same rule applies and for the same reason.

The judgment of the court below is affirmed as to that part of it which adjudges that the plaintiff is the owner in fee of the lands described in the complaint and ordering a writ of possession, with the costs, including the referee's fee. That part of the judgment which adjudges that the defendant recover of the plaintiff $719 for betterments and expenses of supporting the plaintiff and his family is not affirmed, but is erroneous. The plaintiff is also entitled to have judgment against the defendant for the sum of $50 per year from July, 1894, for the use and occupation of the lands.

Modified and affirmed.

PLAINTIFF'S APPEAL.

MONTGOMERY, J. The plaintiff's fourth exception to the judgment of the court below is sustained, and there was error in that part of the judgment which adjudged that the defendant recover of the plaintiff $719 for betterments and expenses in supporting the plaintiff and his family.

Error.

Cited: Wildes v. Nelson, 154 N. C., 595.

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(357)

ROSA V. BUTLER AND HUSBAND V. ELIZA MCLEAN.

(Decided 29 March, 1898.)

Deed, Construction of—Trusts—Intent of Grantor.

1. A trust will not be declared as arising from a conveyance absolute in form unless the intent of the grantor to create a trust clearly appears on the face of the deed.

2. A deed made by J. M. to his son-in-law, W. S. M., recited as follows: "I, J. M., for and in consideration of the sum of $400, as an advancement to his wife, Polly Cornelia, and also for the further sum of $400 in hand paid by the said W. S. M., do grant, etc., unto the said W. S. M., his heirs and assigns forever" the land described. *Held*, that the deed conveyed the land absolutely in fee to the grantee, and no trust can be declared in favor of the wife of W. S. M. or her heirs for one-half of the land.

ACTION, tried before *Adams, J.,* at Fall Term, 1897, of CHATHAM, upon the complaint and answer and agreed facts, a jury trial being waived. The action turned upon the construction of the language of the deed referred to in the opinion. His Honor rendered judgment for the *feme* plaintiff, and defendant appealed.

H. A. London for plaintiff.
R. H. Hayes for defendant.

FAIRCLOTH, C. J. This is an action to have a trust declared in favor of the plaintiff for one-half of a body of land conveyed by deed of Jesse Morley to his son-in-law, W. S. McLean, and the question turns upon the following words in the deed: "That I, Jesse Morley, for and in consideration of the sum of $400, as an advancement to his wife, Polly Cornelia,

(358) and also for the further consideration of the sum of $400 in hand paid by the said William S. McLean, do grant, etc., unto the said William S. McLean, his heirs and assigns forever," the land described.

We have no guide except the deed. In the absence of an express trust we then have to look for the intent of the grantor. The books show many expressions from which the intent is gathered, and many others which fail to satisfy the courts that a trust was intended.

Trusts have been declared when the estate is purchased in the name of one person and the consideration is paid by another; also, where the intention not to benefit the grantee is expressed in the conveyance, as by saying "upon trust."

A familiar case under the first is where the husband buys and takes the title to himself alone, but pays for the land with his wife's money—a trust results in her favor. *Lyon v. Akin,* 78 N. C., 258. It sometimes occurs that the expression supposed to lay the foundation for a trust imposing an obligation merely furnishes the motive which led to an absolute gift or conveyance. And it is probable in some instances that the grantor has no clear idea himself of what he is doing. It is certain, however, that it must appear in some way that he intended to create a trust, otherwise the court cannot declare its existence. Sometimes the donor or grantor may have reasons to convey an absolute estate to the husband and leave the wife to take such incidental benefits as arise from her marital relations with him. Where there is uncertainty the court will not declare a trust, because the intent fails to appear, and the equivocal words will signify a wish only. An able judge has said that the instrument must point out the *objects,* the *property* and the *way* (359) *in which it shall go.*

Moseley v. Moseley, 87 N. C., 69, is in point in the present case. The deed was to "M. and his heirs" in consideration of one dollar, as well as the "natural affection" of the grantor to his daughter, wife of the said M.," and it was held absolute in the grantee and no trust in favor of the wife.

We hold that no trust can be declared in this instance, and that disposes of the case.

Error.

CLARK, J., concurring. The deed is a conveyance in fee simple to the son-in-law. The recital relied on to have it decreed a conveyance in trust for his wife as to one-half is "In consideration of the sum of $400, as an advancement to his wife, Polly Cornelia, and also for the further consideration of $400 in hand paid by said William S. McLean"—here follows the conveyance in fee simple to McLean. From this it will be seen that the intention was to convey the whole tract to him and remit half the purchase money as a gift to the wife. The advancement to her is not "one-half of the within conveyed land" but "$400" of the purchase money, and, as the law stood at that time, money given to the wife became

eo instanti the property of the husband. The deed on its face not only does not warrant the allegation of the trust for the wife as to one-half, but in fact negatives it. The transaction was as if $800 had been paid by McLean, the deed made to him, and then $400 thereof immediately handed back as an advancement to the wife, for the advancement to her is $400—money, not land.

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(360)

L. M. FOUSHEE v. H. E. OWEN.

(Decided 5 April, 1898.)

Attachment—Unliquidated Damages—Affidavit—Special Appearance—Intervenor—Evidence.

1. An action to recover the loss, amounting to a definite sum, which plaintiff sustained by reason of damaged goods purchased by him and resold under the instructions of the defendant and the latter's promise that he would make it good, is an action for liquidated damages, and an action will lie therefor.
2. Under section 347 of The Code and chapter 77, Laws 1893, an action will lie for unliquidated damages arising out of breach of contract.
3. The affidavit on attachment need not state that the defendant has property in the State.
4. A warrant of attachment cannot be discharged upon the special appearance of the defendant when the grounds for his motion involved the finding of facts and such as he has no interest in.
5. Where a defendant in an attachment denied the ownership of the property attached, and, on the trial of an appeal from the refusal of a justice of the peace to dismiss the warrant, asked for the submission of an issue as to whether he was the owner: *Held*, that the submission of the issue was properly refused since the question of ownership could only be raised by an intervenor who might claim the property and have the matter determined in an issue collateral to the main action.
6. The judgment against a nonresident debtor being exhausted by a sale of the property attached, a nonresident defendant in attachment proceedings, who denies ownership of the attached property, cannot be injured by the judgment, and, hence, is not entitled to have an issue submitted as to the title to the property.
7. Letters written by the H. E. Owen Grain Company are not admissible to prove an agreement alleged to have been made by H. E. Owen, in the absence of any testimony to show that H. E. Owen and the H. E. Owen Grain Company were one and the same.

ACTION, tried before *Adams, J.*, and a jury, at Fall Term, 1897, of CHATHAM, on appeal from a judgment of a justice of the peace. The

plaintiff recovered judgment in the Superior Court, and the defendant appealed. The facts are fully stated in the opinion of *Associate Justice Montgomery.* (361)

Simmons, Pou & Ward for plaintiff.
R. H. Hayes for defendant.

MONTGOMERY, J. This action was commenced in a court of a justice of the peace to recover of the defendant H. E. Owens $132.18 which the plaintiff alleged the defendant promised to pay him as damages sustained in the sale and delivery to him by the defendant of a carload of unsound corn, the corn having been bought and paid for as sound. At the time of the order of the publication of the summons, the defendant being a nonresident of the State of North Carolina and a resident of the State of Virginia, the plaintiff sued out before the justice of the peace a warrant of attachment and had the same levied upon a carload of meal at Cumnock, N. C., which the plaintiff alleged was the property of the defendant. At the trial of the case before the justice of the peace the defendant made a special appearance for the purpose of having the attachment discharged on the grounds (1) that the alleged claim of the plaintiff was for unliquidated damages; (2) for that the order of publication was not made or obtained according to law; (3) for that the title to the property at the time of seizure was not in the defendant; and (4) for that the meal in controversy was not shipped by H. E. Owen, the defendant, but by the H. E. Owen Grain Company. The justice of the peace discharged the attachment and gave judgment in favor of the plaintiff for the amount of his claim. Both parties appealed to the Superior Court. At the trial in that court the defendant made a special appearance and renewed his motion to dismiss the (362) attachment on the grounds set out in the justice's court, and upon an affidavit made by W. D. Bright to the effect that the carload of meal seized by the sheriff under the attachment was shipped, not by H. E. Owen, but by the H. E. Owen Grain Company, and that upon information he believed the meal was never the property of H. E. Owen, the defendant, but was the property of the H. E. Owen Grain Company. His Honor overruled the motion, and the defendant excepted. There was no error in this ruling.

In his complaint the plaintiff alleged that he notified the defendant of the damaged condition of the corn when he received it, and that the defendant instructed him to dispose of it at the best possible price, and that he would make good the loss which might occur; that he, the plaintiff, did make sale of the corn at a reduced price, and the loss sustained was $113.82, and that he went to the further expense of $12.80 in reference to the sale of the corn, which expense he was instructed to incur by

the defendant. The action was commenced, therefore, not for unliquidated damages in the ordinary sense of that term, but upon such a contract as admitted of the plaintiff's specifying definitely the sum due to him. But if the demand had been for purely uncertain damages, an attachment could have been issued, as this Court has decided that an attachment now lies, under The Code, 347, and chapter 77, Laws 1893, for unliquidated damages arising out of breach of contract or for injury to real or personal property, but not for any other torts. *Price v. Cox,* 83 N. C., 261, and *Wilson v. Mfg. Co.,* 88 N. C., 5, were decisions
(363) made under section 197, C. C. P.

The second ground of objection to the issuing of the attachment was that the order of publication was not made or obtained according to law. The defendant contended that the affidavit of the plaintiff to procure the attachment should have stated that the defendant had property in the State, and it appearing that the affidavit did not contain that statement, therefore the order of publication was not made or obtained according to law. It is not necessary that the affidavit should contain the statement that the defendant had property, that was held to be necessary in *Windley v. Bradway,* 77 N. C., 333, and in *Spiers v. Halstead,* 71 N. C., 209. That inadvertence was pointed out by the Court in *Branch v. Frank,* 81 N. C., 180, and in *Parks v. Adams,* 113 N. C., 473.

The last two grounds urged for the discharge of the attachment were not such as could be made upon a special appearance. They involved the finding of facts, and such facts as the defendant had no interest in.

The defendant excepted to the refusal of his Honor to submit an issue to the jury as to whether the defendant H. E. Owen was the owner of the meal seized under the attachment. He was not entitled to this issue. It was a question which could be raised only by intervenor who might claim the property as his own, and have it tried in an issue collateral to the main action.

The judgment against a nonresident debtor is exhausted by a sale of the property attached, and has no other legal force. If the property attached, therefore, was not the property of the defendant, the judgment can do him no harm, as it is not a personal judgment. *Pennoyer v. Neff,* 95 U. S., 714; *Winfree v. Bagley,* 102 N. C., 515.

The defendant's counsel argued here certain rights claimed by
(364) the National Bank of Norfolk, Va., and by Bright & Segrove.

Neither in the case on appeal nor from the transcript of the record itself does it appear that in the Superior Court they, or either of them, made up any collateral issue as to the title of the property attached, or appealed from the judgment of that court. It is true that long after the case on appeal was docketed in this Court the clerk of the Superior Court

sent up a statement under his seal (without *certiorari*) to the effect that Bright and Segrove had served a notice of appeal on the plaintiff. There was no appeal perfected, no bond given by Bright & Segrove, and no application to bring up the appeal *in forma pauperis*. The defendant H. E. Owen, only, appealed.

There was an error, however, on the trial in the admission by the court of certain evidence offered by the plaintiff to prove his debt against H. E. Owen. The plaintiff alleged that H. E. Owen sold to him the damaged corn, and that H. E. Owen promised to pay him the damages named in the complaint. The plaintiff on the trial offered letters from the H. E. Owen Grain Company to show that agreement. These letters were received in evidence by his Honor without any attempt on the part of the plaintiff to prove that the H. E. Owen Grain Company was the same as H. E. Owen. There was error in this, because of the variance pointed out, and for which there must be a new trial.

There were so many peculiarities in the constitution of this case for this Court, and the argument of the counsel of defendant here was upon a line so different from the questions involved in the record, that we have thought it best to discuss the whole matter.

New trial.

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(365)

SOPHIA A. HOUSTON v. F. W. THORNTON ET AL.

(Decided 5 April, 1898.)

Action Against Bank Directors—Issues—Bank Directors—Negligence—Liability of Bank Directors for False Statements of Bank's Condition—Purchasers of Stock—Summons—Statute of Limitations.

1. In the trial of an action against the directors of a bank for loss suffered by the plaintiff through the negligence of the defendants in permitting false statements of the bank's condition to be published, by which the plaintiff was deluded as to the value of the stock and misled into purchasing it, it was proper to submit issues as to the negligence and wrongful acts of the defendants instead of issues as to whether there had been fraud and misrepresentations on the part of the defendants.

2. The negligence of the directors of a national bank in permitting to be published false and fraudulent statements of the condition of the bank, whereby a person is misled into buying stock in the bank, is a wrong done to such purchaser for which the directors are liable directly to such purchaser, and is a cause of action which does not pass to the receiver of the bank upon its insolvency.

3. Directors of a national bank who, by their negligence, permit false and fraudulent statements of the bank's condition to be published and wrong-

ful dividends to be declared, are liable to a person injured thereby whether or not they directly participated in the fraud by signing the statements or otherwise.

4. In the trial of an action against the directors of a bank based upon their negligence in permitting false and fraudulent statements of the bank's condition to be published and dividends to be declared, when the earnings did not justify them, the plaintiff's right to recover should not be restricted to one instance of negligence when there are many others in evidence.

5. The fact that bank directors, who left the management of the bank to dishonest and careless officers by whom the bank was wrecked, resided away from the town where the bank was located, and by private arrangement with the other directors and officers were not required to give personal attention to the affairs of the bank, will not relieve them from liability to persons injured by their negligence, or justify the assumption that they could not give proper attention to their duties and ascertain the falsity of statements published concerning the condition of the bank.

6. A summons is issued when it is put out from the clerk's office under his direction or authority and given or sent to an officer for the purpose of being served.

7. The presumption that a summons was issued on the day it bears date is not rebutted by the fact that the sheriff's endorsement of its receipt by him is of a later date.

8. Where the receiver of an insolvent national bank recovered judgment against a stockholder for an assessment under the individual liability imposed by the National Banking Act, such stockholder's right of action against directors, through whose negligence the stockholder was injured in purchasing and holding the stock, did not accrue until payment of the judgment.

DOUGLAS, J., dissents.

(366) ACTION, tried before *Adams, J.*, and a jury, at Fall Term, 1897, of CHATHAM. The facts appear in the opinion. There was a verdict for the plaintiff and from the judgment thereon the defendant appealed. The plaintiff also appealed from the refusal of judgment in her favor for the amount of a judgment which had been taken against her by the Receiver of the People's National Bank of Fayetteville for an assessment under the personal liability attaching to her as a stockholder, which judgment she had not paid.

H. A. London for plaintiff.
Womack & Hayes for Scott, defendant.

CLARK, J. The issues tendered by the defendant presented the question whether there had been fraud and misrepresentation on the part of the defendants. Those settled by the Court at the close of the plaintiff's evidence presented the inquiry whether there had been
(367) negligence and wrongful acts by which the plaintiff had been damaged. The latter were proper upon the pleadings.

The plaintiff complained that the board of directors of The People's National Bank, among whom were the defendants, in February, 1890, and at sundry other times, before and after, caused to be published reports of the status of the bank which showed it to be amply solvent, whereby the plaintiff was induced in April, 1890, to purchase eleven shares of the capital stock of said bank, whereas at the times aforesaid the bank was hopelessly insolvent, and had been so for at least five years; that the said directors either knew this to be the true condition of the bank or with proper care could have known it. The complaint is full and contains a detailed statement of the acts of negligence alleged against the defendant. The bank was declared insolvent on 31 December, 1890, and the receiver took charge in February, 1891. The plaintiff not only lost the whole sum ($1,100) invested in the purchase of said eleven shares of the stock of the bank, but under the liability clause of the National Banking Act has been assessed 50 per cent on her stock and a judgment has been obtained against her by the receiver for $550 on that account in the Federal Court. The published statement of the bank, 2 January 1890, showed that the capital stock was $125,000 the deposits $87,300, the surplus $32,000, and undivided profits $6,795. The former cashier of the bank testified, without contradiction, that this statement was made by the order of the directors; that it was untrue; that there was no surplus, no undivided profits, and that the bank did not even have its capital stock; that, if the directors had examined the papers they would have known the insolvency of the bank; that, at that time, the president (Moore) owed the bank between $100,000 (368) and $120,000; that one of the directors (Thornton) owed the bank $40,000, another director (McNeill) owed it $20,000, and Starr, another director, owed it between $6,000 and $7,000—thus between $166,000 and $187,000 being due the bank from these officials, of whom McNeill was then known to be insolvent; that Moore was also insolvent and failed in November, 1890, and Thornton in the spring of 1891; that the bank never had a finance committee; that, in November, 1889, Moore owed the bank on his unsecured paper $100,000, of which $30,000 had been due three to ten years. It is needless to go through the evidence, which shows the most culpable negligence on the part of the board of directors, for this is sufficiently shown by the above recited facts if nothing further had been proved. At the meeting of the directors on 14 January, 1890, a dividend of 4 per cent out of the profits was declared, all the directors being present, and the defendants voting for the declaration of the same, though this dividend, like all the other semi-annual dividends for the five years previous, was in fact paid out of the deposits and not out of the earnings.

The defendants asked the Court to charge—

1. That upon the facts in evidence the plaintiff cannot recover because of any negligence of the defendants, they being directors of a National Bank in the hands of a receiver, becomes an asset of the bank for which the receiver alone can sue, and the jury will therefore answer the second issue "No." This prayer was properly refused. The wrong complained of is not one towards the company, not any negligence in the duty to guard its interests and to comply with the requirements of the National Banking Act, but a wrong to the plaintiff in per-
(369) mitting a false and fraudulent statement of the condition of the bank to be published, whereby the plaintiff, trusting in the truth thereof the high character of the defendants, was misled into parting with $1,100 for the purchase of eleven shares of the capital stock of the company which at that time was worse than worthless. This is not a cause of action that under any circumstances could have passed to the receiver. 3 Thompson on Crop., sec. 4304, 4132, 4144. If this action had been brought by a depositor, the settled doctrine of the law is that "if, in the pretended performance of duties imposed upon them by law, the directors of a bank used their official station to make false representations which are believed and acted upon by third parties, they are liable to respond for the injury done to the one defrauded thereby, and that the liability provided for in the National Banking Act cannot be deemed to preclude the right to maintain a common law action for deceit for such false and fraudulent representation." *Prescott v. Houghey,* 65 Fed. Rep., 653, 659, which distinguishes *Bailey v. Mosher,* 63 Fed. Rep., 488; *Delano v. Case,* 121 Ill., 247; 3 Thompson Corp. sec. 4304. The allegations and proof as to declaring dividends out of deposits and allowing an official to borrow more than one-tenth of the capital stock are not the basis of this action; if they were, then the receiver should have brought the action; but they are merely evidential to show the negligence whereby the plaintiff, not the bank, was injured and to support her action for the injury to herself.

2. That the plaintiff cannot recover unless the jury shall believe from the evidence that these defendants participated in the fraudulent statement made by other officers of the bank, and unless the plaintiff
(370) has shown such participation the jury will answer the second issue "No." Refused, and the defendants excepted.

There was no error in refusing this prayer. The ground of recovery is not the participation of the defendants in fraud, but that by their gross negligence they permitted the statements to be put forth upon their authority showing the bank to be amply solvent, with large surplus, and the declaration of 4 per cent semiannual dividends out of profits, when there had been no profits, as to all of which the defendants should

have been informed. It was in evidence and not denied that all the directors were present when the dividend of January, 1890, was declared, and Starr alone voted no, as to whom a nonsuit was entered. As was said in *Solomon v. Bates,* 188 N. C., 311, and reaffirmed in same case, 118 N. C., 321, and *Caldwell v. Bates,* 118 N. C., 323, "If false and fraudulent statements of the condition of the corporation are put forth under the authority of the directors, it is not necessary that they should know them to be such; it is their duty to know them to be true, and they are liable for damages sustained by any one dealing with the corporation, relying upon the truth of such reports." 1 Morse on Banking, secs. 132, 137; *Kinkler v. Junica,* 84 Texas, 116. So salutary and just a rule is supported by ample authority elsewhere, and if we are not, it is correct in itself and a just protection to which the public are entitled. It is not necessary, as the defendants asked the court to instruct the jury, that these defendants "participated in the fraudulent statements," but if the statements were given to the public by the authority of the board of directors (which is not controverted) and were in fact false and fraudulent, and the plaintiff, relying thereon (as she had a right to do), was induced to buy stock or had made deposits whereby she (371) suffered injury, all the directors are liable whether they "participated" in the fraud or not. *Arnison v. Smith,* 41 Ch. D. (L. R.), 348; 3 Thompson, *supra,* sec. 4108.

The defendants further asked the court to instruct the jury that if they should believe from the evidence that the directors used reasonable diligence in the management of the affairs of the bank, which is such as prudent men usually exercise in the management of their own affairs of a similar nature, then the plaintiff cannot recover, and the jury will answer the second issue "No." The court gave this prayer with this addition, to which the defendants excepted, to wit: "Unless you should find that the defendants declared or paid a dividend at the January meeting, 1890, out of the capital stock or deposits of the bank, and not out of the earnings, and the plaintiff was induced or misled by such declaration of dividends to purchase stock in the bank, and the defendants could have, by the exercise of ordinary diligence, known that the dividends were paid or declared out of the capital stock or deposits of the bank, and not out of the earnings of the bank, then you should answer the second issue 'Yes.'" The defendants cannot complain of this modification, though the plaintiff had just ground to except (if it had been necessary) that the inquiry was restricted to one instance of negligence when there were so many others in evidence. Indeed, the court might well have told the jury that if they believed the evidnce, the defendants had not "used reasonable diligence in the management of the affairs of the bank."

4. The defendants asked the court to charge that if the jury shall believe that the defendants were selected by the stockholders, knowing that their residence away from the town of Fayetteville, at which (372) place the bank was located, rendered it impracticable for them to give close personal attention to the affairs of the bank, and that by the action of the directors and stockholders it was made the duty of the other directors to look into the daily affairs of the bank, and that these directors were to give only a general and supervisory control over the affairs of the bank; that it was not their duty to pass upon the paper discounted by the bank, but that such duty was delegated by the directors to a committee of directors known as "the discount committee," and that such delegation of powers is usual in national banks; that these directors performed all the duties assigned to them by the custom of the bank, which was well known to the stockholders; that the frauds of the officers of the bank could not have been discovered by the directors in the regular performance of their duties and without a close and critical examination into the bookkeeping of the bank and the solvency of the papers held, then the plaintiff is not entitled to recover, and the jury will answer the second issue "No." The defendants' exception to the refusal of this prayer cannot be sustained. The assumption of fact therein that the payment of semiannual dividends out of the deposits for five years and the discovery of the fact that nearly the entire capital and deposits were loaned to the president and three directors, and most of it without security, could not have been ascertained by the defendants in the proper discharge of their duty, is not sustained by the evidence. It is also in evidence that one of these borrowing officials was insolvent and two others were men of bad character, which devolved upon the defendants the duty of being more than usually diligent. On the contrary, the evidence shows them to have left the management (373) entirely to those officials. But, aside from this, there is no principle of law or morals that will permit the selection of nonresident directors of good characters, whose names shall be a pledge of honest management upon which the public shall make deposits and buy the stock of the bank, and then when the crash comes will excuse such directors from liability because, being nonresidents, they could not give proper attention to their duties, and by private arrangement it was agreed that they should not be required to do so. Such arrangement, if it had been shown, would not have released them from their duties as prescribed by act of Congress, nor from their common-law liability for negligence or fraud. There is no allegation or proof that these defendants were guilty of fraud or had actual knowledge of the frauds, or that they knew the representations in the published reports were fraudulent. On the contrary, the basis of the action is that these defendants were men of high

character, who would not participate in or connive at fraud, and for that very reason, when the reports of the bank were published, the plaintiff, relying on the well known character of these defendants, trusted implicitly to the correctness of such statements and was misled, to her damage $1,100, into buying the eleven shares of the capital stock of the bank, which were wholly worthless, and entailed liability on her besides. It is no answer to this to say that the defendants themselves were also misled as to the condition of the bank, and suffered loss. They had opportunity to know the true condition of the bank. They ought to have known. It was their duty to know. They should not have permitted statements to go out upon their authority as to the condition of the bank which were untrue, and relying upon which the plaintiff was led into loss. It may be a hardship upon these defendants, but it (374) would be a greater hardship upon the public and destructive of confidence in banks if directors of good character, whose names are useful in drawing patronage, are absolved from responsibility for fraudulent representations whereby the public are duped and defrauded, because such directors had no actual knowledge of the frauds and did not participate in them. "Ignorance will not excuse when they had means of knowledge." *Shea v. Mabry,* 1 Lea (Tenn.), 319, 342; *Seale v. Baker,* 70 Texas, 283; *United Society v. Underwood,* 9 Bush (Ky.), 609. Lord Erskine declared on a memorable occasion that "Morality may come in the cold abstract from the pulpit, but men smart practically under its lessons when courts and juries are the teachers." The courts hold that "culpable negligence [in such matters] is in law equivalent to fraud" (*Shea v. Mabry, supra*), and the surest guarantee against it is the verdict of a jury for the damages inflicted.

There are several other exceptions for refusals to give prayers asked and to the instructions given, but what has been said is sufficient to dispose of them.

The only remaining exception is that as to the fourth issue the court charged: "The action was commenced by issuing the summons, and the summons was issued when it was put out from the clerk's office, by direction and under sanction and authority of the clerk, and given to the officer for the purpose of being served. If it was sent out or handed to some one else to give to the officer for the purpose of being served, this would be an issuing of the summons, but it must leave the office for this purpose by the direction or under the sanction and authority of the clerk." This charge is correct and was taken from *Webster v. Shrape,* 116 N. C., 466. The presumption that it was issued (375) when it bears date is not rebutted by the bare fact of the date of the sheriff's endorsement of its receipt by him. *Currie v. Hawkins,* 118 N. C., 593.

The court further instructed the jury, properly, that the statute of limitations having been pleaded, the burden was upon the plaintiff to show that the action was commenced three years from 31 December, 1890, which was admitted to be the date when the statute began to run. *Parker v. Harden,* 121 N. C., 57; *House v. Arnold, ante,* 220. The admission settles the date, but it is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, 31 December, 1890, and did not in truth begin to run upon the actual discovery, later on (after the investigations of the receiver) that the bank was insolvent in the spring of 1890 at the time the incorrect statements were put forth. Code, sec. 155 (9).

Affirmed.

DOUGLAS, J., dissents.

PLAINTIFF'S APPEAL.

CLARK, J. The facts are set out in the defendants' appeal. The plaintiff alleged that in addition to the ground of damage upon which she recovered a verdict, she had been assessed 50 per cent upon her stock by virtue of the liability clause in the National Banking Act, and she introduced a properly certified transcript of a judgment obtained by the receiver of the bank upon such assessment in the United States Circuit Court for $550. It was in evidence that the plaintiff had not paid anything on said judgment. She offered to prove that she was solvent and able to pay said judgments and is still liable therefor. This was
(376) properly excluded by the court. Not till the plaintiff has paid the judgment will her cause of action on that account accrue, and the statute of limitations in favor of the defendants will begin to run from such payment.

No error.

Cited: Coble v. Beall, 130 N. C., 537; *McClure v. Fellows,* 131 N. C., 515; *Hooker v. Worthington,* 134 N. C., 285; *Smith v. Lumber Co.,* 142 N. C., 31; *Grocery Co. v. Bag Co., ibid.,* 181.

W. E. WORTH, RECEIVER OF THE GREENSBORO COAL AND MINING COMPANY, v. E. P. WHARTON.

(Decided 22 March, 1898.)

Action to Recover Unpaid Subscriptions to Stock—Stockholder Delinquent—Complaint—Demurrer—Insolvency of Corporation—Demand.

1. Where, in an action by the receiver of an insolvent corporation to recover from a delinquent subscriber to its capital stock the amount of his unpaid subscription, the complaint alleged that the defendant subscribed for fifteen shares of the stock of the par value of $1,500, of which he had paid $500 and still owed $1,000 thereon; that the corporation had been declared insolvent and that it would take the whole of the $1,000 due by the defendant to pay creditors of the corporation; that the plaintiff had been duly appointed receiver of the corporation and that defendant refused to pay his said indebtedness: *Held*, that the complaint was good on demurrer.
2. Where a complaint in an action by the receiver of an insolvent corporation against a delinquent subscriber to its capital stock contained an allegation that it would take the whole of defendant's unpaid subscription to pay the debts of the concern, it will be presumed, on demurrer to the complaint, that before the action was brought the court appointing the receiver had ascertained that the whole of the amount due by the defendant would be necessary to pay the indebtedness of the corporation.
3. A complaint which alleges that the defendant refuses to pay the debt sued on, without alleging a demand, is good on demurrer.

ACTION, heard on complaint and demurrer, before *Adams, J.*, (377) at January Term, 1898, of NEW HANOVER. The complaint and demurrer are set out in the complaint. His Honor overruled the demurrer, and defendant appealed.

J. D. Bellamy for plaintiff.
George Rountree for defendant.

FURCHES, J. This case comes to this Court upon complaint and demurrer without any statement of case on appeal, and but for the statements of counsel on the argument we would have a very imperfect conception of the case. The complaint is as follows:

"Plaintiff, complaining of defendant, alleges:

"First. That the plaintiff was duly appointed by an order of the judge of the Superior Court of New Hanover County receiver of the Greensboro Coal and Mining Company on the .... day of ....., 1896, in an action therein pending, brought by the Waterbury Rubber Company, who sued in behalf of themselves and all other creditors of the Greensboro Coal and Mining Company.

"Second. That the said Greensboro Coal and Mining Company is and was declared by said court to be utterly insolvent and owes a large amount of money to various and sundry creditors.

"Third. That the defendant E. P. Wharton was a subscriber to 15 shares of the capital stock of said Greensboro Coal and Mining Company, of the par value of $100, and has only paid in on said stock the sum of $500, and that there is due and payable on the same the sum of $1,000, all of which is necessary to liquidate the said indebtedness of the said Greensboro Coal and Mining Company, and which the said defendant refuses to pay. Wherefore, the plaintiff prays judgment against the defendant for the sum of $1,000, with interest from
(378) the ....day of ....., 1896, together with costs of action."

To this complaint the defendant filed the following demurrer:

"The defendant demurs to the complaint herein because it does not state a cause of action against the defendant, in that—

"First. That neither the corporation nor any court of equity has made any call for a balance of unpaid subscription, and there is no debt due from the defendant to the plaintiff.

"Second. That it does not appear from the complaint that any court has previously determined the amount of the corporate indebtedness and fixed the liability of each share of stock.

"Third. For that the action ought to have been by a bill in equity in which all questions involved could be settled in the same action."

It will be observed that the complaint does not state what sort of a company the Greensboro Coal and Mining Company was, whether a corporation or a joint-stock partnership. It is true the demurrer twice speaks of it as a corporation. But it is not the province of a demurrer to allege facts but to admit the facts alleged. Then we will have to take it to be true that there was a "company" that issued the shares of stock; that the defendant subscribed for 15 shares of the par value of $1,500; that he has only paid $500 thereon, and that he is still owing $1,000 to said company on said 15 shares of stock. That said "company" has become insolvent and has been so declared by a court of competent jurisdiction; that it will take the whole of the $1,000 due by defendant to pay the creditors; that the plaintiff has been duly appointed receiver
(379) of said "company," and that the defendant refuses to pay said indebtedness.

The defendant, admitting all this, says that the plaintiff cannot succeed in this action; and the defendant contends that it was necessary before bringing the action that the court should have ascertained what part of this debt was necessary to pay the indebtedness of the "company."

Suppose this to be the law, we must presume this has been done, as the plaintiff says it will take it all to do so, and the defendant admits the allegation to be true.

The defendant further contends that the plaintiff cannot maintain this action because he has made no demand for payment before bringing the action. Suppose we admit this is the law, the plaintiff alleges that the defendant refuses to pay this claim sued on, and the defendant admits that this allegation is true. How then can it be true that he refused to pay if he had not been asked to pay?

There is some diversity of opinion expressed in the books as to notice, but Smith on Receivers, page 404, note 3, citing several authorities, holds that such an action may be maintained at law without ascertaining the amount due and giving the notice, as contended for by the defendant. But as it appears from the allegations of the complaint and the admissions of the defendant that this has all been done, it is not necessary for us to decide that question, and we do not do so. The plaintiff having been appointed receiver, the statute authorized him to sue—Code, sec. 668.

This is what would have been an action at law before the joinder of jurisdiction under the Constitution of 1868 and the Code of Civil Procedure, in which the plaintiff would have been entitled to judgment. And the defendant, if he had equitable grounds of defense, would have been compelled to file a bill in equity in which he would have (380) to allege his equities. But that is not so now, as he may set up his equities in his answer, and if necessary to a full, fair, and equitable settlement of the matter, may have such other parties made as are necessary to that end. And while we are compelled to overrule the defendant's demurrer, this is not deciding the case against him.

It was alleged by counsel for the defendant that it would not take the whole of the $1,000 to pay the defendant's *pro rata* of the "company's" indebtedness; that there was only a deficiency of about $6,000, while the unpaid stock of the concern amounted to many times that amount; that while the defendant was behind in the payment for his stock, the plaintiff himself was behind in the payment of his stock to a much greater amount, and this suit was brought against him alone to unfairly oppress him. Of course we cannot allow such statements as these to influence our opinion in this case; but if they are true they may all be set up by the defendant, and must be adjusted and determined before he can be brought to judgment. *Harmon v. Hunt,* 116 N. C., 678.

Affirmed.

Cited: Cooper v. Security Co., post, 464.

(381)

W. E. WORTH & CO. v. T. J. FERGUSON ET AL.

(Decided 29 March, 1898.)

Trial—Evidence—Demurrer Ore Tenus—Hinsdale's Act.

1. Under chapter 109, Acts of 1897, the defendant is not put to his election to move for a judgment of nonsuit or proceed with his evidence under the act unless the plaintiff has produced his evidence and rested his case. If the motion for judgment is therein refused he can note his exception and proceed as if he had made no motion.

2. Under chapter 109, Acts of 1897, the fact that defendant had, on a trial of an action, been allowed to introduce certain written evidence during the hearing of the plaintiff's evidence and then demurred *ore tenus*, did not debar him from introducing further evidence, and it was error to give judgment for the plaintiff in such case.

ACTION, tried before *Adams, J.*, and a jury, at January Term, 1898, of NEW HANOVER, on appeal from a judgment of a justice of the peace. At the conclusion of plaintiffs' evidence the defendants (who had been allowed to introduce some testimony during the hearing of the plaintiffs' testimony), stated that they demurred to the evidence under the act of 1897. The plaintiffs contended that defendants were not entitled to the benefit of the act of 1897. His Honor, after hearing argument, ruled that the plaintiff had made out a *prima facie* case, declined to allow the defendants to introduce other evidence, and gave judgment for the plaintiff. Defendants appealed.

Ricaud & Bryan for plaintiff.
John D. Bellamy for defendants.

FAIRCLOTH, C. J. The goods were sold and delivered to Ferguson, and the plaintiff seeks to charge the defendant Shutt as a silent part-
(382) ner. The defendant Ferguson was a witness for the plaintiff, and testified that he and Shutt had two written agreements, but the entire agreement was not embraced in the writings. The defendant objected to the witness' speaking of the agreement unless the writings were produced. The objection was overruled, and the witness proceeded to give the agreement. The defendant exhibited the two writings to the witness, and he recognized and acknowledged them as the written parts of the agreement. The defendant started to read the writings, and the plaintiff objected unless the defendant put them in evidence, which the defendant did. The plaintiff then examined other witnesses, and rested his case.

The defendant stated to the court that he demurred to the evidence under the act of 1897, chapter 109. The court being of opinion against

the defendant, he then offered to introduce other testimony, which was objected to on the ground that the defendant had introduced evidence, to wit, the said two writings, exhibits "A" and "B," and "that the act of 1897 did not cover a demurrer, but a motion for judgment of nonsuit." The defendant was not allowed to put in his evidence, and the plaintiff had judgment, although neither the jury who had been empaneled nor the court had found any facts. The defendant Shutt excepted and appealed.

The plaintiffs did not object to the defendant's reading the exhibits provided he put them in as his evidence, indicating a move on the board for the *last speech.* It is the usual course in trials for the defendant to introduce his evidence when the plaintiff has closed, but the trial judge may depart from that course when he deems it expedient and proper to do so without prejudice to any rights. *Olive v. Olive,* 95 N. C., 485. Whatever may occur while the plaintiff is developing his (383) case, the defendant is not put to his election to move for a judgment of nonsuit or proceed with his evidence under said act, unless the plaintiff has produced his evidence and "rested his case." Then, if his motion is refused, he notes his exception and proceeds as if he had made no motion.

The plaintiff's position seems to be that the defendant could not demur *ore tenus* because he had introduced evidence, and then asked for and obtained a judgment because the defendant had demurred, admitting that the plaintiffs' evidence was true.

With this conclusion there is nothing more before this Court, as no trial has taken place.

Reversed.

CITY OF WILMINGTON v. M. CRONLY ET AL.

DEFENDANT'S APPEAL.

(Decided 26 April, 1898.)

Action to Recover Delinquent Taxes—Delinquent Taxes—Constitutional Law—Limitations—Sales for Taxes Inoperative.

1. It is competent for the General Assembly to provide for the collection of arrearages of taxes due for past years when ascertained in the mode prescribed by law.

2. Neither the three nor the ten years statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides.

3. Attempted sales of property for taxes, when no money passed and the property afterwards remained in the use and occupancy of the taxpayer, are inoperative and void.

(384) ACTION, brought by plaintiff on 28 August, 1896, under an act of the General Assembly of North Carolina, chapter 182, Laws 1895, for delinquent taxes for the years 1875, 1876, 1877, 1881, 1885, 1886, 1891, and 1892, and to subject the land of the defendants for sale to satisfy said taxes, tried before *McIver, J.*, and a jury, at January Term, 1897, of NEW HANOVER.

It was admitted that the taxes were properly assessed, and that each tax became due, payable, and enforceable on the 31st day of December of each current year.

It is admitted that the property, against which the taxes were levied, was sold by the city for all the years for which the taxes are demanded in the complaint, and bid in by plaintiff for amount of costs and tax for each year, and that Margaret Cronly has listed the property for each year since 1876, and paid the taxes assessed thereupon for the years since 1892, and has been in actual possession of the property. It was further admitted, by both sides, that the sales by the city were void.

The defendant, in answer, plead the ten years statute of limitations, and also plead the three years statute of limitations.

The defendant offered in evidence Laws 1858-9, ch. 198, ratified 16 February, 1859, entitled "An act concerning the town of Wilmington," which defendant contended was in force, and that no sales of land could be made for taxes after three years.

His Honor charged the jury that all of said taxes which were due and owing ten years or over were barred by the statute of limitations, but that all such taxes which were due and owing more than three
(385) years were not barred by the statute of limitations.

The jury returned a verdict for plaintiff for $16, with interest at 6 per cent from 31 December, 1886; for $112, with interest at 6 per cent from 31 December, 1891; and $112, with interest at 6 per cent from 31 December, 1892.

Defendant moved for a new trial on account of the error in the judge's charging that the taxes which were due and owing three years and over were not barred. His Honor refused the motion and gave judgment for the plaintiff, and defendants appealed.

George Rountree, Herbert McClammy, and Ricaud & Bryan for plaintiff.

T. W. Strange and J. D. Bellamy for defendants (appellants).

CLARK, J. This action is brought by plaintiff under authority conferred by chapter 182, Laws 1895, to recover arrearages of taxes due

by defendant on real estate for the years 1875, 1876, 1877, 1878, 1881, 1882, 1885, 1886, 1891, and 1892, the taxes having been paid thereon in the period from 1875 to 1895 only in the years not above enumerated, and to enforce the lien conferred by said statute for the collection of such delinquent taxes. The right of taxation is the highest and most essential power of government (*R. R. v. Alsbrook,* 110 N. C., 137), and is necessary to its existence. All who are liable to the payment of taxes should pay their legal share. Those who fail to do so simply devolve its payment upon others, for, taxes being essential to the existence of government, if any do not pay, others have to pay for them. It justly follows that if taxes are not paid within the statutory (386) time, the Legislature can authorize the collection of such arrearages notwithstanding. The defendant's appeal presents only two questions:

1. Did the General Assembly have power to pass the act of 1895 empowering the State, county, and city to collect arrearages of taxes. It is well settled that it has. In *R. R. v. Commissioners of Alamance,* 82 N. C., 259, *Smith, C. J.,* says: "If a definite unpaid tax, collectable within less than two years after it is levied, may be enforced by legislative permission years afterwards for the benefit of the collector and his sureties, it would seem that there could be no legal impediment to the State's compelling the payment of its own just demands against the delinquent taxpayer when they are ascertained in the mode prescribed by law." And, further, "The retrospective features of the act are not fatal to its validity. . . . No vested rights are involved. No wrong is done by the means employed to correct a common error and prevent an unjust and unintended exemption." This is cited with approval and followed in *Jones v. Arrington,* 91 N. C., 125 (which also cites with approval *Morton v. Ashebee,* 46 N. C., 312, which is to same effect, and overrules *Taylor v. Allen,* 67 N. C., 346), and says the matter has been "settled by adjudication and practice for too long a period for the court now to review it and disturb the rulings." This case has since been cited and approved in *Jones v. Arrington,* 94 N. C., 541; *Wooten v. Sugg,* 114 N. C., 253; *Cowgill v. Long,* 15 Ill., 202; *Tallman v. Jonesville,* same purport, 2 Dillon Mun. Corp., sec. 751 (4th Ed.); Cooley Taxation, 356 (2d Ed.); *Fairfield v. People,* 94 Ill., 253; *Cowgill v. Long,* 15 Ill., 202; *Tallman v. Jonesville,* 17 Wis., 71; *Cross v. Milwaukee,* 19 Wis., 509, and many similar decisions in other States. The ruling (387) in *Johnson v. Royster,* 88 N. C., 194, is based upon the language and scope of the statute in that case, and is not a denial of the power of the Legislature. Indeed, that case quotes with approval *R. R. v. Comrs., supra.*

To prevent evasions in the discharge of the duty of paying taxes, the General Assembly adopted The Code, sec. 3679, as the standing policy of the State, which contains a provision that if any real estate has been or shall hereafter be omitted from the tax list, the county commissioners shall enter it on the tax list and "add to the taxes of the current year the simple taxes of *each and every preceding year* in which such land or town lot shall have escaped taxation, with 25 per centum in addition thereto as far back as the said lands have escaped taxation." This act has been reënacted in each revenue act since, till 1897, when a limitation of five years was added in cases where the property had not been assessed. As authority for the provision of The Code, the Code Commissioners append as reference the case of *R. R. v. Commissioners of Alamance, supra.*.

2. The other exception is that the court did not hold that arrearages of taxes were protected by the three years statute of limitations, Code, sec. 155 (2). But, as was held in *Davie v. Blackburn, supra, Montgomery, J.*, a tax, though in one sense a debt, is something more, and is not liable to the incidents of debts between individuals. It needs no citation of authority to show that statutes of limitation never apply to the sovereign unless expressly named therein—*nullum tempus occurrit regi*—and the act in question (Acts 1895, ch. 182), authorizing the State, county, and city to recover these delinquent taxes contains no
(388) limitation, and neither the ten years nor the three years statute applies. *Jones v. Arrington,* 94 N. C., 541, 544.

As to some attempted sales of this property for taxes heretofore, the record states "it is admitted by both parties that such sales are void." No money was received from such sales, and the property has remained all the time in the use and occupancy of the defendant. Such sales being void are, of course, of no effect. *Crews v. Bank,* 77 N. C., 110, citing *Halyburton v. Greenlee,* 72 N. C., 316, and distinguishing *Wall v. Fairley,* 77 N. C., 105. Judgment having been rendered as to all the taxes covered by the defendant's appeal before the repealing act of 1897, the defendant concedes that it has no effect as to this appeal.

No error.

Cited: Wilmington v. Stolter, post, 396; *Wilmington v. McDonald,* 133 N. C., 550; *Wolfenden v. Comrs.,* 152 N. C., 96; *Marsh v. Early,* 169 N. C., 468; *Wilmington v. Moore,* 170 N. C., 53; *Threadgill v. Wadesboro, ib.,* 643.

CITY OF WILMINGTON v. M. CRONLY ET AL.

PLAINTIFF'S APPEAL.

(Decided 26 April, 1898.)

Action to Recover Delinquent Taxes—Delinquent Taxes—Statute of Limitations—Interest—Repeal of Statute.

1. No statute of limitations runs against the sovereign unless it is expressly so provided therein; hence, where an act authorizing the collection of arrearages of taxes for past years does not prescribe any limitation, the ten years statute of limitations does not apply, and the unpaid taxes for any year can be recovered.

2. Under chapter 182, Acts of 1895, authorizing the collection of delinquent taxes, interest, and penalties, no rate of interest being fixed therein, only 6 per cent interest per annum can be recovered.

3. An action pending to recover arrearages of taxes, brought under chapter 182, Acts of 1895, authorizing the collection of unpaid taxes for past years, is not affected by the repeal of such statute, since section 3764 of The Code provides that the repeal of a statute shall not affect any action brought before such repeal for any forfeiture incurred or for the recovery of any rights accruing under such statute.

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

ACTION to recover delinquent taxes due to the city of Wilming- (389) ton, instituted 28 August, 1896, and tried before *McIver, J.*, and a jury, at January Term, 1897, of NEW HANOVER. The facts are stated in the report of the defendant's appeal, *ante,* page 383. On the trial, his Honor instructed the jury that the plaintiff could not recover for taxes due more than ten years prior to the bringing of the action, or a greater rate of interest on the unpaid taxes than 6 per cent per annum. To such instructions the plaintiff excepted and appealed from the judgment rendered.

George Rountree, Herbert McClammy and Ricaud & Bryan for plaintiff.

Thomas W. Strange and J. D. Bellamy for defendant.

CLARK, J. The facts are stated in the opinion in the defendant's appeal in this case. Only two exceptions are presented in this appeal:

1. The Court refused to permit the collection of unpaid taxes for any year more than ten years before the bringing of this action. This was error, as stated in the opinion in the defendant's appeal. *Jones v. Arrington,* 94 N. C., 541. No statute of limitations runs against the

sovereign unless it is expressly named therein. This is im-
(390) memorial law, based on reasons of public policy, which has been observed by all governments.

2. The second exception is that the Court did not allow 10 per cent interest, which was allowed the city on delinquent taxes by the act of 1859, nor 8 per cent as authorized by the act of 1876-7, but those statutes only allowed collection of arrearages for three years, and besides they have been abrogated by the subsequent charter of the city. The present statute is not a re-enactment of that clause of the charter of 1859, nor of that clause of the act of 1876-7, nor is it a mere removal of the statute of limitations from the right given by those repealed statutes, but it is an independent statute, in the exercise of the sovereign power, authorizing in the mode therein pointed out the collection, by the State, county and city, of the public dues of those who have evaded payment thereof. Such power is inherent, is just, and its exercise is authorized by a long series of statutes and decisions, as shown in the opinion in the defendant's appeal herein.

The right to collect these arrearages of taxes exists solely by virtue of the act of 1895, the former act having been repealed, besides the right therein given has expired by its terms, and the measure of such collection, prescribed by the act of 1895, is the amount of "delinquent taxes, interest and penalties." The word "interest," standing alone in the act without naming the rate, means 6 per cent, and his Honor committed no error in thus restricting the recovery.

The defendant moved in this Court, for the first time, to dismiss the plaintiff's appeal, because (unlike the taxes covered by defendant's appeal) no judgment had been obtained and the statute had been repealed, since the trial, by ch. 517, Laws 1897, ratified on 9 March, 1897. But the Code, sec. 3764, provides "the repeal of a statute shall not affect any action brought before the repeal for any forfeiture incurred or for the recovery of any rights accruing under such statute."
(391) Here, the action, having been brought before the repealing statute was enacted, is plainly not affected by it. If the Legislature had meant otherwise, it would have inserted, as it always does when such is the intent, the words "and this shall apply to pending suits." Not having done so, this action falls under the protection of the general law that a repealing statute does not affect suits already brought. In *Wikel v. Commissioners,* 120 N. C., 451, the plaintiff had no accrued interest except as to costs, and it was held that he could not be deprived of that by the repealing statute. The defendant argued strenously that the right to collect back taxes accrued under the acts of 1859 and 1876, and that the act of 1895 merely removed the bar of the statute of limitations. If this were true it could not alter the result whether the

action had already been brought on a right accrued under the act of 1895, when the repealing statute was passed independently or was a former right renewed by the act of 1895, or was an independent right conferred by the act of 1895. In fact, however, it is the latter, for as we said in *Jones v. Arrington,* 91 N. C., 125 (at p. 130), an act to collect arrearages of taxes is "not an enactment that attempts to revive a demand that has been barred by the statute of limitations, which would be repugnant to the Constitution of the United States, as was recently declared in *Whitehurst v. Dey,* 90 N. C., 542." The act of 1895 is the act of the sovereign directing the collection of taxes for the years in which the delinquent's property has not paid it quota, as required by law, to the support of the public burdens and providing procedure by which that quota may be ascertained, giving the alleged delinquents a hearing, and providing further that the total amount of the delinquency so ascertained may be declared a lien on the prop- (392) erty which the defendant had at its passage, and that it may be sold as under foreclosure. Thus no question under this statute can arise as to liens for taxes upon property which the delinquent has sold off before the passage of the act.

The same right to collect arrearages of taxes is generally recognized. "Unless there be some constitutional restriction the Legislature may authorize a municipality to levy and collect retrospective taxes, and for this purpose use the assessment roll of a previous year." 2 Dil. Mun. Corp. (4 Ed.), 751. There is no hardship in this proceeding. It is essentially just. It merely compels taxpayers who have evaded their share of the public burdens to fulfill their duty, and to that extent relieves those who have faithfully borne the heat and burdens of the day and will discourage like evasions in the future. The Legislature in repealing the act of 1895 did not think proper to make the repeal apply to "actions already brought," and the courts cannot do it even if there had been any equity in doing so. The only inequality that can be complained of is that the repealing statute protects to that extent the delinquents against whom no action had been instituted. In sustaining the statute of limitations there was

Error.

FAIRCLOTH, C. J., dissenting. Facts: The charter of the city of Wilmington, Private Acts 1858-9, ch. 198, sec. 3, allowing taxes to be laid, provides that "No sale of land for any taxes shall be made sooner than three months after such taxes have been laid or imposed, or later than three years thereafter." The act of 1895, ch. 182, sec. 1, provides, "for the enforcement and collection of all claims in favor of said

(393) State, county and city for delinquent taxes against any person or property, whose names appear delinquent on the tax books or list of said city or county."

An action had been commenced against the defendant under said act for delinquent taxes, and was pending when the act of 1897, ch. 517, repealed said act of 1895, ch. 182, without any limitation or reservation of rights. So, it is this way: The remedy for collecting delinquent taxes was lost by the lapse of time, when the act of 1895 restored the remedy for collecting all delinquent taxes, and before they were collected or any judgment for them had been rendered, the act of 1897 repealed unconditionally the act of 1895.

The Code, sec. 3764, is in these words: "The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of *any rights accruing under said statute.*"

The act of 1895, by its terms, "looked backward" very far, in the language of Edward Bellamy, but assuming that the State in its sovereignty could authorize the collection of delinquent taxes to any period, I assume that the State also could withdraw its authority to collect taxes, which had become uncollectible by lapse of time, provided it did not violate any provision of the organic law or interfere with any vested rights, which had vested in the meantime. Between the acts of 1895 and 1897, I do not see any accrued rights between the plaintiff and defendant. Their relations remained as before. No contract was made, no obligations assumed by defendant, and no consideration was paid by plaintiff for the right to enforce its claim. The plaintiff only acquired the privilege of collecting under the act of 1895, which the Legislature extended to it, which the State could withdraw, as it did by the act of 1897, without infringing on any vested right. The plaintiff had

(394) only the hope of collecting that which it had lost by its own laches in former years, and was trying to do so when the Assembly changed its mind in reference to these back taxes. I do not look into the equity of the matter in such a case. That is the province of the Legislature in enacting and repealing acts in these matters of taxation. I feel bound to confine myself to the will of the Legislature plainly expressed. That body did not undertake to give a new cause of action by the act of 1895. The plaintiff's cause of action was the nonpayment of the taxes found on the tax list, and its remedy was under the act of 1895, until it was repealed by the changed will of the Legislature of 1897.

In *Wilson v. Jenkins*, 72 N. C., 5, *Pearson, C. J.*, in considering the effect of repealing an act whilst an action was pending on the subject, said: "We are unable to see any principle upon which that circumstance can make a difference. He acquired no right of property, nor

did he ever acquire a lien by the pending of his action to any money in the treasury. He had not changed his condition . . . . or surrendered any right. All that he had complained of is that the people have seen proper to amend the Constitution, and in accordance thereto the General Assembly has repealed the act of 1868, under which he had hoped to have his coupon satisfied."

The plaintiff, however, falls back on The Code, sec. 3764, cited above. That refers to any *rights accruing under such statute.* No right accrued under the act of 1895. It was only the remedy, given and taken away before he had acquired any lien on anything. It was a disappointed expectation, taken away by the will of the Legislature. This opinion applies to all the appeals in which no judgment was entered before the repealing act of 1897. (395)

FURCHES, J. I concur in the dissenting opinon.

Cited: Wilmington v. Stolter, post, 396; *Dyer v. Ellington,* 126 N. C., 945; *Grocery Co. v. R. R.,* 136 N. C., 401; *Lumber Co. v. Smith,* 146 N. C., 201; *Williams v. R. R.,* 153 N. C., 365; *Threadgill v. Wadesboro,* 170 N. C., 643.

CITY OF WILMINGTON v. MRS. R. C. STOLTER ET AL.

(Decided 26 April, 1898.)

Action to Recover Delinquent Taxes—Delinquent Taxes—Interest—Repeal of Statute—Counsel.

1. An action pending to recover arrearages of taxes brought under chapter 182, Acts of 1895, authorizing the collection of unpaid taxes for past years, is not affected by the repeal of such statute. (Section 3764 of The Code.) FAIRCLOTH, C. J., and FURCHES, J., dissent.

2. Under chapter 182, Acts of 1895, authorizing the collection of delinquent taxes, interest, and penalties, no rate of interest being fixed therein, only 6 per cent interest per annum can be recovered.

3. Section 2 of chapter 182, Acts of 1895, authorizing the collection of delinquent taxes due to the City of Wilmington provides that the city attorney, together with such other associated counsel as he may select, shall bring the actions. *Held,* that it was proper, on the resignation of the city attorney, for the associated counsel to continue as counsel for the city.

ACTION under chapter 182, Laws 1895, to recover certain back taxes alleged to be due by the defendant R. C. Stolter on certain property in the city of Wilmington for the years 1891-'92-'93, and tried before

Allen, J., at September Term, 1897, of NEW HANOVER, a jury trial being waived. The facts necessary to an understanding of the opinion appear therein. His Honor rendered judgment for the plaintiff and defendants appealed.

George Rountree and Ricaud & Bryan for plaintiffs.
J. D. Bellamy for defendants.

(396) CLARK, J. This action was brought under Laws 1895, chapter 182, authorizing "the collection of arrears of taxes due the city of Wilmington" by the State, county and city, to recover arrearages of taxes due by the defendant for 1891, 1892 and 1893. The summons was issued on 15 December, 1896, but the trial was not had until after the repealing act ratified on 9 March, 1897. For the reasons given in *Wilmington v. Cronly, ante,* 388 (in the opinion in the plaintiff's appeal), the plaintiff's right to collect arrearages of taxes accrued under the act of 1895, and hence this "action brought before repeal" is not affected by the repealing act. Code, section 3764. His Honor, however, erred in allowing 8 per cent interest, for the reasons given in *Cronly's case, supra.* The judgment will be modified by reducing the interest on the recovery to 6 per cent.

Sec. 2, ch. 182, Laws 1895 provides that the city attorney, together with such associate counsel as he may select, shall bring the actions authorized by said chapter for delinquent taxes. This was done, and the associate counsel were recognized by the city authorities. Afterwards, the city attorney resigned. We cannot see upon what ground the defendants can object to the associate counsel continuing as counsel for the city.

Modified and affirmed.

Cited: Wilmington v. Bryan, 141 N. C., 691.

(397)

W. H. WORTH, STATE TREASURER, ET AL. v. THE BANK OF NEW HANOVER ET AL.

(Decided 12 April, 1898.)

Banks—Branch Banks—Principal and Agent—Insolvency of Principal Bank—Assets of Branch Banks—Distribution of Assets.

1. The Bank of N. H., under a provision of its charter authorizing it to establish agencies at such times and places and subject to such rules and regulations as the president and directors might designate and prescribe,

established a branch at W. under the name of "The Bank of N. H. at W.," the directors being elected and the capital supplied by the parent bank. No capital stock was issued by the branch bank, but it received deposits and dealt with the public as "The Bank of N. H. at W.," making semi-annual statements to the parent bank, which included in the statements of its own assets the capital and surplus of the branch bank. Upon an assignment by the parent bank of all its assets, including the assets of the branch bank, for the benefit of creditors, the branch bank also made an assignment for the purpose of protecting the depositors and others dealing directly with it. *Held*, that the relation between the parent bank and the branch was that of principal and agent, and all the assets and indebtedness of the agency were those of the principal, and the depositors and creditors of both must share ratably.

2. The establishment of a branch bank by a bank having the authority under its charter to do so, is not an estoppel upon the latter so as to require it to treat the former as an independent bank, and if such estoppel could arise as between the two it would not affect the creditors of the principal bank, who are entitled to have its property of every description applied ratably to the payment of their claims.

THIS ACTION is a consolidation of two actions, the one brought in NEW HANOVER by Holmes & Watters, in behalf of themselves and all other creditors, against the Bank of New Hanover and Junius Davis, to whom the bank had made a deed of assignment, and the other brought in WAKE by S. McD. Tate, State Treasurer, against the Bank of New Hanover and Junius Davis (who had been appointed (398) receiver in the Holmes & Watters case) and R. T. Bennett, assignee of the Bank of New Hanover at Wadesboro.

George Rountree and E. S. Martin for plaintiffs and Junius (402) *Davis, receiver of defendant Bank.*

Jas. A. Lockhart and R. T. Bennett for W. A. Smith and others, petitioners.

CLARK, J. This case has been argued very ably and elaborately and with great wealth of citation. In deference to counsel, time has been taken to consider the arguments and the opinions cited to sustain them. But in the view we take of the case, the decision of the controversy depends upon a very few simple propositions.

The Bank of New Hanover was chartered by an act of the General Assembly, ratified 12 January, 1872, with the usual powers of a banking corporation, and established its principal place of business at Wilmington. Section 9 of said act provided: "Agencies of the bank may be established at such times and places as the president and directors may designate, and such agencis may be removed at any time and shall be subject to such rules and regulations as may be prescribed by the president and directors of the bank." Agencies under this authority were

established at Goldsboro, Wadesboro and Tarboro, N. C., and Marion, S. C., styled in their reports respectively, "The Bank of New Hanover at Goldsboro" and "The Bank of New Hanover at Wadesboro," etc. Some time since, the agencies at Goldsboro, Tarboro and Marion were discontinued and removed as authorized by said section 9. On 19 June, 1893, the Bank of New Hanover made an assignment of all its property "of every description whatsoever and wheresoever situate, including all that belongs or may belong to its agency or branch bank
(403) at Wadesboro." On the same day the agency or branch bank at Wadesboro made a separate assignment, but without any authority from the bank at Wilmington. The property and deposits at Wadesboro, if appropriated solely to the depositors at that point and other creditors dealing directly with the agency, would be sufficient to satisfy them in full, but if this property is placed with the other assets of the Bank of New Hanover and the depositors and creditors dealing directly with the agency at Wadesboro are to share generally with all the creditors of the Bank of New Hanover, the *pro rata* dividend will be small. Hence, the effort of the Wadesboro depositors and creditors to have the assets at that point declared a trust fund for their benefit, the surplus alone, if any, to go into the assets of the Bank of New Hanover. But it is found as a fact by the referee that "There was no stock issued by the branch bank (as it is called for convenience) and there was no charter therefor distinct from the Bank of New Hanover; that the branch bank derived its authority solely from the provisions of the act chartering the Bank of New Hanover and the action of the directors of the bank, establishing the branch bank, was in pursuance of the powers given by its charter." It necessarily followed that the relation existing between the Bank of New Hanover and the agency at Wadesboro was that of principal and agent, and all the assets of the agency belong to the principal, and all the debts of the agency were debts of the Bank of New Hanover. *Prince v. Oriental Bank,* Eng. L. R., 3 App. Cases, 325; *Garnet v. McKewar,* L. R., 8 Ex., 10; *Irvin v. Bank,* U. C., Q. B., *Webb v. Bank,* 50 N. C., 288. This being so, the rule of
(404) distribution upon the insolvency of a corporation, both under the general law and section 670 of The Code, is that all creditors shall share equally and ratably. No corporation can create a subordinate corporation without express legislative warrant. This is not only an uncontrovertable proposition of law, but the evidence is conclusive that in point of fact the bank did not attempt to create a subordinate corporation at Wadesboro. The Bank at Wilmington sent $25,000 to Wadesboro to start the branch bank business, and by resolution established a local board of three directors to manage it, and these directors, together with all the other officers, were from time to time elected by

the parent bank in Wilmington, to which the officers and directors in immediate charge of the bank at Wadesboro transmitted their reports twice every year. In the published reports of the Bank of New Hanover in Wilmington, the items of capital and surplus funds always included the capital and surplus fund of the Wadesboro Bank, and the dividends were declared upon the total earnings, including those of the branch bank. There could be no charter for a bank at Wadesboro under the general incorporation law, since The Code, section 684, expressly forbids it, and, indeed, there is no evidence of any effort to that end. There could be no estoppel on the Bank of New Hanover requiring it to treat the bank at Wadesboro as an independent bank, since that would be to create a subordinate corporation, which it could not do, and its conduct in electing the officers of the branch at Wadesboro, which besides had no stockholders, and their having to transmit regular statements to the Bank of New Hanover at Wilmington, negative any other view than that the Wadesboro branch was a mere agency. Besides, if there could possibly be an estoppel on the bank from its dealings with the branch bank at Wadesboro, it would not affect the (405) creditors of the Bank of New Hanover, who are the real parties in interest, represented by the receiver, and who are entitled to have "its property of every description, wheresoever found" applied ratably (after discharging expenses and valid liens, if any) to all the creditors thereof, whether living at Wilmington or at Wadesboro, or elsewhere.

After full and careful consideration, each and all of the exceptions to the judgment of the Court below are sustained.

Error.

Cited: Banking Co. v. Tate, ante, 315; *Bank v. Bank,* 127 N. C., 434; *Fisher v. Bank,* 132 N. C., 776.

R. W. HICKS v. J. H. ROYAL.

(Decided 24 May, 1898.)

Appeal—Rule 28—Printing Exhibit—Dismissal of Appeal.

Where an exhibit, made a part of the pleadings and necessary to the understanding of a plea in the action, is not printed as a part of the record on appeal, the appeal will be dismissed under Rule 28.

ACTION tried before *Adams, J.,* at January Term, 1898, of NEW HANOVER. There was a judgment for the defendant and plaintiff appealed. In this Court the defendant (appellee) moved to dismiss under Rule 28.

H. E. Faison and Frank McNeill for plaintiff.
J. L. Stewart, J. D. Kerr and J. D. Bellamy for defendant.

PER CURIAM. An exhibit which is made a part of the pleadings and is material to understanding the plea of "another action pending for the same cause" is not printed. Even under the former rule, the mo-
(406) tion to dismiss would have been allowed. *Fleming v. McPhail,* 121 N. C., 183; *Barnes v. Crawford,* 119 N. C., 127. Much the more so is this true under the present Rule 28 (121 N. C., 695) which, to avoid just such disputes as to the materiality of omitted parts, requires the entire transcript on appeal to be printed.

Appeal dismissed.

ARMOUR PACKING COMPANY v. G. W. WILLIAMS ET AL.

(Decided 24 May, 1898.)

Appeal—Docketing Appeal—Dismissal—Printing Record on Appeal—Practice.

1. Unless appellant dockets his appeal by the beginning of the call of the calendar for the district to which his case belongs, the appellee can move to docket and dismiss; if such motion, however, is not made until after the appellant actually dockets his appeal, at any time during the term, the motion is too late, the appellee's lack of diligence serving to cure the appellant's previous laches.
2. As an appeal docketed after the time required does not stand for argument until the next ensuing term, it is sufficient if the transcript is printed when the case is reached for argument.

ACTION, tried before *Adams, J.,* at January Term, 1898, of NEW HANOVER. From a judgment for the defendant the plaintiff appealed. The appeal was not docketed at 10 o'clock a. m. on Tuesday when the call of the calendar of cases from the Sixth District began, but was docketed at 10:35 a. m. on that day. The appellee thereupon moved to dismiss under Rule 17 for appellant's failure to docket before the Court
(407) began the call of the causes of the district.

T. W. Strange for defendant (appellee).
No counsel contra.

PER CURIAM. The appeal was docketed at 10:35 a. m. on Tuesday of the week to which it belongs. Under the present Rule 5 (121 N. C., 694), the appellee might have moved to docket and dismiss under Rule

17 at the opening of Court on Tuesday, or at any time afterwards during the term, if before the appellant dockets the appeal, but as he did not make that motion till after the appellant had already docketed the appeal, his own lack of diligence cures the appellant's previous laches. *Smith v. Montague,* 121 N. C., 92; *Triplett v. Foster,* 113 N. C., 389. The only difference in the present rule and that under which those cases were decided is that now appeals being required to be docketed at the opening of the Court on Tuesday of the week of the district to which an appeal belongs, the appellee can move earlier to docket and dismiss, but the principle is the same that, if he does not make that motion till after the appellant actually dockets his appeal, the motion to dismiss is too late. The appeal having been docketed after the time required (10 a. m. on Tuesday) does not stand for argument at this term, and the motion to dismiss for failure to print must also be denied. It will be sufficient if the transcript is printed when the case is reached for argument. *Smith v. Montague, supra.*

Motion denied.

Cited: In re Burwell's Will, 123 N. C., 126; *Benedict v. Jones,* 131 N. C., 474; *Curtis v. R. R.,* 137 N. C., 309.

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(408)

ARMOUR PACKING COMPANY v. G. W. WILLIAMS ET AL.

(Decided 24 May, 1898.)

Dismissal of Action—Extension of Time to File Complaint— Discretion of Court—Appeal.

The refusal to allow an extension of time to file a complaint is within the discretion of the trial judge, and his order dismissing the action for failure to file complaint within the time prescribed by law will not be disturbed on appeal.

ACTION, heard before *Adams, J.,* at January Term, 1898, of NEW HANOVER on defendant's motion to dismiss the action for plaintiff's failure to file its complaint within the time prescribed by law. The summons was issued 16 June, 1896, and the complaint was filed 16 September, 1897. His Honor, in the exercise of his discretion, allowed the motion, and plaintiff appealed.

Herbert McClammy for plaintiff.

T. W. Strange and Ricaud & Bryan for defendants.

PER CURIAM. The refusal to extend the time to file the complaint rested in the discretion of the judge. In dismissing the action there is

No error.

(409)

JOHN E. KERR AND WIFE v. R. W. HICKS.

(Decided 22 March, 1898.)

Premature Appeal—Practice.

Where, after the trial of issues submitted upon exceptions to the report of a referee, the cause was recommitted to have the report conformed to the verdict, an appeal from such order was premature. An exception should have been noted which, on appeal from the final judgment, could have been considered.

ACTION, tried before *Allen, J.,* and a jury at Fall Term, 1897, of SAMPSON. A jury trial was had upon certain exceptions to a referee's report, and, after a verdict on the issues, the cause was recommitted to the referee to have the report conformed to the verdict. From the order re-referring the case to the referee the defendant appealed.

J. L. Stewart for plaintiff.
Henry E. Faison and Stevens & Beasly for defendant.

PER CURIAM. This case was referred, and on coming in of the report certain issues were eliminated and submitted to the jury. After the verdict thereon the cause was recommitted to the referee with instructions to revise and conform his report in accordance with the verdict, and also to correct his calculations of interest to the basis of 6 per cent. The defendant appealed. The appeal is premature. The defendant should have caused his exception to be entered, and then appeal from the final judgment. *Wallace v. Douglas,* 105 N. C., 42, in which it is said, quoting *Grant v. Reese,* 90 N. C., 3, "Slight attention to the decisions of the Court would prevent miscarriages like the present and facilitate the administration of justice."

Appeal dismissed.

Cited: S. c., 131 N. C., 91; *S. c.,* 154 N. C., 609.

(410)

W. D. McMILLAN v. H. J. McMILLAN ET AL.

(Decided 29 March, 1898.)

Certiorari—Appeal.

An appellant is entitled to a *certiorari* upon docketing a certificate from the clerk of the Superior Court stating the names of the parties, that a judgment was rendered and an appeal taken, and that the transcript of the record proper was not sent up because the judge had the original papers to settle the case on appeal, such certificate being accompanied by appellant's affidavit negativing laches.

ACTION, tried before *Robinson, J.*, at September Term of PENDER. From a judgment for the plaintiff the defendants appealed, and in this Court moved for a writ of *certiorari* to bring up the record and case on appeal.

Ricaud & Bryan for plaintiff.
John D. Bellamy for defendants (appellants).

PER CURIAM. The appellant dockets a certificate from the clerk stating the names of the parties to the case, and that a judgment and an appeal had been taken therein, and that the transcript of the record proper could not be sent up because the judge had the original papers to settle the "case on appeal," and had not sent them back, nor any "case settled." The appellant files his affidavit negativing laches and averring merits in his appeal. He is entitled to the *certiorari* asked for. Of course, if the original papers were in the clerk's office below, he should have docketed a transcript of the record proper and have moved upon that for a *certiorari* for the case on appeal. *Burrell v. Hughes,* 120 N. C., 277; *Critz v. Sparger,* 121 N. C., 283. The appellant has docketed all he could get, and is in no laches.

Motion allowed.

Cited: Norwood v. Pratt, 124 N. C., 747; *Slocumb v. Construction Co.,* 142 N. C., 350.

(411)

DURHAM FERTILIZER COMPANY v. J. M. MARSHBURN ET AL.

(Decided 22 March, 1898.)

Practice — Appeal — Noting Exceptions — Jurisdiction—Justice of the Peace—Process of Justice of the Peace Against Nonresident Defendants—Judgment.

1. No appeal lies from an order of the Superior Court overruling a motion to dismiss an appeal from a judgment of a justice of the peace. An exception should be noted to the refusal of the motion, which would be considered on an appeal from the final judgment.

2. The question of jurisdiction may be raised at any time and in any court where a case is pending; hence, a motion to dismiss an appeal from a judgment of a justice of the peace, based on a lack of proper service of process, may be made at any time in the Superior Court since it raises a question of jurisdiction.

3. Where a justice of the peace has not obtained jurisdiction of the party by reason of nonservice of process in a matter of which he has exclusive original jurisdiction, the Superior Court cannot on appeal obtain jurisdiction by ordering a summons to issue to bring the party before it.

4. As the officers of one county are not authorized to serve process in another county, the process provided for in section 871 of The Code must be issued or addressed to the officers of the county where it is to be served.

5. A summons improperly issued by a justice of the peace and improperly served does not bring a defendant into court, and a judgment rendered against such defendant is void.

6. A judgment rendered by a justice of the peace against a nonresident defendant, on whom process was not served at least ten days before the return day, is void.

ACTION, tried on appeal from a justice of the peace at December Term, 1897, of DUPLIN, before *Robinson, J.* The facts appear in the opinion. The action was dismissed on motion of the defendants and plaintiff appealed.

(412) *Stevens & Beasley for plaintiff.*
John D. Kerr for defendants.

FURCHES, J. This action was commenced before a Justice of the Peace of Duplin County. A part of the defendants named in the summons lived in Duplin County and a part of them in Sampson County. The summons was directed to "Any constable or other lawful officer of Duplin County." This summons was duly served on the defendants liv-

ing in Duplin, but not on those living in Sampson. Upon the return of the summons, endorsed as above indicated, the case was continued to 24 November, 1894, and an *alias* summons was issued by Woodward, the Justice of the Peace of Duplin, directed as the original was to "any constable or other lawful officer of *Duplin* County." This duplicate was issued on 19 November, and on the 20th, Warren Johnson, a Justice of the Peace of Sampson County, being satisfied that Woodward, who issued the summons, was a Justice of the Peace of Duplin, endorsed it under sec. 872 of The Code, and the Sheriff of Sampson served the same on 23 November and returned it to Woodward in Duplin. The Sampson defendants, by an attorney, appeared before Woodward on the 24th and entered a special appearance, and moved to dismiss as to them. This motion was refused and the Justice proceeded to judgment, and the said defendants appealed to the Superior Court.

In the Superior Court, the said defendants again entered a special appearance and moved to dismiss. This motion was refused, and the Court ordered the Clerk of the Superior Court of Duplin to issue a summons for these defendants to Sampson, which was done and served on said defendants. At the next term these defendants again renewed their motion to dismiss, which was allowed, and the (413) plaintiffs appealed.

It was contended here, in support of the plaintiff's appeal, that the original service was sufficient; if not, the service of the summons ordered by the Court was; and that the defendants were estopped by their motion at the previous term of the Court to dismiss—that it was *res judicata.*

The last position taken by the plaintiff would probably have to be sustained as the defendants seem not to have noted an exception. This was all the defendants could have done, as it was not such a judgment as they could have appealed from, and in this respect differs from *Henry v. Hilliard,* 120 N. C., 479. But it is a jurisdictional question, and may be made at any time and in any court where the case is pending. *Lilly v. Purcell,* 78 N. C., 82.

The action having been commenced before a Justice of the Peace, in a matter in which that court had exclusive original jurisdiction, the Superior Court has no jurisdiction except by appeal. And it then only succeeds to the jurisdiction the Justice of the Peace had. The Superior Court cannot create jurisdiction. Where a defendant named was not before the Justice, the Court cannot by its order and process bring him into the Superior Court. This would be to create original jurisdiction in a matter where the exclusive original jurisdiction was before a Justice of the Peace. It is different in special proceedings com-

menced before the Clerk, as he is considered but the hand of the Court. They are commenced in the Superior Court before the Clerk and are provided for by proper legislation, there being no constitutional provision to prevent such legislation, while the Constitution expressly provides that the Superior Court shall not have such jurisdiction,
(414) except by appeal. It must therefore follow that the order of the Court to the Clerk to issue summons for these defendants was unauthorized, unconstitutional and invalid, being original process. This reasoning does not prevent the Court from issuing process to bring executors, administrators, and the like, into court, where the parties they represent were properly before the Justice's court and the case has come into the Superior Court by appeal.

This leaves the case to depend upon the original summons issued by Woodward, and its service upon the Sampson County defendants and the action of the Justice thereon.

Originally, Justice of the Peace had no authority to issue any process to any other county but his own. And although he has the power to do so now, it is a restricted legislative power. Code, sec. 871. And being a restricted legislative grant of power, when exercised, it must be strictly pursued. This section of The Code provides that "no process shall be issued by any justice of the peace to *any county* other than his *own* . . . . ," but he may issue process to *any county* in which any such non-resident defendant resides. This plainly provides that when the Justice issues process for non-resident defendants, it must be issued—addressed—to the officer of the county where it is to be served. The officers of Sampson are not authorized to serve process issued to the officers of Duplin County. *Davis v. Sanderlin,* 119 N. C., 84. And if this summons was improperly issued and improperly served, it did not bring these defendants into court, and the Justice of the Peace had no jurisdiction over them and no right to go to judgment as against them. *Davis v. Sanderlin, supra.*

(415) Section 873 provides another mode of service by having the certificate of the Clerk and it also provides that the process shall be issued to the officers of the other county, where it is to be served. This goes to sustain the contention of the defendants.

While sections 871, 872 and 873 of The Code provide that Justices of the Peace in certain cases may issue process to other counties than their own, yet section 874 positively forbids any Justice from going to judgment against any non-resident defendant, unless *it shall appear* that process was served upon him at least ten days before the return day of the summons. In this case it plainly appears that it had not been served ten days. The summons was issued on tne 19th, *returnable* on the 24th, *five days after it was issued,* and was served on the 23rd, the

day before the return day, when the Justice proceeded to judgment. Such work as this, in defiance of the law, cannot be sustained. There is no error and the judgment of the court below is

Affirmed.

Cited: Johnson v. Reformers, 135 N. C., 387; *Austin v. Lewis,* 156 N. C., 462; *Bank v. Carlile,* 174 N. C., 625.

(416)

J. A. MATHIS v. BOARD OF COMMISSIONERS OF DUPLIN COUNTY.

(Decided 3 May, 1898.)

Action for Mandamus—Intoxicating Liquors—Liquor License—County Commissioners—Discretion.

Under section 34, chapter 168, Laws 1897, providing that county commissioners "may grant" an order to the sheriff to issue a license to sell liquors to all properly qualified applicants who have complied with the requirements therein mentioned, it is within the discretion of the commissioners to grant such order, and their refusal to do so cannot be reviewed on appeal.

MANDAMUS in DUPLIN, heard before *Adams, J.,* at chambers at Clinton, N. C., in February, 1898.

Stevens & Beasley and Jones & Boykin for plaintiff (appel- (418) *lant).*

Allen & Dortch for defendants.

FAIRCLOTH, C. J. This is an action of *mandamus* to compel the defendants to grant an order to the sheriff to issue a license to the plaintiff to retail liquors in the town of Magnolia, in the county of Duplin. There is a controversy in the record whether the plaintiff had the recommendation of the commissioners of the town as required by the recent law. In order to put this decision on the main question, we will (419) assume that he did.

In *Muller v. Comrs.,* 89 N. C., 171, *Ashe, J.,* collected minutely all the legislation on the subject from 1825 till 1883, showing the fluctuations of the legislative mind during that period. That case arose when the law (Code, sec. 3701) said that county commissioners "shall grant" the order to all properly qualified applicants who had complied with the requirements therein mentioned. The court there held, upon its own view of the law and upon the authority of *Attorney-General v. Justices,* 27 N. C., 315, that the commissioners do not possess the arbitrary power of suppressing retailing *in toto,* nor are they bound to grant license,

although the applicant proves a good moral character. They have a limited legal discretion, and may consider all questions and matters which pertain to the welfare of the community. This Court sustained the refusal of the board to grant the application.

Laws 1897, ch. 168, sec. 34, amends the preceding act by substituting the words "may grant" for "shall grant" when the applicant has complied with the required provisions of the act.

In the agreed case sent to this Court we can see no arbitrary exercise of power, and as no reasons are assigned for the refusal to grant the order we have to assume that the defendants did so in the exercise of their discretion, which is not reviewable by the Court. This they may do under Laws 1897, ch. 168, sec. 34.

Affirmed.

Cited: Barnes v. Comrs., 135 N. C., 45.

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(420)

J. A. HERRING v. R. D. S. DIXON, SHERIFF OF GREENE COUNTY.

(Decided 22 March, 1898.)

Action to Enjoin Collection of Special Taxes—Counties—Public Roads and Bridges — Necessary Expenses — Special Taxes—Constitutional Law—Convicts on Public Roads.

1. The cost of building bridges and constructing public roads is a necessary expense of a county; and, hence, the levy of a special tax for such purpose, under the authority of an act of the General Assembly is constitutional, though not submitted to a vote of the people as required by section 7, Article VII of the Constitution.

2. A levy by county commissioners of a tax for road and bridge purposes under a special legislative act authorizing the same is valid, though, when added to the State and ordinary county levies, the whole exceeds the constitutional limitations for the latter.

3. Under chapter 500, Acts of 1897, requiring the commissioners of certain counties "in their respective joint sessions" to levy a road and bridge tax, the work to be under the control of the "respective boards," and conferring sundry powers on the "respective boards," and giving authority to the board of commissioners of each of the counties to return at will to the old system of working roads, it was *Held*, in an action to restrain the collection of special taxes under such act, that the respective boards were to act, each in and for its own county, the validity of its action not being dependent upon the action in the other two counties.

4. *Semble*, that under legislative authority the boards of commissioners of two or more counties might combine their means and convicts for road build-

ing and improvement, and might, in joint session, levy a common tax for some common benefit, treating the counties affected as a taxing district for that special purpose.

5. Section 5 of chapter 500, Acts of 1897, conferring on the commissioners of certain counties authority to employ on public roads certain classes of convicts is within the legislative power.

INJUNCTION, pending in GREENE, heard before *Allen, J.*, at chambers in Kinston, N. C., on 19 November, 1897.

H. G. Connor and S. G. Mewborn for plaintiff. (421)
Swift Galloway, L. V. Morrill, and MacRae & Day for defendant (appellant).

CLARK, J. This action is brought to enjoin the collection of a special tax levied by the commissioners of Greene Coonty under the authority of chapter 500, Laws 1897, entitled "An act to provide for the working of the public roads of Greene, Wilson, and Wayne counties." Section 1 thereof requires the boards of commissioners of said counties "in their respective joint sessions" to levy each year a special tax of 15 cents on $100 worth of property and 45 cents on the taxable poll, said taxes, "when collected, to be applied to the laying out, discontinuing, establishing, building, constructing, and repairing public roads and public bridges in said counties of Greene, Wilson, and Wayne, under the supervision, control, and management of the said respective boards of commissioners." The plaintiff, suing on behalf of himself and other taxpayers of Greene County, contends that the act is unconstitutional:

1. Because the tax has not been authorized by a majority of (422) the qualified voters of said county. The Constitution, Art. VII, section 7, prohibits any tax to be levied or collected by a county, city, or town "except for the *necessary expenses* thereof unless by a vote of the majority of the qualified voters therein." But building and repairing public bridges and roads have always been held necessary expenses. The court, in construing this section in *Brodnax v. Groom,* 64 N. C., 244, says: "Repairing and building bridges is a part of the necessary expenses of a county as much as keeping the roads in order or making new roads." In *Vaughn v. Comrs.,* 117 N. C., 429, the court says: "The costs of erecting courthouses and jails, like that of building bridges and constructing public roads, is one of the necessary expenses of a county." To same purport are *Satterthwaite v. Comrs.,* 76 N. C., 153; *Evans v. Comrs.,* 89 N. C., 154, and other cases. In *Long v. Comrs.,* 76 N. C., 273, the court enumerates, among the necessary expenses of a county, "repairing county buildings, erecting bridges, building roads, caring for the poor, paying jurors, etc."

There has long been a feeling that the system of working roads entirely by a levy upon labor, without any taxation upon property, was unsatisfactory in its results, and with many there has been a conviction of its unfairness. The present act is, at any rate, an outcome of what is known as the "Public Roads Improvement" movement, which originating, as far as this State is concerned, in a statute somewhat similar to this, enacted for the county of Mecklenburg, has, with more or less modification, been since enacted for a great many other counties; the features common to all being largely the working of the public roads by taxation in lieu of the conscription of labor, and further, the utilization (423) of convicts, who formerly lay idle in jail. Working the roads being a necessary expense, the courts are incompetent, under the authorities, to interfere with the manner and expense of working them, unless the total levy exceeds the constitutional limitation or the equation is not observed. *Williams v. Comrs.*, 119 N. C., 520; *Board of Education v. Comrs.*, 107 N. C., 110; *Jones v. Comrs., ibid.*, 248; *Barksdale v. Comrs.*, 93 N. C., 472; *Cromartie v. Comrs.*, 87 N. C., 134; *Clifton v. Wynne*, 80 N. C., 145; *French v. Comrs.*, 74 N. C., 692; *Trull v. Comrs.*, 72 N. C., 388; *Mauney v. Comrs.*, 71 N. C., 486. In *Vaughn v. Comrs.*, 117 N. C., 429, while it was held that the commissioners could incur a debt for necessary expenses without a vote of the people, it was not held that they could levy a tax in excess of the constitutional limit to pay it without special approval of the Legislature.

2. The plaintiff, however, further contends that the levy is unconstitutional because when this special levy is added to the levy by the State and the ordinary county levy, the total exceeds $2 on the poll and 66⅔ cents on the $100 value of property. This tax, however, is authorized by the Constitution, Art. V, sec. 6, since it has the special approval of the General Assembly and is for a special purpose, that of raising funds by which the county can put the public roads and bridges in better condition than could be done within the constitutional limitation upon taxation. *Broadnax v. Groom, supra; Williams v. Comrs., supra; Evans v. Comrs., supra; Halcombe v. Comrs.*, 89 N. C., 346. Article V, section 6, confers upon the Legislature power to authorize a county by special act and for a special purpose "to exceed double the State tax." (424) As the State tax is 43 cents, this would have empowered the Legislature to authorize the county to go far beyond the point to which this tax reaches, and, as the greater includes the less, authorizes this key which is well within that limit, though exceeding the limitation of 66⅔ cents on the $100, and $2 on the poll.

The decisions may thus be summed up:

(1) For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.

(2) For necessary expenses, the county commissioners may exceed the constitutional limitation by special legislative authority without a vote of the people. Constitution, Art. V, sec. 6.

(3) For other purposes than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority. Constitution, Art. VII, sec. 7.

3. The plaintiff further contends that the act is unconstitutional because it requires the boards of commissioners of the three counties to act together in the matter of roads and bridges. The act requires "the boards of commissioners of Greene, Wilson, and Wayne, in their respective joint sessions," to levy the tax, and the work is to be carried on under the control of "the respective boards," and section 5 confers sundry powers on "the respective boards." Section 7 confers authority upon the board "of each of said counties," and section 10 gives the board of commissioners of each of the counties authority to return at will to the old system of working the public roads. From the above expressions and the general tenor of the act, it is plain that the respective boards were each to act in and for its own county, the validity of its action not being dependent upon the action in the other two counties. (425) The word "joint" is a transparent inadvertence of the draughtsman, who doubtless had in mind the former "joint" session of the magistrates with the county commissioners for the purpose of levying taxes. But if this were not so, we are not prepared to hold that the Legislature might not authorize the boards of commissioners of two or more counties to combine their means and convicts for the purpose of obtaining machinery, and also operating their convicts more economically under one guard and superintendent, and possibly might authorize the three boards in joint session to levy a common tax for some common benefit, treating the counties affected as a taxing district for that special purpose. This arrangement might be useful in some instances, but we do not deem it necessary to pass upon the point. No provision of the Constitution was pointed out which clearly forbids it.

4. We see no force in the objection that section 5 is unconstitutional. It provides that "the said respective boards of commissioners shall have power and authority, under such rules and regulations as they may deem best," to hire or employ convicts on public roads, with provisos that this shall not apply to convicts sentenced for longer than two years, nor to any convict who is physically or mentally incapacitated, nor to any female, nor to any convict who the judge, in his sentence, directs shall not be so employed. The county commissioners had this authority under The Code, sec. 3448 (*S. v. Yandle,* 119 N. C., 874), and the present statute is even more explicit.

The whole matter is not only within the power of the Legislature, but by the above cited and other provisions in this act it has shown great care to prevent abuse.

(426) In granting the injunction there was Error.

Cited: Tate v. Comrs., post, 815; *Comrs. v. Payne,* 123 N. C., 488; *Hutton v. Webb,* 124 N. C., 757; *Smathers v. Comrs.,* 125 N. C., 488; *S. v. Sharp, ibid.,* 633; *Cotton Mills v. Waxhaw,* 130 N. C., 298; *S. v. Young,* 138 N. C., 574; *Crocker v. Moore,* 140 N. C., 432; *McLeod v. Comrs.,* 148 N. C., 85; *R. R. v. Comrs., ibid.,* 237; *R. R. v. Comrs., ibid.,* 251; *Howell v. Howell,* 151 N. C., 579; *Trustees v. Webb,* 155 N. C., 388; *Pritchard v. Comrs.,* 160 N. C., 478; *Hargrave v. Comrs.,* 168 N. C., 627; *Moose v. Comrs.,* 172 N. C., 428, 432, 451.

W. L. CHURCHILL v. TURNAGE & ORMOND.

(Decided 11 May, 1898.)

Action for Accounting and Injunction—Mortgagor and Mortgagee—Usury—Forfeiture of Interest—Time Prices for Goods—Debtor Seeking Equitable Relief—Pending—Evidence.

1. Where a complaint in an action to enjoin the sale of land under mortgage and for accounting, alleged (substantially) that a note and mortgage had no other consideration than the balance due on a prior debt and mortgage of which it was a renewal, and that the difference between the two was usury charged by the mortgagee for indulgence: *Held,* that under The Code the allegations set out with sufficient distinctness the facts which constitute the alleged usury.

2. Where, in an action to enjoin a sale of land under mortgage, the complaint alleged usury in the debt, and the answer admitted that the note and mortgage were in consideration of the balance due on a prior mortgage, but in another paragraph alleged a further consideration of several hundred dollars, the exact amount of which the defendant could not remember, and on the trial it appeared that the new mortgage debt exceeded the old one and accrued interest by several hundred dollars for which no consideration was proved: *Held,* that the difference between the true amount of the old debt and the amount named in the new mortgage was usurious.

3. A "time" price charge of 10 per cent on the cash price for supplies furnished under an agricultural lien, being the usual rate of advance, is not usurious.

4. A debtor, seeking the aid of a court of equity, will have the usurious element eliminated from his debt only upon his paying the principal and legal rate of interest, the only forfeiture enforced against the creditor being the excess of the legal rate.

CLARK, J., dissents *arguendo.*

CHURCHILL *v.* TURNAGE.

ACTION to enjoin a sale under mortgage and for an accounting, (427) usury being alleged, heard before *Allen, J.*, at August Term, 1897, of GREENE, on exceptions to the report of a referee to whom the case had been referred under The Code. The facts sufficiently appear in the opinion. From a judgment overruling the plaintiff's exceptions, the plaintiff appealed.

George M. Lindsay and Shepherd & Busbee for plaintiff.
Swift Galloway, Y. T. Ormond, and J. B. Batchelor for defendants.

MONTGOMERY, J. The plaintiffs executed to the defendants a mortgage upon real estate, on 27 December, 1889, for the amount of $3,671.36, evidenced by three bonds of equal amount, payable on 1 January, 1891, 1892, and 1893, respectively, with interest at the rate of 8 per cent per annum. On 1 January, 1894, the plaintiffs executed another mortgage to the defendant Turnage upon the same land to secure the amount of $3,743.89 evidenced by three bonds of equal amount, payable 1 January, 1895, 1 January, 1896, and 1 January, 1897, with interest at 8 per cent. This action was commenced by the plaintiffs for an accounting, and for an injunction to prevent a sale of the land until the account should be stated between the parties. The complaint is inartistically drawn, and the allegations as to usury against the defendants are not clear what the best practice would suggest; but we think that under The Code they set out with sufficient distinctness the facts which constitute the alleged usury. It is substantially alleged in the complaint that the debt and mortgage of 1 January, 1894, had no other consideration than the debt secured in the mortgage of 1889, less the payments made (428) upon the last-named mortgage; that the mortgage of 1894 was simply a renewal of the mortgage of 1889, and that the difference between the debts mentioned in the two mortgages was usury charged by the defendant Turnage for indulgence. We think that, substantially, the requirements of the law as laid down in *Rountree v. Brinson,* 98 N. C., 107, cited by the counsel for the defendants in their argument here, have been complied with in the complaint as to the manner of statement of facts going to show the alleged usury. The defendants in one section of their answer admitted, out and out, the truth of the plaintiff's allegations that the only consideration of the mortgage of 1894 was the balance due on the mortgage of 1889; but in another section of the answer it was averred that there was a further consideration in the mortgage of 1894 of between $350 and $400, but, in the language of the defendants, "the exact amount the said defendant cannot now remember," which Turnage had advanced and loaned to the plaintiff, and that the same was added to the principal and interest due up to that time on the notes secured by the mortgage of 1889. The referee found as a fact that a

part of the consideration of the debt under the mortgage of 1894 was the balance of the mortgage of 1889, but no where does the referee find *what* the other part of the consideration of the mortgage of 1894 was; indeed, he could not have found any other consideration from the evidence before us. The plaintiff excepted to that finding of the referee and insisted that there was no evidence before the referee upon which he could or ought to have made that finding, and that he ought to have found that there was no other consideration for the debt secured in the mortgage of 1 January, 1894, except the balance due on the mortgage of
(429) 1889; and upon examination of the evidence we are of that opinion. Turnage himself testified that the plaintiff paid him (he averring that he was then the sole owner of the mortgage of 1889), in November or December, 1890, $1,000 on the mortgage of 1889, and $300 on the same in 1891 (in his own words), "might have been a little more or a little less." He seldom seemed to be accurate as to his business transactions with the plaintiff, except, possibly, in those in which it was to his interest to be definite. He testified further that when he took the mortgage of January, 1894, he computed the amount due on the three notes secured in the mortgage of 1889, and took the three notes secured in the mortgage of 1 January, 1894. He testified to nothing about the $350 or the $400 which he averred in his answer that he had advanced to the plaintiff and added in the mortgage of 1894. There was no testimony going to show any other consideration for the debt secured in the mortgage of 1894, except the amount due under the mortgage of 1889. The transaction was, even by the evidence of Turnage himself, a simple renewal of the debt secured in the mortgage of 1889, and, by a simple mathematical calculation, the debt secured in the mortgage of 1894 exceeded the debt due under the mortgage of 1889 between four and five hundred dollars. That calculation is based upon the payment of $300 (admitted to have been paid by the plaintiffs in 1891) as having been made on 1 January, 1891—most strongly against the interest of the creditor. Upon this evidence the referee ought to have found that the difference between the true amount of the debt due under the 1889 mortgage and the amount named and secured in the mortgage of 1894 was usurious, and should not have been allowed by the referee. This
(430) difference was carried forward as is admitted by all the parties, and is embraced in the mortgage of 9 November, 1894, and ought to have been eliminated in the finding of the referee, with the interest on it from 1 January, 1894.

The plaintiff's second exception cannot be sustained. The defendants charged the usual time prices for goods and supplies furnished the plaintiffs, an average of about 10 per cent more than for cash, without interest, and we do not think that was unlawful. No interest was charged on the

advancements. The other exceptions of the plaintiff to the rulings of his Honor on the referee's report affect the defendant's right to recover any interest whatever after the discovery of usurious interest in the transactions between the parties. In *Moore v. Beaman,* 112 N. C., 558, the Justice who delivered the opinion of the Court expressed the view, which he said was his individual opinion and not necessary to the decision of that case, that where usury was received no interest ought to be allowed, and the Justice who writes this opinion might be disposed to coincide with that view, but the decisions of this Court are too numerous and too strong the other way to be overruled. These decisions are numerous and uniform and to the effect that a *debtor* seeking the aid of a court will have a usurious element eliminated from his debt only upon his paying the principal and legal interest. *Ballinger v. Edwards,* 39 N. C., 449; *Purnell v. Vaughan,* 82 N. C., 134; *Burwell v. Burgwyn,* 100 N. C., 389. The defendants Turnage and Ormond ought not to have been allowed by the referee interest at the greater rate than 6 per cent on the amounts brought over from one year to the other in the crop liens executed by the plaintiffs to the defendants from the years 1891 and 1895, inclusive of both, because of usury charged and secured in (431) each of the crop liens upon the cash advanced in the account of 1891. In *Grant v. Morris,* 81 N. C., 160, it was held that the mere entry of a usurious claim upon an account which was neither recognized nor paid by the debtor was not "a charging" within the meaning of the act of 1876, 1877. There the Court said that the words, "a taking, reserving or charging," imply something more to be done to the loss or detriment of the debtor than the mere presentation of an illegal claim, which is neither recognized nor paid. In the case before us, the usurious interest on the cash advanced in 1891, under the crop lien of that year, was not only charged but it was carried forward in the crop liens of each succeeding year to 1895, inclusive, and was recognized by the plaintiffs as a debt against them, and was secured by a lien. The sum of $46.60 usury collected by Turnage (admitted by him), with interest from 9 January, 1893, must be deducted from the amount of the mortgage of 9 November, 1894. The judgment below may be modified in accordance with this opinion with the consent of the parties, and if that is not done the report will be recommitted to the referee that he may make another report in conformity with this opinion.

Modified and affirmed.

CLARK, J., dissenting in part. Under the usury law in force up to 1866, whenever usury was shown the entire contract was void. This was so severe that the courts felt moved to modify its stringency by holding that where the debtor had to apply to the court for an injunction

the court would not help him unless he would pay the debt and legal interest. *Ballinger v. Edwards,* 39 N. C., 449. The act of 1866 in reducing the penalty to mere loss of interest also made this apply, (432) whether the debtor or creditor was the moving party, by providing that where usury was charged no interest should be allowed "either in law or equity." The attention of the Court was not brought to this change, for it was adverted to in no decision till its effect was pointedly and ably presented by counsel in *Moore v. Beaman,* 112 N. C., 558—in the meantime the Court having followed *Ballinger v. Edwards* without question. In *Moore v. Beaman,* the Court's attention was not only called to the above change in the act of 1866 forbidding the recovery of interest "either in law or equity" when usury was charged, but the subsequent legislative construction in The Code, sec. 3836, which makes usury a "forfeiture of the entire interest which the note or other evidences of debt carried with it." There is no exception in the statute, and equity as a separate jurisdiction being abolished, there is no ground upon which the Court can interpolate any exception. Indeed, it will be a virtual repeal of the usury law if a creditor, by dexterously securing himself by a mortgage with power of sale, can secure himself against the "forfeiture of all interest" which the statute law visits, without exception, upon every "note or other evidence of debt" which is in any way tainted with usury. When this point was presented in *Moore v. Beaman* the point was not necessary to a decision, and the above view was expressed only as that of the Justice writing the opinion. But the Court and the profession understood it as a virtual construction of The Code, sec. 3836, and accordingly, in the very next volume, in *Ward v. Sugg,* 113 N. C., 489, in which case the plaintiff was a debtor asking an injunction against a sale under mortgage, the Court held that all interest was forfeited, and (at bottom of page 492) expressly quote with (433) approval *that very part* of *Moore v. Beaman,* "the contract, usury being pleaded, is simply a loan of money which in law bore no interest"; and in the same opinion (on page 496) it again refers to and adopts *Moore v. Beaman* on that point. Thus the expression in *Moore v. Beaman* was expressly adopted and made the judgment of the Court in *Ward v. Sugg;* and even the dissenting opinion in that case does not controvert that *Moore v. Beaman* was the law.

In *Atkins v. Crumpler,* 118 N. C., 532, *Moore v. Beaman* is cited as authority, though it is true that in that case the plaintiff was the creditor. In *Smith v. B. and L. Asso.,* 119 N. C., 249, 255, in a case in which (like *Ward v. Sugg*) the debtor was the plaintiff, the Court expressly cite and reaffirm *Ward v. Sugg* and *Moore v. Beaman* as the law under The Code, sec. 3836, and hold that usury being shown, "the contract is simply a loan of money bearing no interest." It would be an anomaly under

this statute for the Court to rule that the debtor must pay the principal debt, "with interest," when the statute provides that if he does the debtor can immediately sue to "recover back double the interest so paid." *Roberts v. Ins. Co.,* 118 N. C., 429.

The legislative construction is also that of *Moore v. Beaman, Ward v. Sugg,* and *Smith v. B. & L. Assn., supra,* for, in the act of 1895, chapter 69, it is expressly provided that if the interest is paid the debtor may recover "twice the amount of interest paid and also the forfeiture of the entire interest"; *cui bono* order the debtor to pay the interest? This is now the settled law both upon the decisions and the legislation above cited. To allow a party to evade the "forfeiture of usury" simply because he has secured himself by a mortgage with a power of sale would be a nullification of the protection intended by the statute, except (434) that the debtor could bring another action "to recover back twice the amount and the forfeiture of interest." Our decision (119 N. C., 255) and the act of 1895 both expressly say the penalty is "forfeiture of all interest and recovery of double the interest paid." The Court should abide by these recent decisions, which are in accord with late legislation, and have proved a salutary protection to the oppressed.

Cited: Cheek v. B. & L. Assn., 127 N. C., 122, 123; *Owens v. Wright,* 161 N. C., 131, 136; *Cuthbertson v. Bank,* 170 N. C., 532; *Corey v. Hooker,* 171 N. C., 231, 240.

SAMUEL BEAR, SR. v. BOARD OF COUNTY COMMISSIONERS OF BRUNSWICK COUNTY.

(Decided 5 April, 1898.)

Action for Mandamus—Judgment Against County—Res Judicata—Parties.

1. A judgment against parties present before a competent court is conclusive of matters adjudged therein.

2. In a proceeding for mandamus to compel the levy of taxes for the payment of a judgment against the board of commissioners of a county, it is no defense that the judgment was rendered on a void claim.

3. A judgment against a county or its legal representatives, in a matter of general interest to all of its citizens, unless impeached for fraud or mistake, is binding on every citizen and taxpayer of the county.

DOUGLAS, J., dissents.

MANDAMUS, heard before *McIver, J.,* at Fall Term, 1897, of BRUNSWICK. Upon the facts found by his Honor (which are set out in the opinion of *Chief Justice Faircloth*) he denied the application for
(435) the *mandamus,* and plaintiff appealed.

J. D. Bellamy and Shepherd & Busbee for plaintiff.
No counsel contra.

FAIRCLOTH, C. J. This action is brought to compel the defendant to levy a tax on all the subjects of taxation in the county, sufficient to pay the plaintiff's judgments set out in the complaint. The case agreed, upon the facts found by the court, states that the judgments sued on were obtained in 1894 in certain actions by the plaintiff against the defendant, on former judgments obtained by the plaintiff against the defendant in the year 1888; that the causes of action on which the said judgments of 1888 were obtained were school claims as alleged in the answer; that there is nothing in the records or judgments of 1894 to show what the causes of action were, except that they were brought on former judgments. The present action was heard and tried at Fall Term, 1897, when the court denied the application for an order of *mandamus,* and the plaintiff appealed. Upon the hearing two citizen taxpayers of the county entered and denied the validity of the judgments of 1894, and also alleged that the taxpayers of the county were not bound and concluded by the judgment against the county board of commissioners, and this presents the question for this Court.

Reason and a wise policy require that a judgment against parties present before a competent court should be conclusive of matters adjudged, otherwise litigation might be endless. An irregular judgment is voidable and may be set aside on motion. An erroneous judgment is remedied by appeal. Generally, judgments are conclusive, *res judicata,* except for fraud or mistake.

The only contention here is, that it *now* appears that the former
(436) judgments were rendered on "school claims," which does not appear in the record in which the judgments of 1894 were entered. If there is any force in the contention it should have been, and is presumed to have been, availed of when the former judgments were rendered. There seems to be no ground for the contention that the board of commissioners are not concluded. Are the taxpayers concluded by the action of their legal representative?

Where a valid judgment is rendered against a corporation the stockholders are bound thereby in respect to corporate matters, and such judgment is not open to collateral attack. *Hawkins v. Glenn,* 131 U. S., 319. A judgment against a county or its legal representatives, in a matter of general interest to all its citizens, is binding upon the latter,

though they are not parties to the suit. Every taxpayer is a real though not a nominal party to such judgment, and cannot relitigate any of the questions which were litigated in the original action against the county or its legal representatives, and if the county board fail to avail itself of legal defenses, the people are concluded by the judgment. If such failure comes from negligence or corruption, the taxpayer has a remedy on both the criminal and civil dockets of the courts, and if from incompetency, the taxpayer's remedy is the ballot box. Such judgments must be conclusive unless impeached for fraud or mistake. They must be conclusive or not admissible at all. This doctrine is supported by able authorities. Freeman Judgments, sec. 178; Black Judgments, sec. 583; *S. v. Rainey,* 74 Mo., 229; *Clark v. Wolf,* 29 Iowa, 197; *Harmon v. Auditor,* 123 Ill., 122; *Cairo v. Campbell,* 116 Ill., 305. "A judgment against a city, county, or school district, in a matter of general (437) interest, is binding upon all its citizens, though not made parties by name." 1 Herman *Res Judicata,* secs. 155, 128; *Brownsville v. Loague,* 129 U. S., 493, illustrates the distinction made in cases. It was there held that if the petitioner for a writ of *mandamus* to levy a tax to pay his judgment is obliged to go behind the judgment in order to obtain his remedy, or if he must refer to the alleged cause of action on which his judgment was rendered, and if there appears on the face of the record that there was no cause of action, the principle of *res judicata* does not apply, and the aid of the court will not be granted.

The plaintiff is not embarrassed with such a condition. He relies upon a former judgment "filed and docketed." There was error below.

Reversed.

DOUGLAS, J., dissents.

Cited: S. c., 124 N. C., 204.

A. H. McLEOD v. R. M. NIMOCKS.

(Decided 29 March, 1898.)

Action for Conversion and Embezzlement—Arrest and Bail—Judgment by Default—Trial—Practice—Damages.

Where a defendant who was duly served with summons failed to file answer to the complaint in an action for conversion of cotton and embezzling the proceeds, judgment by default final was properly rendered as to the conversion and embezzlement, but the amount of damages should be determined by proof of the value of so much of the cotton as was converted.

(438) ACTION, tried before *McIver, J.,* at December Term, 1897.

N. A. McLean for plaintiff.
T. A. McNeill for defendant (appellant).

(439) MONTGOMERY, J. The plaintiff in his complaint alleged that under an agreement with the defendant he delivered to him 141 bales of cotton to the end that the defendant, as the agent of the plaintiff, have the cotton stored in a warehouse in Fayetteville for the account of the plaintiff, who was to pay the warehouse charges; that the defendant never had any authority to sell the cotton or any part of it; that the defendant having received the cotton did not store it in the warehouse, although he frequently wrote the plaintiff that he was in possession of the cotton and that it was stored in the warehouse; that the defendant well knew that these statements in the letters were false; that on 20 May, 1897, the defendant, in answer to a letter written to him by the plaintiff as to where the cotton was, wrote, "I let the cotton go, holding myself responsible for its value at the time you might be inclined to close it out"; that such disposal of the cotton by the defendant was without the knowledge or consent of the plaintiff, and that the defendant wilfully and wrongfully converted the cotton, and knowingly, wilfully and fraudulently misapplied the proceeds thereof to his own use, by which the plaintiff was damaged to the amount of $5,600. Upon the issuing of the summons by the clerk an affidavit, which was in full compliance with the requirements of the law, was made by the plaintiff to procure the arrest of the defendant. The order of the arrest was made and served, and the defendant gave bond, as allowed by the statute, with two sureties, A. H. Slocomb and Q. K. Nimocks. The complaint was verified and filed according to law, and at the appearance term, the defendant having filed no answer, a judgment by default and in-

(440) quiry was entered up against him. In the judgment it was adjudged that the defendant, while the relation of the principal and agent existed between the plaintiff and himself, unlawfully, wilfully, and fraudulently embezzled and converted to his own use 141 bales of cotton, and that the plaintiff recover of the defendant the value of the cotton, with interest from the time of its conversion. The cause was continued until the next term of the court that an issue might be submitted and tried by a jury as to the value of the cotton. The judgment also contained a clause in reference to the order of arrest, in the following words: "It appearing to the court that an order of arrest for the said Nimocks has been issued and executed in this cause, and that he has given bail in the sum of $6,000 to render himself amenable to the process

of the court during the pendency of this action, and to such as may be issued to enforce the judgment herein, said order is continued to await the final judgment in this cause, when the plaintiff's damages shall have been assessed."

The defendant does not complain of that part of the judgment which institutes an inquiry as to the damages which the plaintiff may have sustained by reason of the matters set out in the complaint, but he insists that the judgment by default final, for the conversion of the cotton and embezzlement of the proceeds, is such a judgment as could not have been rendered under section 386 of The Code. We think his contention not well founded. The action sounded in damages and was for a *tort*. The tortious conduct of the defendant was set forth in the complaint as the basis for demanding the damages. The judgment by default and inquiry, the defendant having said nothing in answer to the plaintiff's complaint, was conclusive that the plaintiff had a cause of action (441) against the defendant of the nature declared in the complaint, and would have been entitled to nominal damages without any proof. *That* cause of action was admitted by the defendant's failure to answer. *Lee v. Knapp,* 90 N. C., 171; Eaton's Forms, 318; *Parker v. House,* 66 N. C., 374; *Banks v. Mfg. Co.,* 108 N. C., 282.

In the last-cited case the action was for damages on account of alleged malicious prosecution. No answer having been made, a judgment by default and inquiry was entered, and this Court held that the court below properly refused to submit an issue as to whether the defendant did prosecute the plaintiff maliciously and without probable cause. The Court said: "The issue tendered by the defendant was not raised, as there was no answer, and that matter was settled by the judgment by default."

In the case of *Parker v. House, supra,* the action was against a constable and his bond for a failure to use due diligence in collecting claims put into his hands as an officer. The Court said, "the defendant, by failing to answer, admits the allegation."

So, in the present case, the defendant by his failure to answer admitted the cause of action as set out in the complaint, and the judgment was a proper one. The authorities all concur, however, in deciding that the *amount* of damages is not admitted in cases of judgment by default and inquiry, and that the matter is a question to be determined upon proof. *Parker v. House, supra; Lee v. Knapp, supra; Witt v. Long,* 93 N. C., 388. And we are of the opinion that the judgment should be so modified as to declare the defendant's liability should be fixed upon the value of so much of the cotton as the plaintiff may prove on the inquiry was converted by the defendant. (442)

Modified and affirmed.

Cited: Culbreth v. Smith, 124 N. C., 291; *Junge v. MacKnight,* 135 N. C., 109, 114; *S. c.,* 137 N. C., 289; *Blow v. Joyner,* 156 N. C., 142; *Graves v. Cameron,* 161 N. C., 550.

MARGARET A. JOHNSON, ADMINISTRATRIX OF D. A. JOHNSON, ET AL. v. ELGATE TOWNSEND.

(Decided 29 March, 1898.)

Action on Note—Trial—Contradictory Verdict—Judgment.

In a trial of an action on a note the jury found in response to one issue that the note was executed in good faith for the purchase of land conveyed by the payees to the maker, and, in response to another, that the note was not executed in good faith and for the price of the land, but in pursuance of a fraudulent scheme, in which all parties participated, to hinder, delay, and defraud the creditors of one of the payees: *Held,* that the verdict was contradictory and no judgment could be rendered thereon.

ACTION, tried before *Coble, J.,* and a jury, at May Term, 1897, of ROBESON. The facts are stated in the opinion. Upon the verdict his Honor rendered judgment for the defendant, dismissing the action, and plaintiffs appealed.

French & Norment and MacRae & Day for plaintiffs.
McNeill & McLean and G. B. Patterson for defendant.

MONTGOMERY, J. This action was commenced by Margaret Johnson, administratrix of D. A. Johnson, deceased, and Margaret Johnson and Mary Johnson, sisters of the intestate, to recover the amount (443) alleged to be due on a promissory note in the sum of $1,215, executed by the defendant to the intestate and the plaintiffs. The defendant admitted the execution of the note, but averred that it was void and of no effect because it was made under a fraudulent agreement between himself and the payees to enable them to defeat and defraud the creditors of the payees. The defendant's story of the transaction, in substance, is: That the two sisters—old persons—the plaintiffs, and the brother, D. A. Johnson, now deceased, became indebted to Rowland & MacLean, a firm of lawyers, for professional services rendered to them, and that they were being pressed for the debt; that the plaintiffs asked the defendant if they should make him a deed to the tract of land they owned (then worth, according to the evidence of some of the witnesses, about $4,000) would he, when they requested, reconvey to them;

that he agreed to do so; that one Buie was called in (all of the parties being present) "to fix up the papers," who, in drawing the deed, suggested that they take a note and recite a consideration in the deed; that the plaintiffs and their brother all said they wanted to make the deed to keep Proctor from getting a judgment against them for Rowland & McLean; that nothing was said about the note until Buie mentioned it; that he went after Buie to draw the deed; that he knew when the deed was drawn and note executed they were made to defraud Rowland & McLean; that he has never paid anything on the note; that it was never intended he should pay anything on it; and that he has refused to reconvey the land unless the plaintiffs would pay him some debt which he alleges they owe him. It is admitted that the defendant, through legal proceedings of which we have no particulars, is in possession of the land. Upon this state of facts, as related by the defendant, (444) it is amusing (if it was not so serious a matter) to quote one of the defendant's prayers for instructions. He requested his Honor to charge that, "It is a maxim of our law that no court will lend its aid to a person who founds his cause of action on an illegal and immoral act, its object being to leave the parties exactly where the fraud and immorality placed them, not extricating or aiding either, in order to discourage dishonesty and promote good faith in business dealings." A writer of fiction could hardly imagine such a rare and racy character as the defendant is, and the "setting," too, is so unique. But still, it is a wonder that such a man can flourish in practical life and in a Christian age.

Among the issues submitted were:

1. Was the note executed by defendant to plaintiffs given for the purchase money of the land described in the complaint?

3. Was said note given by defendant to M. A., D. A., and M. J. Johnson in pursuance of a fraudulent purpose to hinder, delay, and defraud creditors of D. A. Johnson?

On the first issue his Honor instructed the jury that if the plaintiff had shown the note was given for the purchase money of the land they should answer the issue "Yes"; if they had failed to show that fact, they should answer the issue "No."

He then laid before them the contention of the plaintiffs, which was that the transaction was *bona fide;* that they sold the land to the defendant, and that he was to pay them for it the sum of $1,215, and that the note was given for that amount and for that consideration; that the defendant was to maintain the plaintiffs during their lives; that their maintenance was to be credited upon the note, and that there (445) was no other purpose connected with the transaction than the sale of the land to the defendant and the binding of the defendant by the

note to pay the purchase money, and, therefore, the plaintiffs contended that the jury should answer the first issue "Yes." Then his Honor set out the defendant's contention, which was, that the note was not given for the purchase money of the land; that the whole transaction was in pursuance of a scheme on the part of the plaintiffs to hinder, delay, and defraud their creditors, and that the defendant was a party to the scheme; that the note was executed only to give color to the transaction; that it was never intended the note should be paid, but that it was to be surrendered to the defendant when the land should be reconveyed to the plaintiffs. His Honor then said: "This question is for the jury to decide, whether the note was given for the purchase money of the said land, or whether it was given for the purpose of giving color to a fraudulent transaction in pursuance of a scheme on the part of the plaintiffs in which the defendant assisted to defraud the creditors of the plaintiff." The jury responded "Yes"; that is, that the note was given according to the contention of the plaintiffs, in good faith for the purchase money of the land and to bind the defendant. On the third issue, as to whether the note was given by the defendant to the plaintiffs in pursuance of a fraudulent purpose to hinder, delay, and defraud creditors of D. A. Johnson, the court instructed the jury that the burden of proof was on the defendant, that he must show by the greater weight of evidence that the note was given in pursuance of the fraudulent purpose to defraud the creditors of D. A. Johnson.

(446) The court called their attention to the defendant's contention, which was, that the note was given in pursuance of a scheme to defeat Johnson's creditors; that Johnson was indebted to Rowland & McLean and others, and that the note was given to cheat and defraud Rowland & McLean, and, therefore, that the jury should answer the third issue "Yes." The court also set out the plaintiff's contention, which was that D. A. Johnson did not owe Rowland & McLean anything, and that if he did, the deed and note were not executed to defraud them; that the transaction was in good faith; that the land was conveyed to the defendant for $1,215; that the defendant was to support the plaintiffs during the lives of the plaintiffs; that the cost of their maintenance was to be credited on the note, and that, therefore, the jury should answer the issue "No." The jury answered the issue "Yes"; that is, that the note was executed not in good faith and for the purchase money of the land, and that the defendant should be bound for its payment, but that it was given in pursuance of a scheme to defraud and cheat the creditors of D. A. Johnson.

It is plainly to be seen from this review of the case that the verdict is not only inconsistent but that it is contradictory. The response of the jury to the first issue was that the note was executed in good faith for

the purchase money of the land, with no covinous purpose. The response to the third issue was that the note was executed not in good faith and for the purchase money of the land, but in pursuance of a fraudulent scheme, in which all the parties participated to hinder, delay, and defraud the creditors of D. A. Johnson. No judgment ought to have been rendered on the verdict. *Mitchell v. Brown,* 88 N. C., 156; *Porter v. R. R.,* 97 N. C., 66.

New trial.

(447)

W. B. COOPER ET AL. v. A. C. McKINNON ET AL.

(Decided 29 March, 1898.)

Action to Set Aside Deed of Assignment—Assignment for Benefit of Creditors—Validity of Deed of Assignment.

1. The requirements of the act regulating assignments for the benefit of creditors (chapter 453, Acts of 1893) are mandatory.
2. A deed of assignment for the benefit of creditors becomes absolutely void, both as to creditors and as between the parties, by the failure of the assignor to file a schedule of preferred debts within five days.
3. Where an assignor in a deed of assignment failed to file the schedule of preferred debts within five days, and thereafter filed a new deed of assignment covering the same property but making changes in the preferences: *Held,* that the new deed vested the property in the assignee subject to the trusts imposed thereby.

ACTION, pending in ROBESON, and heard on complaint and affidavits before *Allen, J.,* at chambers, in Lumberton, during February Term, 1898, of that court. The facts are stated in the opinion. From an order dissolving the temporary injunction theretofore issued, the plaintiffs appealed.

T. A. McNeill for plaintiffs.
N. A. McLean and G. B. Patterson for defendants.

DOUGLAS, J. This is an action to set aside a deed of assignment for the benefit of creditors on the ground that there was at the time of the execution of said deed a previous and existing deed of assignment which, however void as to creditors, was good as between the parties.

On 5 November, 1897, the defendant McKinnon executed to his codefendant, G. B. Patterson, a deed of assignment, duly (448) recorded, whereby he conveyed to the said Patterson, for the benefit of his creditors, all his property, reserving, however, his exemp-

tions as allowed by law. This deed was filed for registration on the date of its execution, but the verified schedule of preferred debts was not filed in the clerk's office within five days after the registration of said deed, as required by section 1, chapter 453, Laws 1893. Subsequently, and after the docketing of the judgments now in suit, the defendant McKinnon, on 15 December, 1897, executed to the defendant Patterson a second deed of assignment for the benefit of creditors, covering substantially the same property included in the first deed, but changing the preferences. This second deed was duly recorded, and there is no allegation that the proper schedules were not filed as required by law. It further seems that the land is not involved in this action, and that no levies were made under the judgments herein set out.

The plaintiffs brought suit to set aside the second deed of assignment, and moved for a receiver and injunction. A temporary restraining order was granted. Upon the hearing, the restraining order was discharged, and the motion for a receiver and injunction denied. From this judgment the plaintiff appealed, contending that the first assignment was good as between the parties thereto, and having passed the title to the property in question from the assignor to the assignee, subject only to avoidance by creditors, that no interest remained in the assignor to support the second assignment. On the contrary, the defendants contended that the first deed of assignment having become absolutely void by the failure of the assignor to file the schedules, as required by law,
(449) the title to the property reverted to the assignor, if, indeed, it ever passed to the assignee, and was conveyed in the second assignment subject to all its provisions. We think that the contention of the defendants is correct.

In *Bank v. Gilmer,* 116 N. C., 684, this Court held that the provisions of the act of 1893 were not merely recommendatory, but were mandatory from the very nature of the act, and that the failure of the assignor to file the schedules required by the act, and within the time required, rendered the deed of assignment *void* and *invalid,* both terms being used in the opinion. This case was reheard and reported in 117 N. C., 416, 426, in which the Court reaffirms this doctrine, and says: "The act seems to make this a necessary part of the execution of such conveyances, and if the assignor does not comply with this requirement the courts will pronounce it a legal fraud and void." See, also, *Glanton v. Jacobs,* 117 N. C., 427. It is needless to recite here the authorities cited in the opinions of the Court delivered in those cases as they can be found therein. While this statute is of recent origin, it appears to be already well settled that such a deed becomes absolutely void upon a failure of the assignor to comply with the mandatory requirements of the statute.

The distinction suggested by the plaintiffs that the assignment may

be valid between the parties—that is, the assignor and assignee, and yet void as to creditors, cannot be maintained. This doctrine applies only to cases where the grantee takes the property for his own benefit exclusively, as a mortgage, or grantee in an absolute deed of conveyance. There the deed is made for the benefit of the grantee, and there is no reason why he should not take and hold such benefit in the (450) absence of some superior claim. If such a conveyance is in fraud of creditors, either actually or by construction of law, it may be set aside as to them; but, until so set aside, it is valid between the parties. While said to be void as to creditors, it may perhaps more properly be called voidable. But a deed of assignment for the benefit of creditors is essentially different, and if such a deed becomes void as to creditors its primary and essential purpose is defeated, and it is totally invalid. The assignee does not take the property for his own benefit, but for the benefit of the creditors, and while he holds the legal title, they are really the equitable owners to the extent of their claims. Whatever defeats their interest defeats the object of the trust, and consequently the trust itself.

In the case at bar, the first deed of assignment being void, the title of the property was still in the assignor, and was by him conveyed to his codefendant Patterson by the second deed of assignment, which is admittedly valid if not affected by the prior deed. The judgment is

Affirmed.

Cited: Brown v. Nimocks, 124 N. C., 419; *Martin v. Buffaloe,* 128 N. C., 308; *Powell v. Lumber Co.,* 153 N. C., 57.

(451)

A. H. McLEOD v. WARREN WILLIAMS AND WIFE.

(Decided 3 May, 1898.)

Motion to Issue Execution on Dormant Judgment—Defenses—Married Woman—Consent Judgment Against Married Women.

1. Upon a judgment creditor's motion to revive a dormant judgment and issue execution thereon, the defendant may set up grounds he has in opposition to the motion.

2. A personal judgment cannot be rendered against a married woman, not a free trader, for her husband's debt.

3. Where a married woman, pending an appeal by her from a personal judgment rendered against her and her husband on notes given for property bought by her husband and secured partly by a mortgage on her land,

consented to withdraw the appeal and to allow a compromise judgment to be entered against her husband for a certain amount payable in installments: *Held*, that she had no power to consent to such judgment, and it has no binding force on her although she was personally present and represented by counsel of her own selection at the time of its rendition.

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

MOTION for leave to issue execution on a judgment, heard on appeal from an order of the Superior Court clerk directing the issue of such execution, before *McIver, J.*, at Fall Term, 1897, of ROBESON. At the same time the *feme* defendant moved to set aside the judgment as to her. His Honor affirmed the order of the clerk, and denied the motion to set aside the judgment. The *feme* defendant then appealed.

N. A. McLean for plaintiff.
T. A. McNeill for defendants.

(452) FURCHES, J. It seems that in 1882 Pope & McLeod sold a steam sawmill, boiler, engine, and fixtures to the defendant Warren Williams at the price of $3,000, for which sum three notes of $1,000 each seem to have been given; and a mortgage was also made to Pope & McLeod on the tract of land upon which said milling property was to be located, and two other tracts of land, to secure the payment of these notes. It does not appear from the case whether the *feme* defendant signed the notes or not, but she joined in the mortgage with her husband, and a part of the land therein conveyed was her land, inherited from her father.

In 1886 the plaintiff McLeod, having become the sole owner of these notes and mortgage, two of which had not been paid, brought suit against the defendants and recovered judgment by default for $2,000, and a foreclosure of the mortgage. This judgment not being satisfied, at January Term, 1891, the *feme* defendant made a motion to set it aside as to her, which motion was refused, and she appealed to the Supreme Court. At May Term the parties came to an agreement by which the said defendant was to withdraw her appeal to the Supreme Court, and the plaintiff was to take judgment for $2,000, to be paid in five annual installments of $400 each. The record shows that the judgment of May Term, 1891, was rendered under the following state of facts:

"That at the time the final judgment, which Ann E. Williams asked to have set aside, was taken, she was before the court with her husband, Warren Williams, and she was represented by Messrs. French & Norment, counsel of her own selection, who were also counsel for her husband; that said judgment was taken by agreement of herself and her counsel, as well as by consent of her husband, and was a compromise judgment, the terms of which were suggested by herself and her husband and their

counsel; that the *feme* defendant owns other separate real estate (453) outside of that included in the mortgage made by Warren Williams and Ann E. Williams to A. H. McLeod."

This judgment of 1891 having become dormant, the plaintiff filed an affidavit and gave notice of a motion to revive it and to have execution on 29 April, 1897.

On 8 May, 1897, the *feme* defendant filed an affidavit alleging the irregularity of the judgment against her, and opposed the plaintiff's motion for execution. This motion was decided against her, and she appealed to the judge, and at once gave notice of a motion to set aside the judgment. The two motions were heard together at Fall Term, 1897, and decided against her, and she appealed. Upon the plaintiff's motion for execution the defendant had the right to set up any grounds she had why it should not be granted. *McDonald v. Dickson,* 85 N. C., 248; *Lytle v. Lytle,* 94 N. C., 683.

Under *Green v. Ballard,* 116 N. C., 144, this judgment cannot stand as to the *feme* defendant. But it is contended that *Green v. Ballard* is not in harmony with *Neville v. Pope,* 95 N. C., 346, and *Vick v. Pope,* 81 N. C., 22. And it appears to the Court that it is not necessary to decide that question, as there is another upon which it depends; and the Court prefers to put its judgment upon that.

It appears that the debt is the husband's debt, and if the *feme* defendant signed the notes (and it does not appear that she did) this created no personal liability on her. *Sherrod v. Dixon,* 120 N. C., 60. The judgment which the *feme* defendant seeks to set aside is a contract judgment, and cannot stand unless the party making the contract (454) had the right to contract. *Bank v. Comrs.,* 119 N. C., 214.

The defendant Ann E. Williams, being a *feme covert* and not a free trader, had no power to contract so as to bind her personally or her property. *Loan Assn. v. Black,* 119 N. C., 323. The only difference between this obligation and her note or promise to pay is that this is in the form of a judgment under the sanction of the Court, and the promissory note would not be. If the plaintiff had the individual note of the *feme* defendant, and was suing upon it, it could hardly be contended that he could recover against her.

There was error in allowing the plaintiff's motion to renew this judgment as to her, and in refusing to vacate the judgment against the defendant Ann E. Williams, except as to the foreclosure of the mortgage.

Error.

CLARK, J., dissenting. This case differs from *Bank v. Comrs.,* 119 N. C., 214. There the defendants having no power conferred upon them to create the indebtedness, their consenting to a judgment therefor was *ultra vires* and void. They had no inherent or conferred power to con-

tract the debt, and of course could not do so by a consent judgment. A married woman, on the contrary, has the same inherent power to contract a liability that a married man has, and is only disabled in the instances as to which the law creates a disability, and she is not disabled from submitting to a judgment by any statute or decision. The Constitution was evidently intended to emancipate married women and place them, so far as property rights are concerned, on a par with men and *femes sole,* for Article X, section 6, provides: "The real and
(455) personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female." The only instance in which that instrument requires the privy examination of the wife is in the conveyance of the homestead (Article X, section 8).

In *Pippen v. Wesson,* 74 N. C., 437, the Court is advertent to this change and says: "The Legislature may abolish all incapacities of married women, and give them full power to contract as *femes sole.*" In *Bank v. Howell,* 118 N. C., 271, the Court quotes in full the New York statute, which does that very thing, and says that whether the adoption of a similar statute here would not be more in accordance with the literal intent of the Constitution and a remedy for the abuses which abound under the present system is a matter addressed to the legislative judgment. Certainly, after the above cited provisions of the Constitution, there being no inherent or constitutional disability upon married women, we must look solely to the statutory law for such disability as shackles their freedom of action. The only statutory restriction that can be contended for is in The Code, sec. 1826. That this section does not apply to a judgment, but that the wife is bound thereby, is expressly decided in a line of very clearly expressed and able opinions. In *Vick v. Pope,* 81 N. C., 22, *Smith, C. J.,* says that where a husband and wife are sued jointly it is the duty of the husband to set up the wife's disability, and if he fail to do so, the wife cannot have the judgment against her set aside on the ground of her incompetency to contract. He further says that a judgment against a married woman appearing in the suit by counsel of her husband's selection is as binding as one against
(456) any other person, unless it be obtained by the fraudulent combination of the husband with the adverse litigant. He pertinently adds: "If it were otherwise, how could a valid judgment ever be obtained against a married woman, and how could her liability be tested? If she is disabled from resisting a false claim, how can she prosecute an action for her own benefit, when nothing definite is determined by the result? It is no sufficient answer to say that the defendant's execution of the note with her husband did not bind her. The judgment conclu-

sively establishes the obligation, and such facts must be assumed to exist as warranted its rendition, inasmuch as neither coverture nor any other defense was set up in opposition to defeat it.

"As, then, a married woman may sue and, with her husband, be sued on contracts, they and each of them must at the proper time resist the recovery as other defendants, and their failure to do so must be attended with the same consequences."

The opinion cites *Taylor, C. J.,* in *Frazier v. Felton,* 8 N. C., 231, and *Greene v. Branton,* 16 N. C., 504, in which the elder Ruffin says: "Married women are barred by judgments at law as much as other persons with the single exception of judgments allowed by the fraud of the husband in combination with another. . . . She must charge and prove that she was prevented from a fair trial at law by collusion between her adversary and her husband, preceding or at the trial."

And the late Chief Justice of this Court, in *Neville v. Pope,* 95 N. C., 346, reaffirmed what had been said by the three Chief Justices above named. In that case a judgment had been taken against a married woman before a justice of the peace, and in the action brought to set aside the judgment the plaintiff laid stress upon *Daugherty* (457) *v. Sprinkle,* 88 N. C., 300, in which it had been held that such action could not be maintained, but that ground was overruled, the Court saying: "It may be that if the plaintiff in this case had made defense, pleaded her coverture, and had appealed from the adverse judgment given against her, she would have been successful; but she did not make defense at all, and as there was judgment against her according to the course of the Court, it must be treated as conclusive that the cause of action and the facts were such as warranted the judgment." In *Grantham v. Kennedy,* 91 N. C., 148, in an opinion by the same learned judge, and citing the same authorities, it was again held: "Married women and infants are estopped by judgments, in actions to which they are parties, in the same manner as persons *sui juris.*" A settled and unbroken ruling, thus made by the Court for so long a period and forcibly and clearly expressed in opinions delivered by the four eminent judges named, has become a rule of property, and can only be shaken for strong and overwhelming reasons. Their very names commanded public reliance on their utterances, for

> "In Israel's court there sat no Abethden
> With hands more clean or more discerning eyes"

than theirs. The plaintiff in this very action relied, and took this judgment relying (as he tells us) upon those very decisions. The judgment being valid without, and independent of, her consent, cannot be invalidated by her expressing her willingness and assent. It cannot be that

the fact that the *feme* defendant was "represented by counsel of her own selection, who were also counsel for her husband, that the judgment was taken by agreement of herself and counsel, as well as by consent (458) of her husband, and was a compromise judgment, the terms of which were suggested by herself and her husband and their counsel," will enable her to invalidate the judgment when in the cases above cited it was held that she could not do so, though in them she was not present and left it to her husband to employ counsel. In those cases it is recited that the consideration of the notes sued on "inured wholly to the husband's benefit and not to the benefit of the wife or her separate estate, and there was no charge upon her separate property, and she was not a free trader." A judgment is binding even upon an infant taken against him when represented by a guardian *ad litem. Ward v. Lowndes,* 96 N. C., 367, and the husband is at least as much protection to the wife.

The above decisions have never been overruled, the only shadow ever cast upon them being by a passing *obiter* in the late case of *Green v. Ballard,* 116 N. C., 144, and if valid, they sustain the judgment rendered below in this case, refusing to set aside the judgment taken against the *feme* defendant and her husband at May Term, 1891, at the rendition of which the *feme* defendant's rights were so well protected, being represented by her husband, several able counsel, and herself taking an active part, and they procuring the benefit of a compromise of a former judgment, by which she was bound by having abandoned her appeal therefrom. *Vick v. Pope* and *Neville v. Pope, supra,* were recognized as authority by *Montgomery, J.,* 116 N. C., 711, subsequent to the *obiter* in *Green v. Ballard, supra,* and they had been cited in *Patterson v. Gooch,* 108 N. C., 503, and in many other cases. *Vick v. Pope* was strongly endorsed by *Dillard, J.,* in *Nicholson v. Cox,* 83 N. C., (459) 48, at page 53.

It must not be lost sight of that the question before us is not as to the proper mode in which a wife should charge her separate estate, but the sacredness of a judgment which is conclusive that she has done so, from which judgment she did not appeal. It must be remembered that the Constitution imposes no restriction whatever upon the power of a married woman to bind her estate by her contracts, and that the statute law (Code, sec. 1826) requires nothing beyond the written consent of the husband. The decision in *Flaum v. Wallace,* which *created* the requirement of a special charge and a privy examination (for the opinion says the question was then presented for the first time), did not assume to invalidate the power of the courts to bind a married woman by a judgment in an action to which she was a party.

The decisions holding that the judgment against a married woman, unappealed from, is binding on her as one *sui juris,* were rendered both

before and since the Constitution of 1868, and that Constitution, as above stated, reflected the spirit of the age and was liberal, not restraining in its application to married women. It is not only ungallant but unjust to classify married women with "idiots, lunatics, and infants," and as being inferior to men and even to single women. If there can be any reason for making such classification as to the execution of deeds and the running of the statute of limitations, it has never existed as to judgments, the conclusive presumption being that in the courts, with husband and counsel to represent them, they have gotten justice, when no appeal is taken.

But it may be again noted, as often heretofore decided by this Court, that the retention of such disabilities, even as to conveyances, contracts, and limitations, is only statutory and not required by (460) the Constitution, except the privy examination must be taken as to a conveyance of the homestead and there must be a written consent of the husband to the conveyance by the wife of her property. The retention of the former statutory disabilities upon married women (and their increase, for under the old statute of presumptions, unlike the present statute of limitations, time ran against a married woman as against any one else, *Faggart v. Bost, post,* 517) is probably more fruitful of fraud than any other single cause known to the law.

The spectacle of men doing business in their wives' names and casting the responsibility for repudiating their just debts upon their wives is not to be encouraged. The imputed duress and inferiority of a married woman to her husband is purely imaginary and a survival from the time when superiority of brute strength meant duress, for only in physical strength are women, as a class, inferior to men as a class. While there may be women, though the instances are exceedingly rare, who, on a privy examination, will negative their previous assent, there are doubtless fully as many men who, upon a privy examination, might truthfully confess that they were under duress of their wives. In the great number of States where the antiquated system of privy examinations has been abolished, no great evil has resulted. We know that Deborah, who was both wife and mother, was judge over all Israel, and that the two most illustrious sovereigns of England were women. Lord Campbell includes a woman in his list of the Lord Chancellors, and my Lord Coke, in his Commentaries upon Littleton, 326a, tells of another who exercised the functions of sheriff in person and sat with the judges on the bench (the office of sheriff in England being of higher dignity than here). (461) We know that in four States of the Union women are as fully qualified electors as the men, and that, in all the States but twelve, they vote for some purposes; in most of our States and in England they can hold office; married women are often postmasters, sometimes bank presi-

dents and doctors, and this Court (like most others) has licensed women as fit and competent to practice law. Though the statute is still unrepealed which, as to conveyances and limitations, crowds married women into the same category as "minors and those *non compos mentis,*" there is nothing in the light of the above facts which will justify the courts in extending the rule to render them not bound by a judgment, taken without fraud and not appealed from, when the contrary has been a settled law of the State, recognized by a long line of decisions and acted upon as a rule of property upon which vested rights and titles are now based.

The Code, sec. 178, expressly authorizes a married woman to sue and be sued, requiring only that her husband be joined with her (except in certain cases). This contemplates, therefore, that a valid judgment can be given against her. At common law she could not be sued at all, and in equity only when she had specifically charged her separate estate to enforce the charge. Black Judgments, sec. 188. Our statute by expressly authorizing her to sue and be sued has changed all that, and some confusion has arisen from not noting the change and in trying to conform to the former equitable proceeding. This is further shown by The Code, 424 (4), which expressly provides that judgment may be given against a married woman "in the same manner as against other persons," (462) and by The Code, sec. 443, which provides that "an execution may issue against a married woman" to be levied and collected out of "her separate property." The statute does not restrict it to "the property she had charged with the debt." The words, "her separate property," evidently mean that an execution against her cannot be collected, as formerly, out of the husband, though he is still a necessary party defendant with her.

It would be a novelty to provide by statute that she can be sued and judgment and execution be awarded against her and then judicially to interpolate that the judgment shall not be binding upon her unless her privy examination is taken. If a judgment is given against her in a case in which she should not be held liable, her remedy is by appeal, otherwise she is bound by the judgment like any one *sui juris,* or like an infant who is represented by a guardian *ad litem.* This has been not only the unbroken law in this State (save the intimation to the contrary in *Green v. Ballard*), but is the uniform rule wherever there is a statute allowing a *feme covert* "to sue and be sued." Indeed it is a necessary consequence of such statute. 10 Am. & Eng. Enc., 89, and cases there cited: *Winter v. Council,* 79 Ala., 481; Black on Judgments, sec. 192, and numerous cases there cited; 2 Bishop Married Women, secs. 386 and 486.

MONTGOMERY, J. I concur in the dissenting opinion.

Cited: McCauley v. McCauley, ante, 292; *Roseman v. Roseman,* 127 N. C., 498; *Bank v. Swink,* 129 N. C., 261; *Smith, ex parte,* 134 N. C., 502; *Bank v. Hotel Co.,* 147 N. C., 600.

(463)

W. B. COOPER, TRADING AS W. B. COOPER & CO., v. THE ADEL SECURITY COMPANY.

(Decided 24 May, 1898.)

Attachment—Corporations—Unpaid Subscriptions to Capital Stock of Foreign Company—Parties.

1. A corporation is a necessary party to an attachment proceeding to subject the amounts due it from unpaid subscriptions to its stock to the payment of its debts.
2. The balances due on stock subscriptions are a trust fund for the benefit of the creditors of a corporation and may be subjected to the payment of its debts.
3. Under secs. 218 (1), 363 *et seq.* of The Code, the unpaid balances due a foreign corporation on subscriptions to its stock by subscribers residing in this State are property of such corporation and subject to attachment for the payment of its debts.

ACTION, heard before *McIver, J.,* at December Term, 1897, of ROBESON on a motion to vacate an attachment. The motion was allowed, and plaintiff appealed. The facts appear in the opinion.

T. A. McNeill for plaintiff.
Frank McNeill for defendant McKellar.

CLARK, J. The plaintiff and the defendants McKellar and McQueen are residents of this State. The defendant Adel Security Co. is a Georgia corporation, and the plaintiff alleges in his complaint that he obtained a judgment on 18 February, 1896, against said corporation in the courts of Georgia, upon process personally served, for $433.03, besides interest and costs; that the corporation has sold out most of its property and ceased to run its lumber mill and is insolvent; that the other defendants are stockholders in said corporation and are indebted to the corporation in the sums named in the complaint as to each, for unpaid balances on stock subscriptions; that the corporation has no other (464) assets than its unpaid stock subscriptions, and the names of the other stockholders than those named in the summons are unknown to the plaintiff; wherefore, he brings this action in the nature of a creditor's bill to have an account stated of the assets and liabilities of the

corporation and to have a sufficiency applied to the payment of the indebtedness of the plaintiff and others. *Bronson v. Ins. Co.,* 85 N. C., 411.

The summons was served as to defendants McKellar and McQueen, and returned not served as to the Adel Security Co., whereupon the plaintiff, upon affidavit of that fact, that said corporation is a nonresident and has property in this State liable to plaintiff's claim, etc., in regular form, procured a warrant of attachment which was levied upon the indebtedness to the company by McKellar and McQueen, and publication of summons.

The attachment was dismissed upon the ground that "the unpaid balance on subscriptions to the capital stock of said company due by McKellar and McQueen, residents of Robeson County," was not such property as could be reached and subjected by attachment proceedings, and the action was "dismissed as to McKellar and McQueen because there had been no personal service on the Adel Security Co."

The balances unpaid on stock subscriptions are a trust fund for the benefit of the creditors of a corporation, and may be subjected to the payment of their debts. *Foundry Co. v. Killian,* 99 N. C., 501; *Clayton v. Ore Knob Co.,* 109 N. C., 385; *Hill v. Lumber Co.,* 113 N. C., 173; *Worth v. Wharton,* at this term. It is true that the Adel Security Co. is a necessary party to such proceeding, and that, as it is a non-
(465) resident and personal service cannot be had upon it, it can only be brought into court by publication when "property" of said company has been attached. *Bernhardt v. Brown,* 118 N. C., 700; *Long v. Ins. Co.,* 114 N. C., 465; *Pennoyer v. Neff,* 95 U. S., 714. This raises the question whether the unpaid stock subscriptions, due the corporation by McKellar and McQueen, are "property" which is liable to attachment here for the purpose of acquiring jurisdiction, to the extent of said indebtedness, by a proceeding *quasi in rem* against the corporation. The decisions are in hopeless conflict in different States on this point. See notes to *Illinois C. R. Co. v. Smith,* 19 L. R. A., 577. The decisions are uniform that for purposes of taxation the *situs* of a debt is the person of the creditor, but for purposes of acquiring jurisdiction against a nonresident by attachment there is a conflict. This State, however, is one of those which hold that (under our statute, Code, secs. 218 (1) and 363 *et seq.*) the indebtedness in the hands of a debtor may be attached. *Winfree v. Bagley,* 102 N. C., 515. In dismissing the attachment as well as in dismissing the action there was

Error.

Cited: Balk v. Harris, 124 N. C., 468; *Best v. Mortgage Co.,* 128 N. C., 354; *Sexton v. Ins. Co.,* 132 N. C., 2; *McIver v. Hardware Co.,* 144 N. C., 484; *Warlick v. Reynolds,* 151 N. C., 612; *Gilmore v. Smathers,* 167 N. C., 444.

(466)

H. R. HORNE v. COMMISSIONERS OF CUMBERLAND COUNTY.

(Decided 29 March, 1898.)

Injunction — Summons—Mandamus—Demand and Refusal—Practice.

1. An injunction cannot issue unless a summons has been issued returnable to the Superior Court of the county in which the action is brought.
2. A proceeding in mandamus may be returnable before a judge at chambers, but it cannot be sustained unless a demand has been made for the relief sought, followed by a refusal or what is equivalent to a refusal.

PROCEEDINGS for a *mandamus* and injunction in CUMBERLAND, brought on 13 August, 1897, by summons returnable at chambers at Carthage, N. C., before *McIver, J.* The facts appear in the opinion. On hearing, the defendants entered a special appearance and moved to dismiss the proceeding in so far as it demanded an injunction, for the reason that there was no sufficient summons. They also demurred *ore tenus* to the petition for that it contained no averment of a demand for and refusal of the relief sought. His Honor refused to dismiss and overruled the demurrer and rendered judgment.

N. W. Ray and H. McD. Robinson for plaintiff. (468)
McRae & Day and W. E. Murchison and N. A. Sinclair for defendants.

FURCHES, J. To us, this is a most remarkable proceeding in more than one respect. The defendants are the commissioners of Cumberland County and the plaintiff is a citizen and taxpayer of the town of Fayetteville in said county. The plaintiff complains and alleges that the defendants have created a nuisance, dangerous to the health of the town, by emptying sewerage from the courthouse and public jail into McNeill's mill-pond near the center of the town, and alleges that it should be emptied into the creek some distance below said mill-pond. And for the purpose of having the alleged nuisance abated, and to have the sewerage emptied into said creek at the point indicated, he commenced this proceeding on 13 August, 1897.

The proceeding was commenced by issuing a summons returnable before Judge McIver at Carthage, in Moore County, on 25 August, 1897. This proceeding was commenced without having made any demand on the commissioners; and on the return day the defendants demurred *ore tenus* to the plaintiff's action upon the ground that no demand had been made. But the court overruled the demurrer and proceeded to hear the case, to find the facts, and pronounce judgment.

No other summons was ever issued in the case except the one returnable before Judge McIver, as above stated.

The defendants filed affidavits denying many of the allegations
(469) in the plaintiff's affidavit, but admitted that the sewerage did empty into the mill-pond of the said McNeill. But they also alleged that they had made every effort to procure a right of way to construct a line of sewerage from the courthouse and jail to said creek at the point designated by the plaintiff in his affidavit, and were unable to do so. That not being able to purchase or procure said right of way so as to enable them to construct the sewer, they procured an act of the General Assembly to be passed at its session in 1897 authorizing them to condemn this right of way; that they had employed a competent engineer to survey, locate, and grade this right of way, as they were authorized to do by said act, and that they had made every arrangement to construct the same as soon as the season would permit them to do so with safety to the health of the town, which would not be until fall. And at the trial before Judge McIver, the *plaintiff* offered affidavits of local physicians saying that it would not be safe to do it until the fall. And Judge McIver, under this state of facts, while he ordered that the defendants should make the sewer, provided that they should not be required to do so before 1 October, 1897.

The defendants appealed from this judgment of Judge McIver to this Court, but have built the sewer within a few feet of the courthouse. And the plaintiff has filed affidavits here for the purpose of showing that said sewer *has been constructed,* upon which he bases a motion to dismiss the defendant's appeal on the ground that there is nothing involved now, except costs. In reply to plaintiff's affidavits, defendants file affidavits to show that said sewer *is not complete.* This raises a question of dispute between the parties that we do not propose to settle, but will
(470) consider the case as it stood at the time of the trial and appeal.

The case presents some very striking features. The plaintiff commences what he claims here to be a *mandamus* proceeding, on 13 August, to compel the defendants to do what he says they should *not do* until October. And defendants say they were using every effort to do the very thing that the plaintiff says they *should do* at as early a date as it was safe for them to do it; that not being able to get the right of way they had procured an act of Assembly to be passed in order that they might do what the plaintiff says he wants done. It was contended, as we have said, by the plaintiff's counsel on the argument here that this is a proceeding in *mandamus.* The plaintiff in his complaint styles it an "application for injunction and *mandamus.*" The matter complained of was a public nuisance, and the remedy for this was an injunction. And while there were other prayers falling under the doctrine of *mandamus,* they seem to us to be but incidents to the injunctive relief. But to treat

it either as an injunction proceeding or as a *mandamus* proceeding, or as both, the proceeding must be dismissed.

If it is treated as an injunction, it cannot be sustained as no summons was ever issued returnable to the Superior Court of Cumberland County. And no injunction could be issued until this was done. Code, sec. 339; *Patrick v. Joyner,* 63 N. C., 573; *Trexler v. Newsom,* 88 N. C., 13; *Grant v. Edwards,* 90 N. C., 31.

If it is treated as a *mandamus,* it cannot be sustained for the reason that there was no demand and refusal. And the defendants alleged they were doing everything they could to accomplish the very thing the plaintiff asked that they should be *commanded* to do. A proceeding in *mandamus,* in a case like this, may be made returnable before the judge at chambers. Code, sec. 623. But it cannot be sustained (471) without demand and refusal or what is equivalent to a refusal. *Alexander v. Comrs.,* 67 N. C., 330; High Extraordinary Remedies, sec. 41; *Comrs. v. Comrs.,* 37 Pa. St., 237.

This seems to us to have been a very unnecessary litigation. For the reasons given it cannot be sustained, and the judgment of the court below is

Reversed.

SAMUEL J. GUY v. COMMISSIONERS OF CUMBERLAND COUNTY AND THE DISPENSARY BOARD.

(Decided 5 April, 1898.)

Intoxicating Liquors—Legislative Control of Sale—Monopoly of Sale—Dispensary Law—Constitutionality of Statute.

1. The regulation of the traffic in liquors is within the police power of the State, and a law regulating the sale within a particular locality is not unconstitutional because local, the only limitation upon a local act being that it must bear on all alike within the designated locality.

2. There is no vested right acquired by persons engaged in the liquor traffic which prevents its being forbidden by the General Assembly.

3. The control of the sale of liquor within a county under the "dispensary" system, as provided in chapter 235, Acts of 1897, is not such a monopoly as contemplated by the inhibition contained in section 31, Article I of the Constitution.

ACTION in CUMBERLAND to enjoin the Dispensary Board of that county from establishing and maintaining the dispensary authorized by chapter 235, Laws 1897, and to enjoin the defendant county commissioners from paying out any county funds or pledging the credit (472)

of the county for the support of such dispensary and from engaging in the sale of liquor under said act, and to have the said act declared unconstitutional. A rule to show cause, etc., was issued by *McIver, J.*, and the answer thereto heard before him at chambers in Carthage, N. C., on 22 June, 1898.

His Honor discharged the rule to show cause as to the dispensary board for Cumberland County, but enjoined the defendant county commissioners from appropriating any moneys to the support of the dispensary. From the order discharging the rule as to the dispensary board, the plaintiff appealed.

George M. Rose for plaintiff (appellant).
R. P. Buxton and N. A. Sinclair for defendants.

CLARK, J. The General Assembly of 1897 enacted a statute (chapter 235) to "regulate the sale of liquors in Cumberland County and to establish a dispensary." This action is brought by the plaintiff in behalf of himself and all other taxpayers and residents of said county who may join in the action, to enjoin the county commissioners from paying out any money to aid in establishing or maintaining said dispensary, or pledging the faith and credit of the county for any debt contracted on behalf of the same, and also to enjoin the operation of the dispensary on the ground that the act is unconstitutional and void.

The defendants filed an answer that no county funds have been advanced, and the credit of the county has not been pledged (the only attempted help having been the loan of $100 in county scrip,
(473) which was returned unused to the county commissioners by the dispensary board), and the court enjoined the county commissioners from appropriating any money of the county, or pledging the faith and credit of the county, in aid of the dispensary. This order is not appealed from, and therefore it is unnecessary to consider its validity. The plaintiff has the relief he asked for in that regard.

It is not easy to perceive how, as a taxpayer, he can complain of the establishment of the dispensary, which has devolved, and after the above injunction can devolve, no expense upon the county, and which upon answer appears to be bringing a considerable revenue into the county treasury, largely in excess of that formerly received from liquor licenses, besides reducing the volume of drunkenness and the expense of criminal trials resulting therefrom. But upon the question of constitutionality no doubt can arise. The subject of the regulation of the traffic in liquors has been held uniformly to be within the police power of the State, both by the Supreme Court of the United States and of this State. License Cases, 5 Wall., 452; *Foster v. Kansas,* 112 U. S., 205; *S. v. Joyner,* 81 N. C., 534.

Nor is it essential that the regulation shall be uniform throughout the State. It is estimated, by careful calculation, that by virtue of local prohibitory statutes passed by the General Assembly from time to time, and local prohibition adopted by popular vote under legislative authority for other localities, that as to one-half of the area of the State there is a total prohibition of the manufacture and sale of intoxicating liquors. In addition, in other localities the General Assembly has authorized the high license system, and in several others the dispensary system, which the act in question provides for Cumberland County. (474)

These local acts are within the discretion of the General Assembly, and have been held valid as to the regulation or prohibition of the liquor traffic. *S. v. Muse,* 20 N. C., 319; *S. v. Joyner,* 81 N. C., 534; *S. v. Stovall,* 103 N. C., 416; *S. v. Barringer,* 110 N. C., 525; *S. v. Snow,* 117 N. C., 774; and as to restricting the sale of seed cotton in certain localities, *S. v. Moore,* 104 N. C., 714; as to stock running at large, *Broadfoot v. Fayetteville,* 121 N. C., 418; and in other instances, *Intendant v. Sorrell,* 46 N. C., 49. The only limitation is that the law must bear alike on all within the designated locality. *Broadfoot v. Fayetteville, supra.* There is no vested right acquired by those engaged in the liquor traffic, which prevents its being forbidden by an act of the General Assembly. *Mugler v. Kansas,* 123 U. S., 623, 663; *S. v. Barringer, supra.*

The gist of the plaintiff's contention against the dispensary is that it is a monopoly. To this *Mr. Justice Brown* has replied very conclusively in *Scott v. Donald,* 165 U. S., 104: "Granting that it is a monopoly of traffic in such liquors, it is not a monopoly in the ordinary or odious sense of the term, where one individual or corporation is given the right to manufacture or trade which is not open to others, but a monopoly for the benefit of the whole people (of the district), the profits of which, if any, are enjoyed by the whole people; in short, a monopoly in the same sense in which the Postoffice Department, and the right to carry the mails, is a monopoly of the Federal Government." *Lowenstein v. Evans,* 69 Fed., 908. Also, the well-considered opinion of the Supreme Court of South Carolina, 42 S. C., 222, and Slaughter House Cases, 83 U. S., 36.

It is to be observed that no question of interstate commerce is presented by this record, but simply the right of the State under (475) its police power to provide for the local regulation of the liquor traffic in Cumberland County by the means which the General Assembly thinks best. *Barbier v. Connelly,* 113 U. S., 27.

Affirmed.

Cited: Tate v. Comrs., post, 814; *Bennett v. Comrs.,* 125 N. C., 470; *S. v. Sharp, ibid.,* 633; *Garsed v. Greensboro,* 126 N. C., 160; *S. v. Gallop, ibid.,* 984; *S. v. Smith, ibid.,* 1058; *S. v. Blake,* 157 N. C., 610; *Newell v. Green,* 169 N. C., 463.

CHARLES W. CARTER v. A. H. SLOCOMB.

(Decided 5 April, 1898.)

Action to Set Aside a Sale Under Mortgage—Mortgagor and Mortgagee —Power of Sale—Death of Mortgagor—Notice to Heirs.

1. A power coupled with an interest survives the life of the person giving it, and may be executed after his death.
2. The power of sale in a mortgage is not affected by the mortgagor's death, and may be exercised without notice to his heirs.

ACTION to set aside a sale made by defendant Slocomb under a power of sale contained in a mortgage made by W. F. Carter and wife to said Slocomb, and a deed made thereunder by defendant Slocomb to defendant Daniel Carter, the purchaser at said sale, and to require the said deed to be delivered up and canceled, and for the possession of the land described in said deed, upon the payment by plaintiff of the balance due upon said mortgage, tried before *McIver, J.*, and a jury, at November Term, 1897, of CUMBERLAND.

The following issues were submitted to the jury:

1. Was the sale by Slocomb, under the power of sale in the
(476) mortgage, void for want of notice to the infant plaintiff, the mortgagor being dead?
2. What is the rental value of the land?

Upon the pleadings, his Honor held that the sale by defendant Slocomb, under the power of sale in the mortgage, was void by reason of the death of the mortgagor and of want of notice to the plaintiff (his infant heir), and of legal proceedings against him for foreclosure, and he directed the jury to respond to the first issue "Yes."

(Defendant excepted.)

The jury responded to the first issue "Yes," and to the second issue, "$80."

His Honor rendered judgment for the plaintiff, setting aside the sale as void and ordering the deed to the purchaser at such sale to be submitted for cancellation. From this judgment defendants appealed.

H. McD. Robinson for plaintiff.
J. C. and S. H. MacRae for defendants.

FAIRCLOTH, C. J. The sole question presented is whether a sale of land by a mortgagee under a power of sale in the mortgage, made after the death of the mortgagor, without notice to the heir, conveys a good title—that is, whether at the death of the mortgagor the power of sale ceases and becomes inefficacious.

In this State, when a mortgage is executed the mortgagee becomes the legal and the mortgagor the equitable owner, and until the day of redemption is past the mortgagor has a legal right, and afterwards an equity of redemption. *Hemphill v. Ross,* 66 N. C., 477.

No question of fraud enters into the controversy, nor any as (477) to the amount due on the mortgage debt. The mortgagor cannot demand any notice of intention to sell under the power, and the heir at law stands in the place of his ancestor. *Carver v. Brady,* 104 N. C., 219; *Frazier v. Bean,* 96 N. C., 327. The general rule is that a power ceases with the life of the person giving it, but where the power is coupled with an interest it survives the life of the person giving it and may be executed after his death. By a "power coupled with an interest" is meant an interest in the thing itself, that is to say, the power must be engrafted on the estate in the thing, and not on the product of the exercise of the power. *Hunt v. Rousmanier,* 8 Wheaton, 203. This principle is not affected by any *change of circumstances,* such as the death of the mortgagor. 8 A. & E. Enc., 875; *Cranson v. Crane,* 93 Am. Dec., 106. "The death of the mortgagor does not revoke a power of sale." 2 Jones on Mort., sec. 1792, and cases cited. "In those States where the common-law rule prevails that such a power is coupled with an interest, the death or bankruptcy of the mortgagor does not revoke or suspend the power of the legal holder to sell under the power, as the power is coupled with an *irrevocable* interest and cannot be revoked, but in those States where this power is not coupled with an interest, the rule is different." 2 Pingree on Mortgages, sec. 1336.

The principle here announced is fully recognized in *Parker v. Beasley,* 116 N. C., 1, and other cases by this Court.

Upon these authorities we find that there was error in the judgment below.

Reversed.

Cited: Cawfield v. Owen, 129 N. C., 287; *Fisher v. Trust Co.;* 138 N. C., 100; *Modlin v. Ins. Co.,* 151 N. C., 41.

(478)

J. H. MARSH, ADMINISTRATOR OF M. FAULK, v. R. M. NIMOCKS ET AL.

(Decided 19 April, 1898.)

Action Against Bidder at Judicial Sale—Judicial Sale—Raising Bids—Default of Purchaser—Deficiency.

1. The court ordering a judicial sale of lands has all the powers necessary to accomplish its purpose, and when relief can be had in the pending action it must be sought by a motion in the cause and not by an independent action.
2. An independent action will not lie against a defaulting bidder at a judicial sale for the amount of his bid, or against one who has raised the bid at a sale for the deficiency between the original bid and the price bid and approved on a resale, unless the action in which the sale was made has been closed by final judgment. The remedy against the defaulting bidder is by motion in the cause.
3. Where a judicial sale has been set aside and a resale ordered, on an offer of 10 per cent advance on the amount bid, the commissioner should start the resale at the advanced bid, and in default of other bids should declare the person making the advanced bid to be the purchaser at such price, and, on the latter's failure to comply with the purchase, a motion should be made, on notice, in the pending action, for him to show cause why judgment should not be rendered against him.

ACTION, brought before a justice of the peace to recover $186.65, and heard, on appeal, before *Coble, J.*, at April Term, 1897, of CUMBERLAND. By consent, his Honor found the facts and upon them rendered judgment for the defendants, and plaintiff appealed.

G. M. Rose, H. L. Cook, and N. A. Sinclair for plaintiff.
H. McD. Robinson for defendant.

(479) FAIRCLOTH, C. J. The plaintiff, under an order of court, sold several lots of land for assets to several parties, and reported the sale. The defendants, in apt time, offered to raise the bid 10 per cent on certain lots and 11 per cent on other lots. The clerk ordered the lots to be resold, except the Magnolia building, at which the defendants failed to attend, and the lots were sold to other persons, and the sale was confirmed. The difference between the price bid at the second sale and the price at the first sale, plus the increased bid offered by the defendants, was $186.65, and to recover this difference this action was instituted.

This action must be dismissed. In a proceeding to sell land for assets the court of equity has all the powers necessary to accomplish its purpose, and when relief can be given in the pending action it must be done by a motion in the cause and not by an independent action. The latter is allowed only where the matter has been closed by a final judgment. If

the purchaser fails to comply with his bid, the remedy is by motion in the cause to show cause, etc., and if this mode be not pursued, and a new action is brought, the court *ex mero motu* will dismiss it. This course is adopted to avoid the multiplicity of suits, avoid delay, and save costs. *Hudson v. Coble,* 97 N. C., 260; *Pettillo, ex parte,* 80 N. C., 50; *Mason v. Miles,* 63 N. C., 564, and numerous cases cited in them.

The offer, then, was a standing bid at the second sale. We have adopted the English rule of practice in such matters. At the second sale the plaintiff should have started the bidding at the amount of the price bid at the first sale with the percentage offered by the defendants added, and if no other bid was made, he should have declared the defendants as the best bidders and purchasers, subject to confirmation, and made his report to the court accordingly. (480)

On failure of the defendants to comply with such bid, the practice is by motion in the pending action, upon notice to the defendants to show cause why judgment should not be entered as the court may deem proper, when the defendants have an opportunity to excuse their noncompliance, if they are able to do so. *Pritchard v. Askew,* 80 N. C., 86; *Attorney-General v. Navigation Co.,* 86 N. C., 408. Many of the decisions regulating judicial sales will be found collected in *Trull v. Rice,* 92 N. C., 572; *Vaughan v. Gooch, ibid.,* 524.

Action dismissed.

Cited: Wooten v. Cunningham, 171 N. C., 126.

W. B. MALLOY ET AL. v. CITY OF FAYETTEVILLE.

(Decided 26 April, 1898.)

Action for Damages—Justice of the Peace—Jurisdiction—Constitutionality of Statute.

1. The General Assembly has power, under section 12, Article IV, to apportion out the judicial power and jurisdiction below the Supreme Court as it deems fit, except when to do so conflicts with other provisions of the Constitution.

2. The provision in section 27, Article IV of the Constitution, authorizing the General Assembly to give to justices of the peace "jurisdiction of other civil actions wherein the property in controversy does not exceed fifty dollars," is not a restriction, even by implication, to forbid conferring jurisdiction where *damage* and not *property* is in controversy.

3. Section 888 of The Code, authorizing action for "damages" not exceeding fifty dollars to property, though the property be of greater value, does not contravene section 27, Article IV, Constitution, and is authorized by section 12 of said article.

4. A justice of the peace has jurisdiction of an action for damages, not exceeding fifty dollars, for injury to personal property, though such property be of greater value than fifty dollars.

FAIRCLOTH, C. J., and MONTGOMERY, J., dissent.

(481) ACTION for damages to personal property, tried before *Coble, J.*, and a jury, at April Term, 1897, of CUMBERLAND, on appeal from a judgment by a justice of the peace. There was a verdict for the plaintiffs, and defendant appealed from the judgment thereon. In this Court, for the first time, defendant excepted to the jurisdiction of the justice of the peace of an action for damages to personal property.

J. C. and S. H. MacRae for plaintiffs.
H. McD. Robinson for defendant (appellant).

CLARK, J. The Constitution, Art. IV, sec. 12, empowers the General Assembly to "allot and distribute that portion of the judicial power and jurisdiction, which does not pertain to the Supreme Court, among the other courts prescribed in this Constitution, or which may be established by law, in such manner as it may deem best" (and also to regulate appeals and procedure), "so far as the same may be done without conflict with other provisions of this Constitution." Section 27 of the same article gives justices of the peace jurisdiction "of civil action founded on contract, wherein the sum demanded shall not exceed $200, and wherein the title to real estate shall not be in controversy. . . . And the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed $50."

(482) By virtue of that permission, the General Assembly enacted The Code, sec. 887: "Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed $50."

Then, by virtue of the broader permission in section 12, Article IV, which by its terms applies both to "courts prescribed in this Constitution or which may be established by law," the General Assembly enacted The Code, sec. 888: "All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the conversion of personal property, or *any injury thereto,* shall be commenced and prosecuted to judgment as provided in civil action in a justice's court." There has

been an exactly similar extension of jurisdiction as to attachment proceedings. *Long v. Ins. Co.*, 114 N. C., 465, at page 470. This is an action in a justice's court, alleging $50 damages for injury to personal property, and must be sustained unless we adjudge that the General Assembly had no power to "allot and distribute jurisdiction" to a justice of the peace in an action for $50 injury to personal property.

In *Rhyne v. Lipscombe, post,* 650; *Tate v. Comrs., post,* 661, and *S. v. Ray, post,* 1097, the Court held that the power of the General Assembly to allot and distribute the jurisdiction below his court was unlimited, save by the provision that such allotment "must be done without conflict with other provisions of this Constitution," and it was held that the statute under consideration in those cases did conflict, for reasons therein stated, with the constitutional provisions as to the Superior Court, and also with the provision in section 27, giving an appeal to that court from a justice of the peace, but it was held that, save where there was a conflict with other provisions of the Constitution, the General Assembly could apportion out the jurisdiction below this Court as it saw fit. (483)

The provision in section 27, bestowing express permission to give justices of the peace "jurisdiction of other civil actions, wherein the property in controversy does not exceed $50," is not a restriction, even by implication, to forbid conferring jurisdiction where damages, not property, is in controversy. It certainly does not restrain the broader power given in the constitutional amendment of 1875 (now section 12 of Article IV), by virtue of which the General Assembly has given justices of the peace jurisdiction of "damage to real estate, and for the conversion of personal property, or for injury thereto, under the same rules of procedure as in other civil actions in a justice's court." Code, sec. 888.

There are inseparable reasons for not holding this last statute unconstitutional: First, an enactment of the body charged by the Constitution with the law-making power, should not be adjudged unconstitutional by this coördinate department unless it is clearly and plainly so. "If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Sutton v. Phillips,* 116 N. C., 502.

Second. This section has been repeatedly recognized as valid and constitutional ever since its enactment twenty-two years ago. Judgments have been obtained in actions brought under its provisions, and property sold and titles acquired at sales under execution issued thereon, which will be void (except where ripened by the statute of limitations) if the court was without jurisdiction to render judgment. *Noville v. Dew,* 94 N. C., 43. Among the cases in this Court recognizing the constitu-

tionality of this statute are *Barneycastle v. Walker,* 92 N. C., 198,
(484) 201, and *Harvey v. Hambright,* 98 N. C., 446, and there are others. It is a sound maxim *quieta non movere.*

Great numbers of actions for damages arising out of *tort* not exceeding $50 have been brought before justices of the peace in twenty-two years since this statute has been enacted. Probably the most usual kind has been, like the present, actions asking damages for injury to live-stock, often for their being killed on the railroad. Prior to the constitutional amendment of 1875 and the act of 1876, ch. 251 (now Code, sec. 888), it was held that the justice of the peace did not have jurisdiction of an action for damages for negligent killing of live-stock. *Nance v. R. R. Co.,* 76 N. C., 9, which was for damages for negligence in killing a cow. In *Krider v. Ramsey,* 79 N. C., 354 (at page 359), *Bynum, J.,* recognizes that this had then been changed. Accordingly, in *Roberts v. R. R.,* 88 N. C., 560, and *Winston v. R. R.,* 90 N. C., 66, the jurisdiction of the justice of the peace of an action for damages less than $50 for "injury to personal property" in killing a cow, was accepted as settled law, and has been so recognized by this Court ever since. Among the cases (too numerous to mention) in which the jurisdiction of the justice in such cases is accepted as settled, without readjudication, are *Hardison v. R. R.,* 120 N. C., 492 (*Furches, J.*); *Doster v. St. R. R.,* 117 N. C., 651 (in which case, like this, the frightened animal broke a buggy); *Seawell v. R. R.,* 106 N. C., 272; *Bethea v. R. R., ibid.,* 279; *Horner v. Williams,* 100 N. C., 230. Nor has the jurisdiction been confined to injuries to live-stock. In *Black v. R. R.,* 115 N. C., 667, this Court affirmed a judgment in an action begun before a justice of the peace for damages sustained in burning the plaintiff's turpentine by fire negligently
(485) permitted to escape from the defendant's engine, and in *Young v. R. R.,* 116 N. C., 932 (*Faircloth, C. J.*), similar jurisdiction in a justice of the peace was recognized for damages from negligent burning of personal property not held by virtue of contract as common carrier, but held at the owner's risk. Jurisdiction in a justice of the peace was recognized to exist for damages "not over $50," for "conversion of personal property" (Code, sec. 888), in *Bell v. Howerton,* 111 N. C., 69; for damages for negligence in burning timber, in *Basnight v. R. R.,* 111 N. C., 592; for damages for trespass, *Ginsbery v. Leach, ibid.,* 15; for trespass in cutting trees, in *Edwards v. Cowper,* 99 N. C., 421, at page 424; and for tortious taking of property "not over $50," in *Womble v. Leach,* 83 N. C., 84, at page 86. The list of cases might be greatly extended, but a jurisdiction so long, so often, and so universally recognized cannot be plainly unconstitutional. It would be a serious inconvenience to the public if actions for these small *torts* could be brought only in the Superior Court, and it was because previous experi-

ence had so proved that the constitutional amendment of 1875 (Article IV, section 12) took the Constitution out of a straight jacket and conferred this discretionary power of "allotting and distributing the jurisdiction" upon the General Assembly, which can respond speedily to public demands and needs in such regard.

And furthermore, the jurisdiction of these lower courts, near to the people and inexpensive, is to be favored. In them, matters in difference are settled in the neighborhood by magistrates who know the parties, and without the expense of attending many days at the perhaps distant county-seat, with heavy bills of cost, and the necessity of employing and paying counsel. If either party, however, is dissatisfied with the adjudication upon a small claim for damages, he has the right of appeal, as in an action upon contract or in claim and delivery. The (486) Code, sec. 888, however, does not authorize the bringing of actions for slander, libel, and other unliquidated damages not arising out of injury to property, and this opinion is not to be understood as holding that it does.

This exception to the jurisdiction was made for the first time in this Court, as the appellant had the right to do, or the Court could make it *ex mero motu*. Rule 27. All the exceptions taken below were without merit and require no detailed consideration.

Affirmed.

MONTGOMERY, J., dissenting. This action was commenced in a court of a justice of the peace, *in tort* for damages to personal property. The Constitution of 1868, Article IV, section 33, conferred upon justices of the peace *exclusive original jurisdiction* of all civil actions founded on contract wherein the sum demanded should not exceed $200 and the title to real estate should not be in controversy. The Constitution of 1875, Art. IV, section 27, also prohibits justices of the peace from taking jurisdiction in matters wherein the title to real estate is in controversy, and gives them jurisdiction (exclusive or concurrent with other courts, as the General Assembly might provide) of civil actions founded on contract wherein the sum demanded does not exceed $200. In the same section and article of the Constitution of 1875, the General Assembly is given the power to increase the jurisdiction of justices of the peace in these words: "And the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed $50." In the Acts of 1876-7, ch. 251, sec. 1, the General Assembly exercised the power con- (487) ferred by the Constitution, and enacted *in the precise words of the Constitution* that "Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract wherein the value of the property in controvesy does not exceed $50."

Section 2 of the same act is in the following words, "All actions in a court of a justice of the peace for the recovery of damages to real estate or for the conversion of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil action in a justice's court." The section (2) last quoted of the act is not authorized by the Constitution, and the General Assembly in its attempt to enact such a provision of law exceeded its powers. The Constitution plainly limits the extension of jurisdiction of justices of the peace to civil actions not founded on contract *wherein the value of the property in controversy* does not exceed $50. The language *"property in controversy"* can have no other meaning than that the *property itself*—the title and the right of possession of the property—must be the subject of the action. The Constitution nowhere uses the word *damages* synonymously with *property in controversy* or in the least way connected with the prospective extended jurisdiction of the justices of the peace; and it only could have been intended in that instrument, on that subject, that persons who had a right to, or who had been unlawfully deprived of, the possession of personal property, of the value of $50 or less, might have a speedy remedy in law for recovering its possession. And it must be particularly observed that the limitations placed upon the jurisdiction of justices of the peace, in section
(488) 27 of Article IV of the Constitution, are not and cannot be affected by the provisions of section 12, Article IV, Constitution. The last mentioned section on its face refers to such courts *inferior to the Supreme Court* to be thereafter established, and it especially and pointedly declares that, in any distribution of the judicial powers, the same shall be done without conflict with other provisions of the Constitution. As we have said, Article IV, section 27 of the Constitution contained a limitation upon the power of the General Assembly to extend the jurisdiction of the justices of the peace; that limitation being that such jurisdiction should be extended only to other civil actions wherein the *value of the property in controversy* should not exceed $50. And it would seem that there was good reason for the extension of the jurisdiction of the justices of the peace as permitted by the Constitution and as was enacted in section 1 of the act referred to. The unlawful taking by one of another's ox or cow, or other article of personal property constituting a necessary of life, would be a most serious matter to many of our people, and its prompt return by the justice's trial and judgment with its small costs and small loss of time would be most desirable and necessary to the comfort and well-being of the person unjustly deprived of such property. The justice, too, would have less difficulty in determining who was entitled to the possession of personal property than he would have in passing upon the oftentimes complicated law points aris-

ing under the measure of damages, and upon the rules of evidence governing suits for damages. Also, in actions for damages to either personal or real estate, the injury having already been done, the complainant could wait until the Superior Court could take jurisdiction and more thoroughly hear and determine the matter. (489)

We are aware that there have been numerous *dicta* on this subject in our decisions, but in not a single one of the cases, so far as we have been able to see, was the question whether an action in *tort* for damages growing out of injury to either personal or real property the precise point for decision. I am of the opinion that the action should have been dismissed for want of jurisdiction and, on that account, the judgment below ought to be reversed.

FAIRCLOTH, C. J., dissenting. The question of jurisdiction is the principal one in this case and it must be admitted that it is an important and serious question, requiring our best consideration. It is a constitutional question, and now the inquiry is whether Laws 1876-7, chapter 251, exceeds the constitutional limit.

It is found by the jury that the plaintiff's horse and buggy were damaged by the negligence of the defendant. It appears, or is admitted that the horse and buggy are worth $100 or more. The plaintiff sues in *tort* before a justice of the peace for $50 damages. Has the justice of the peace jurisdiction?

In the Constitution, Art. IV. sec. 12, the General Assembly is empowered to allot and distribute that portion of the judicial power and jurisdiction, which does not pertain to the Supreme Court, among the other courts as it may deem best, . . . provide for appeals and regulate the methods of proceeding in the exercise of their powers "so far as the same may be done without conflict with other provisions of this Constitution."

Since the Constitution of 1868, justices of the peace have civil jurisdiction in actions founded on contract where the sum demanded does not exceed $200. The Constitution, Art. IV, sec. 27, says: (490) "And the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the *value of the property* in controversy does not exceed $50."

The foregoing is the extent of a magistrate's jurisdiction authorized by the Constitution. The act of 1876-7, section 1, after reciting the civil jurisdiction in the language of the Constitution says: "Justices of the pace shall have concurrent jurisdiction of civil actions not founded on contract wherein the *value of the property* in controversy does not exceed $50"; and in section 2: "All actions in a court of a justice of the peace for the recovery of damages to real estate or for the conversion of

personal property or an injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court." It will be observed that the language of the act is more extensive than that of the Constitution, and therefore the latter is a limitation upon the former, as by no process of reasoning can "damages" and "the value of the property in controversy" be assimilated. The evident meaning of the Constitution is to confer jurisdiction on the justices to award damages when the injury is done to property of no more value than $50, so that neither can ever exceed that amount. If that be not so, then the justice may take jurisdiction of injuries to property of the largest value, provided the owner shall lay the damages at $50 or less. Why limit the jurisdiction to injuries to property of no more value than $50? may be asked. The answer is that that is the plain meaning of the language of the Constitution. *Lex ita scripta est.*

The reason for this limitation seems to be to enable the small
(491) owner, as of a cow worth $25, to obtain his remedy for small damages, even if the property be literally destroyed or killed, speedily and without costly delay. If the damage is the test of jurisdiction, without regard to property or its value, then justices may take cognizance of actions for slander or libel, provided the complainant shall lay his or her injury or damage at $50. If the theory of the advocates of the jurisdiction is correct, then it is within the power of the Legislature to extend the jurisdiction to any case of damage to stock, property or the killing of a human being by a railroad engine or other powerful agency. This is the logical conclusion, and the absurdity of a justice of the peace at the trial passing upon the competency of important questions of evidence laid down in Greenleaf and Wharton, and, in cases of death, applying the principles of negligence, contributory negligence, "last clear chance" and the like, must be apparent.

This question has never been considered or passed on by this Court. There are several cases in our later Reports, tried by justices of the peace, wherein damages were allowed when the value of the *property in controversy* was more than $50, but in no case was the jurisdictional question insisted on, or considered or decided by this Court, so that we have decisions which have not decided this question.

As the Constitution is the authority for legislation, it is our duty to observe and enforce its provisions, and if any error has crept into the decisions of this Court, by inadvertence or otherwise, it should be corrected at the first discovery and opportunity, especially in cases where no rights of property or person have vested by reason of such decisions. At this point the remarks of *Pearson, J.*, in *Gaskill v. King,* 34 N. C.,
211, are pertinent: "My idea is that 'law' is not a mere list of
(492) decided cases, but a *liberal science* based on general principles

and correct reasoning. Cases are mere evidence of what the law is; and if a case is found to be unsupported by principle and 'the reason of the thing,' the court is no more bound to follow it than is a jury bound to believe a witness who is discredited by proof of his bad character, or his demeanor or direct contradiction. In the one there is a *sworn* witness; in the other, there is a decided case; both are *prima facie* entitled to credit, until the contrary is made to appear. It is true law should be 'fixed and steady,' but it is also true it should be 'reasonable and right.' The latter is the most important, because, without it, the former object cannot be attained. There are two extremes—a disregard of authority, which I disclaim, and a blind-folded following of cases, which I also disclaim, as not only absurd but impossible (for, suppose a court in attempting to follow a case, should 'miss the point,' which case is then to be followed?) There is a medium which I try to adhere to: take a comprehensive view of all the cases from the 'Year Books' down to the present time—has not this middle course been adopted and acted on throughout? Is it not supportd by good sense and general practice? Let a case be taken as settling the law *prima facie;* but if it is shown not to be supported by principle and 'the reason of the thing,' let it be overruled—the sooner the better; for, if the error is allowed to spread, it may insinuate itself into so many parts and become so much ramified as to make it impossible to eradicate it, without doing more harm than good, but if the seed has not spread too much, pull it up and throw it away."

Cited: Mott v. Comrs., 126 N. C., 881; *Watson v. Farmer,* 141 N. C., 453; *Brick v. R. R.,* 142 N. C., 360; *Duckworth v. Mull,* 143 N. C., 464, 469, 470, 472; *Houser v. Bonsal,* 149 N. C., 54; *Wilson v. Ins. Co.,* 155 N. C., 177.

(493)

STATE EX REL. H. H. BARNHILL v. Z. G. THOMPSON.

(Decided 5 April, 1898.)

Action of Quo Warranto — Public Officer — County Commissioner — County Board of Education—Forfeiture of Office by Accepting Another.

1. The county board of education is a public office.

2. A citizen and taxpayer of a county is entitled to bring an action in the nature of *quo warranto* to try the right of a person to hold two offices in such county at the same time.

3. Under section 7, Article XIV of the Constitution, one person cannot hold the office of county commissioner and also be a member of the county board of education.

4. The question of holding two public offices at the same time does not depend, as at common law, upon the incompatibility of the two offices alone, but upon the positive language of the Constitution forbidding it.

5. The acceptance of a second office by one already holding a public office operates *ipso facto* to vacate the first. While the officer has a right to elect which of the two he will retain, his election is deemed to be made when he accepts and qualifies for the second.

6. Final judgment can be entered in this cause.

QUO WARRANTO to try the title of the defendant to the office of County Commissioner, heard before *Allen, J.*, at Spring Term, 1898, of BLADEN. His Honor, by consent, found the facts as set out in the opinion and rendered a judgment as follows:

"This case coming on for trial and a jury trial being waived, after finding the facts, and the Court being of the opinion that the duties of a member of the Board of Education are not incompatible with the duties of a member of the Board of County Commissioners, and that the defendant did not forfeit his office of county commissioner by subsequently accepting and qualifying as a member of the Board of Education of Bladen County, it is therefore adjudged that the defendant go without day and recover his costs of the relator, to be taxed by the (494) clerk." From this judgment the plaintiff appealed.

R. S. White for plaintiff.
Jones & Boykin for defendants.

FAIRCLOTH, C. J. The facts in this case were found by his Honor, by consent, and are as follows: "The defendant was duly elected a county commissioner for Bladen County at the general election held in 1896 and duly qualified as such on the first Monday in December, 1896, and has since continued to hold the office, and now holds and exercises the duties thereof. On the first Monday of June, 1897, the defendant was elected by the duly constituted election board a member of the Board of Education for Bladen County and qualified as such member by entering upon the discharge of the duties thereof and still continues to exercise the same. An action was brought to Fall Term, 1897, of Bladen Superior Court by the Attorney-General on the relation of one L. P. Cromartie against the defendant and others, to turn said defendant out of the office of county commissioner. The Superior Court sustained the defendant's demurrer and gave judgment dismissing the action, and the relator appealed to the Supreme Court, and at September Term, 1897, thereof the said judgment was affirmed (*Cromartie v. Parker,* 121

N. C., 198) and the opinion of the Court certified to this court (Superior Court) at its present sitting, and judgment in accordance with the opinion of the Supreme Court was rendered at this term. The present action was brought on 23 February, 1898, before the final judgment was rendered in said former action in accordance with the opinion of the Supreme Court. Leave was granted by the Attorney-Gen- (495) eral to bring this action on 24 February, 1898."

It is also admitted that the plaintiff is a citizen, property owner and taxpayer of Bladen County, and that in June, 1897, the defendant Thompson and C. W. Lyon and John F. Croom proceeded to elect themselves members of the board of education for the county. The plaintiff institutes this action in the nature of *quo warranto,* which he may do (*Hines v. Vann,* 118 N. C., 3; *Foard v. Hall,* 111 N. C., 369; Code, secs. 607, 608, 610), for the purpose of ascertaining whether the defendant can legally hold the two offices, of a member of the Board of County Commissioners and member of the Board of Education in the same county, at one and the same time. The Board of Education is now authorized and regulated by Laws 1897, ch. 108, and the 6th section requires the county commissioners, with the clerk of the court and the register of deeds, "to elect three men of their county, of good business qualifications and known to be in favor of public education," who shall constitute a board of education.

In obedience to that section, and in order to observe and perpetuate the "fitness of things," the defendant and his two associates proceeded to elect themselves as members of the board of education, and the defendant accepted and entered upon the discharge of the duties thereof.

One ground of defense is that the board of education is not an office. This was not seriously urged by the defendant's counsel in this Court. An office is defined by good authority as involving a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public, by which it is (496) distinguished from employment or contract. Mechem on Public Officers, secs. 1, 4; *U. S. v. Martwell,* 6 Wallace, 385, 393; *Eliason v. Coleman,* 86 N. C., 235. "A public office is an agency for the State." *Clark v. Stanley,* 66 N. C., 59. We need not further define an office, as the mere reading of the several sections of chapter 108, Laws of 1897, makes it plain that the county board of education is a public office.

At common law there was no limit on the right of a citizen to hold several offices, except the incompatibility of the duties of the several offices, and much learning was invoked in England and in this country on the question of "incompatibility." We are relieved, however, from much labor on that subject by our Constitution, Article XIV, section 7:

"No person, who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other State, or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either House of the General Assembly: *Provided,* that nothing herein contained shall extend to the officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes."

This provision is plain and leaves no room for construction, whenever the two places under consideration are found to be public offices.

Another position of the defendant is that his acceptance of the second office does not forfeit or vacate the first office. This is true in one class of cases, that is, where the officer holds a Federal office and ac-
(497) cepts a State office, and the reason is that the State court has no authority to declare the Federal office vacant. The general rule, however, is otherwise in the States. It is the acceptance of the second that vacates the first. Throop on Public Officers, sections 39, 31.

"Where, however, it is the holding of two offices at the same time which is forbidden by the Constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited operates *ipso facto* to absolutely vacate the first. His acceptance of the one was an absolute determination of his rights to the other." Mechem, *supra,* section 429, citing numerous State decisions.

"The officer has a right to elect which of the two he will have and retain, but his election must be deemed to be made when he accepts and qualifies for the second. The public has a right to know which is held and which is surrendered. It should not be left to chance or to the uncertain and fluctuating whim of the officeholder to determine." *S. v. Brinkerhoff,* 66 Texas, 45; *Stubbs v. Lee,* 64 Me., 195; Mechem, *supra,* sections 426, 429.

In re Martin, 60 N. C., 153, appendix, was considered by this Court at the request of the Governor, with the aid of an excellent brief filed by Mr. Moore. The facts were that Martin was Adjutant-General of North Carolina and accepted the office of Brigadier-General in the Army of the Confederate States: Held, that the office of Adjutant-General was vacant. This ruling was approved in *McNeill v. Somers,* 96 N. C., 467.

The right of election must be admitted in all such cases. If the acceptance in this case and entry did not vacate the first, what
(498) did it do? It is difficult to understand how the defendant could accept the second and hold the first in the same breath, and

thereby do what is expressly forbidden by the Constitution. Reason as well as public policy forbids it. The exceptions in Throop, *supra*, section 32, do not include the defendant's case, because they relate to appointments made in violation of a statute, and were therefore void; whereas the defendant's election was regular and valid, and was ratified by his acceptance.

His Honor's conclusion was erroneous and his judgment must be reversed. The question in this State does not turn upon the incompatibility of the duties of the two offices alone, as it did at common law, but upon the plain and positive language of the Constitution.

Reversed.

Let final judgment be entered here. *Caldwell v. Wilson,* 121 N. C., 425, at pages 473, 474.

Cited: Greene v. Owen, 125 N. C., 219; *Dalby v. Hancock, ib.,* 328; *Gattis v. Griffin, ib.,* 334; *S. v. Smith,* 145 N. C., 477; *McCullers v. Comrs.,* 158 N. C., 80; *Midgett v. Gray, ib.,* 135; *S. c.,* 159 N. C., 445; *Whitehead v. Pittman,* 165 N. C., 90; *Groves v. Borden,* 169 N. C., 9; *Borden v. Goldsboro,* 173 N. C., 663.

GEORGE P. HORTON AND WIFE v. THE LIFE INSURANCE COMPANY OF VIRGINIA AND THE HOME INSURANCE COMPANY.

(Decided 26 April, 1898.)

Action on Fire Insurance Policy—Fire Insurance—Policy—Conditions—Agent—Waiver of Conditions—Evidence—Statute, Construction of.

1. Where the condition of a fire insurance policy was that it should become void if, with the knowledge of the insured, foreclosure proceedings should be begun or notice given of the sale, by virtue of any mortgage or deed of trust, of any property covered by the policy; and the policy provided that if the policy should be canceled or become void the unearned portion of the premium paid should be returned; and, in an action on such policy for the loss by fire of property covered thereby, it appeared that on 5 July the trustees, under a deed of trust, advertised the property for sale, and on 7 August, before the sale, the fire occurred; and it also appeared that the insured had no knowledge that the property was advertised for sale until he saw the advertisement in a newspaper some time before the fire, which advertisement the local agent of the company also saw before the fire; and that the policy was not canceled and no part of the unearned premium was repaid or tendered to the insured: *Held,* that the liability of the company for the loss did not cease before the fire by reason of the above recited stipulation.

2. The knowledge of the local agent of an insurance company is, in law, the knowledge of the principal.

3. The conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer, which waiver may be presumed from the acts of the local agent of the company.

4. When an insurer, knowing the facts, does that which is inconsistent with its intention to insist upon a strict compliance with the conditions precedent of the contract, it will be treated as having waived their performance, and the assured may recover without proof of performance.

5. Where an insurance company, having knowledge that a contingency had happened which gave it the right to cancel its policy, failed within a reasonable time to notify the insured of its intention to do so, and also failed to return the unearned portion of the premium: *Held*, that such failure was evidence tending to show a waiver.

6. Policies of insurance issued by foreign companies, the applications for which are taken in this State, are to be construed in accordance with the laws of this State (section 8, chapter 299, Laws 1893), notwithstanding section 6 of the act of 1893 prescribes that the standard policy adopted by the Insurance Department of New York shall be exclusively used in this State.

(499) ACTION, tried before *Starbuck, J.*, and a jury, at Fall Term, 1896, of ANSON. The facts appear in the opinion. Both plaintiffs and defendant appealed.

(500) *R. T. Bennett for the plaintiffs.*
James A. Lockhart for the defendant.

DOUGLAS, J. This is an action brought on a policy of insurance to recover three-fourths of the value of a house destroyed by fire. The property belonged to the plaintiff, and was conveyed by deed of trust to certain trustees to secure a bond given to the Life Insurance Company of Virginia. The policy was on its face made payable to The Life Insurance Company of Virginia, mortgagee, and provided that it should be void on several contingencies, among others, "If, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed." It also provided that: "This policy shall be canceled at any time at request of insured, or by the company, by giving five days notice of such cancellation . . . If this policy shall be canceled, or become void, or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal—this company retaining the customary short rate, except that when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium." On 5 July, 1894, the trustees advertised the property for sale, in a weekly

newspaper published in the town of Wadesboro, under the deed of trust, and on 7 August, 1894, before any sale, the property insured was totally destroyed by fire. No notice of this sale was given by the trustees to the insured or her husband, and they had no knowledge or information that the property would be advertised for sale before they saw the advertisement in the newspaper some time before the fire. The resident agent of the defendant company testified that he issued the policy; was a regular subscriber of the said paper, and saw (501) the advertisement while it was running through the paper before the fire. No part of the unearned premium was ever repaid or tendered to the insured. It was admitted that the insured had in due time given the notice and sent on proofs of loss according to the provisions contained in the policy. The following issues were submitted to the jury:

1. Did plaintiff Martha C. Horton have knowledge of the notice of sale under the deed of trust of the property insured, and if so, when was such knowledge acquired? A. Yes; after the publication of the notice by the trustees, and before the fire, which occurred while said notice was being published.

2. Did W. A. Rose, local agent of the Home Insurance Company, have knowledge of said notice of sale, and, if so, when was such knowledge acquired? A. Yes; after said publication of notice and before the fire.

3. Did defendant Home Insurance Company waive the breach, if any, by the plaintiffs of the conditions of the policy? A. No.

4. What was the cash value of the plaintiff's house at the time of its destruction? A. Twenty-two hundred and fifty dollars ($2,250).

5. In what sum, if any, is defendant Home Insurance Company indebted to plaintiff, Martha C. Horton, on her policy of insurance? A. $1,687.50.

The first and second issues were answered by consent; the third was answered under the instruction of the Court that there was no evidence of waiver; and the fifth issue was answered by the court as a consequence of the fourth, upon an agreement that the defendant, if liable at all, was indebted to the *feme* plaintiff to the amount of three-fourths of the value of the property as found by the jury.

After the finding upon the fourth issue, the defendant con- (502) tended that the Court should answer the fifth issue "Nothing." and moved for judgment on the first and third issues and responses thereto; the contention of the defendant being that its liability upon the policy had ceased before the fire, by reason of the stipulation which provides that the entire policy, unless provided by agreement entered thereon or added thereto, shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale

of any property covered by this policy by virtue of any mortgage or trust deed. The Court refused this motion, and gave judgment for the plaintiff; whereupon the defendant appealed. This brings before us a pure question of law, founded upon the charge of the Court, in which we see no error. Admitting the validity of a provision rendering the policy void upon a contingency beyond the control of the assured, the only reasonable construction we can give to it is that it was intended to compel the assured to give notice to the company of any such proceedings or advertisement so that the company could exercise its right to declare the policy void, and return the unearned premium, which it was required to do by the very terms of the policy. But the assured could not be required to give information which she did not possess, and which came to her only in the same manner and through the same means that it came to the agent of the defendant, whose knowledge is in law that of the defendant. It is probable that, as the agent lived in the same town where the newspaper was published, he saw the advertisement before the plaintiff, who lived in a different town.

In any event she has violated no provision of the contract of
(503) insurance either in letter or in substance, as the notice of sale *was given without* her knowledge. If the defendant stands upon the letter of the contract, ignoring the equities of the plaintiff, he must be satisfied with what is given him by a literal interpretation. If he demands his full pound of flesh, he must take that and nothing more.

We are of opinion that the judgment is correct upon the issues as found by the jury, even in the absence of a waiver. If, under proper instructions from his Honor, the jury had found that there was a waiver, as they might well have done from the evidence, the case would be that much stronger for the plaintiff; but, as the error of the Court consisted in directing a verdict upon that issue instead of leaving it to the jury, we cannot assume to say what their verdict would have been.

The correctness of this instruction is not strictly presented in this appeal; but, as the plaintiff has directly raised the question in his own appeal now before us, and which must be disposed of in some way, we will consider the two appeals together, so as to avoid repetition of the same citations. Of course, the plaintiff's appeal was taken simply to secure her exceptions in the event of an adverse decision upon the points involved herein. It is rendered useless to her by our view of the case, as its successful prosecution could result only in a new trial, which is now neither necessary nor desirable. At the same time, as it raises a question of importance, we think it better to reaffirm the repeated decisions of this Court. The Court below erred in directing a verdict upon that issue, as there was sufficient evidence to go to the jury. It is well settled in this State that the knowledge of the local agent of an

insurance company is, in law, the knowledge of the principal; that the conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer, (504) and that such waiver may be presumed from the acts of the agent. *Argall v. Insurance Company,* 84 N. C., 355; *Dibbrell v. Insurance Company,* 110 N. C., 193; *Follette v. Accident Association,* 110 N. C., 377, and in 107 N. C., 240; *Grubbs v. Insurance Company,* 108 N. C., 472; *Bergeron v. Insurance Company,* 111 N. C., 45. These cases cite numerous authorities which it is unnecessary here to repeat. One further citation will suffice: Wood on Insurance, 496, cited and approved in *Collins v. Insurance Company,* 79 N. C., 279, at page 284, says: "When the insurer, knowing the facts, does that which is inconsistent with its intention to insist upon a strict compliance with the conditions precedent of the contract, it is treated as having waived their performance, and the assured may recover without proving performance; and that, too, even though the policy provides that none of its conditions shall be waived except by written agreement . . . And such waiver may be implied from what is said or done by the insurer. So, the breach of any condition in the policy, as against an increase of risk or the keeping of certain hazardous goods . . . or, indeed, the violation of any of the conditions of the policy, may be waived by the insurer, and a waiver may be implied from the acts and conduct of the insurer after knowledge that such conditions have been broken." So, again, in section 497: "When other insurance is required to be endorsed upon the policy, if notice thereof is given to the insurer *or his agent* and consent is not endorsed nor the policy canceled, further compliance is treated as waived, and the insurer is estopped from setting up such other insurance to defeat its liability upon the (505) policy."

This line of cases should be distinguished from *Alspaugh v. Insurance Company,* 121 N. C., 290, where the Court based its judgment expressly upon the ground that the condition whose violation was held to vitiate the policy was not a mere technically, but of the very essence of the contract, and under the circumstances could not be held to be waived. There, the condition was that the mill should not run later than ten o'clock at night, and, by agreeing to this condition, the insured obtained his insurance for 3 per cent when he would otherwise have been compelled to pay five and one-half per cent, thus saving nearly half the premium. It would not have been just for the insured to take advantage of the condition, and yet not be bound by it. In the case at bar it would be equally unfair for the defendant to keep the entire premium, and yet cancel the policy in violation of its express terms. When the property was advertised for sale, no loss had occurred, and there was apparently

no reason to anticipate a loss. Upon being informed of the notice, the defendant should within a reasonable time have notified the insured of its determination to cancel the policy, and have returned the unearned premium. Its failure to do so was evidence tending to show a waiver.

The powers of a local insurance agent and the relative liabilities of the company are ably discussed and clearly defined by *Justice Miller* in *Insurance Company v. Wilkinson,* 13 Wall., 222, in which he says: "The powers of the agent are *prima facie* coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals (citing authorities). An insurance company establishing a local agency must be held (506) responsible to the parties with whom they transact business, for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal." The vigorous language in the earlier part of the opinion, in which he condemns the conduct of some insurance companies in stimulating their agents to the highest degree of activity in soliciting insurance, and then seeking to avoid responsibility for their acts and representations, is worthy of note as coming from so high a source.

In *Willis v. Insurance Company,* 79 N. C., 285, at page 289, *Justice Reade,* whose clear and incisive opinions have the ring of a bell and the edge of a razor, says: "Insurance contracts are prepared by insurers who have at their command in their preparation the best legal talent and business capacity, and every precaution is taken for their protection. This is made necessary to prevent the frauds of bad men. But, on the other hand, the insured are generally plain men, without counsel or the capacity to understand the involved and complicated writings which they are required to sign, and which in most cases probably they never read. What they understand is, that they are to pay the insurer so much money, and, if they are burnt out, the insurer pays them so much. When, therefore, there has been good faith on the part of the insured, and a *substantive* compliance with the contract on their part, the courts will require nothing more."

The counsel for the defendant called the attention of the Court to sec. 6, ch. 299, Laws 1893, wherein it is provided that "the standard fire insurance policy, as prescribed and set out in section 121 of the Insurance Law of New York, shall be exclusively used in this State by all (507) fire insurance companies from and after 1 May, 1893," and insisted that such policy should be construed in accordance with the decisions of the State from which it came. Whatever force there might otherwise be in the suggestion is fully met by section 8 of the same act, which reads as follows: "All contracts of insurance, the application for which is taken within this State, shall be deemed to have

been made within this State, and *subject to the laws* thereof." In the determination of a new question the decisions of other States may be taken as precedents to guide our action, but can never be authorities to reverse the settled ruling of our courts. These two sections are not inconsistent, and when construed together become clear in their meaning. The policy is essentially a North Carolina contract, although the *form* thereof may have been borrowed from another jurisdiction. A suit of homespun is none the less a native production because the pattern by which it was cut came from another State. It was deemed best to have a *uniform* policy, which would eventually become familiar to our people, and by repeated adjudications acquire a settled meaning. The New York form was selected because it had been adopted by the largest insurance State in the country, and was the outgrowth of many years of careful and efficient State supervision. It is none the less a North Carolina contract, solvable under our laws and determinable by our decisions. The judgment below is

Affirmed.

IN PLAINTIFF'S APPEAL IN SAME CASE.

DOUGLAS, J. This is the plaintiff's appeal in the same case that has just been decided on the defendant's appeal wherein the judgment of the Court below was affirmed. In that opinion we have fully discussed the questions raised on both appeals, and it is, therefore, (508) unnecessary to repeat here either the facts or arguments. The judgment below is affirmed, but as the plaintiff prosecuted this appeal in good faith to protect what might have become a substantial right, and as his exception to the ruling of the Court below is sustained, he is entitled to his costs. Judgment is

Affirmed.

Cited: Ins. Co. v. Edwards, 124 N. C., 122; *Kendricks v. Ins. Co., ib.,* 319; *Grabbs v. Ins. Co.,* 125 N. C., 395; *Clapp v. Ins. Co.,* 126 N. C., 392; *Strause v. Ins. Co.,* 128 N. C., 66; *Bank v. Deposit Co., ib.,* 373; *Gerringer v. Ins. Co.,* 133 N. C., 411; *Modlin v. Ins. Co.,* 151 N. C., 43; *Robinson v. Engineers,* 170 N. C., 548; *Johnson v. Insurance Co.,* 172 N. C., 147; *Williams v. Order of Heptasophs, ib* 789.

J. M. JONES AND A. E. HOLTON, EXECUTORS OF L. W. JONES,
v. W. E. BENBOW ET AL.

(Decided 5 April, 1898.)

Action on Note—Presumption as to Payment—Evidence—Exceptions.

1. Where plaintiffs' testator, J., held notes payable to B. as collateral security for B.'s note to J., and one of the notes was paid by the maker to B. while J. held it as collateral, the fact that J. afterwards surrendered it to B. does not raise the presumption that B. had paid the amount of such note to be applied on his note to J.

2. Where, on the trial of an action on a note, it appeared that plaintiffs' testator held notes of W., payable to B. as collateral for the note in suit, and W. testified that decedent told him he held notes of $500 against him, which defendant had deposited with him, the decedent, to which witness had replied that he owed $400 on the notes, as he had paid $100 to the defendant, and he further testified that the $100 had afterwards been paid to decedent: *Held*, that the evidence of W. was not such as should have been submitted to the jury as proof of payment on the note, since it barely amounted to even conjecture of payment.

3. Where there is no exception to a judgment at the time of its rendition it will not be considered on appeal.

(509) ACTION tried before *Coble, J.*, and a jury at Fall Term, 1897, of YADKIN. There was a verdict for the defendant, and from the judgment thereon plaintiff appealed. The facts are sufficiently stated in the opinion.

Holton & Alexander and D. M. Reece for plaintiffs.
T. C. Phillips for appellee.

MONTGOMERY, J. The defendant, Benbow, at the time he borrowed from the plaintiff's intestate $950, and gave his note for the same, placed in the intestate's hands certain notes of $250, each executed by Wall to the defendant as collateral security for the $950 note. One of the collateral notes was delivered to the defendant by the intestate, and the defendant collected the same. In the present action for the recovery of the amount due on the $950 note, the defendant in his answer sets up a credit of $324 in addition to the credits which appear on the notes, and also that a third note of Wall for $250 was deposited with the intestate as collateral security in addition to the two set out in the complaint. Two issues were submitted to the jury: (1) Is the defendant, W. E. Benbow, entitled to the credit of $324, set up in the answer? (2) Is the defendant, W. E. Benbow, entitled to a credit for the third Wall note of $250 and interest?

On the trial, Wall was introduced as a witness by the defendant, and testified that he had paid the defendant one of the $250 notes, dated January, 1889; that when the witness paid the note to the defendant the note was not delivered to him, but that in about a month afterwards the defendant handed it to him; that the witness paid other moneys, and all the interest on his three notes, to the defendant while the notes were in possession of the plaintiff; that one day, while he was at (510) work in his field, the intestate of the plaintiff came along, and said he had notes of the value of $500 against the witness, which the defendant had let him have; that the witness answered that he owed him $400 on the notes, but the intestate replied, "You owe $500," and witness said, "I have paid the defendant $100." The witness further testified that the intestate afterwards got this $100 and entered it as a credit on the note. This, in our opinion, is not such evidence as ought to have been submitted to the jury to prove payment on the note. It may have amounted to a conjecture of such payment, but barely that.

The defendant's counsel insisted here that, as the Wall note of $250 had been delivered to the defendant while the plaintiff held it as a collateral security for the $950 note, the law would presume a payment *pro tanto* on the $950 to arise on such surrender of the Wall note. We do not think so. The presumption would be more reasonable, nothing appearing either way, that some other security had been substituted by the debtor in the place of the Wall note; or, if the debtor was entirely responsible and solvent, that the creditor had as a matter of favor given up a security that was useless to him and might be of service to the debtor. The evidence of Whittington and Reece, taken in its most favorable light for the defendant, does not amount to a scintilla, even to show a payment on the $950 note, on account of the payment of the Reece notes, which were executed by Reece to the defendant, and averred by the defendant to have been in the hands of the intestate as collateral security in addition to the Wall notes, as by the uncontradicted testimony the Reece notes were paid to the defendant, not in *money*, but in (511) *land*. As there was no exception to that part of the judgment embraced in the second issue, the same will not be disturbed. A new trial for the error pointed out is ordered on the first issue.

New trial.

DOUGLAS, J., dissents.

J. M. PATTERSON v. R. A. GALLIHER.

(Decided 5 April, 1898.)

Action to Recover Land—Sheriff's Deed Under Sale for Taxes—Tax Deed—Seal—Equity—Pleading—Harmless Error.

1. Under the common law, and always in this State (excepting between 7 March, 1879, and 5 March, 1881, in consequence of chapter 142, Laws 1879), a seal has been held to be absolutely indispensable to the validity of a deed in which is conveyed a greater estate in lands than three years.
2. Section 65, chapter 119, Laws 1895, requiring the attestation clause of a sheriff's deed for land sold for taxes to be in form as follows: "Given under my hand and seal, this .... day of ....., A. D. ....; ....., sheriff," does not dispense with the necessity for a seal.
3. The failure of the sheriff to affix a seal to a deed for land sold for taxes is not an irregularity which can be cured by section 74, chapter 119, Laws 1895.
4. Where a pretended deed for land sold for taxes is invalid for want of a seal, it is not incumbent on one claiming against it to prove that the property covered by it was not subject to taxation for the years named in the deed, or that the taxes had been paid before the sale. (*Moore v. Byrd*, 118 N. C., 688, distinguished.)
5. It is not allowable to a defendant in the trial of an action to recover land to prove an equitable interest for the amount bid for the land at a tax sale, as evidenced by an invalid deed of the sheriff, where he did not set up such equity in his answer.
6. The refusal to permit a defendant claiming land under a void deed to introduce it in evidence on the trial of an action to recover the land was harmless error.

(512) ACTION to recover land, tried before *Coble, J.*, and a jury at Fall Term, 1897, of IREDELL. The facts are stated in the opinion. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Armfield & Turner for plaintiff.
Long & Long and H. Burke for defendant.

MONTGOMERY, J. It was admitted on the trial that both the plaintiff and the defendant claimed the land, which is the subject of the action, immediately under the title of J. A. Galliher. The plaintiff offered in evidence a deed to himself from T. L. Patterson, mortgagee of J. A. Galliher, registered on 5 August, 1897, and then the mortgage deed itself from J. A. Galliher and wife to Patterson, registered on 20 February, 1890. It was admitted that both deeds covered the land in controversy,

and that the mortgagee had advertised and sold the land and made the deed to the plaintiff according to the terms of the mortgage. The defendant offered in evidence a deed executed by J. H. Wycoff, ex-Sheriff of Iredell County, to Thomas J. Conger, registered on 8 May, 1896. The sheriff's deed was made for taxes due upon the land for the year 1894. Upon objection by the plaintiff to the introduction of the sheriff's deed, because it was not executed under seal, it was not received, and the defendant excepted to the ruling of the Court excluding (513) it. The defendant next offered in evidence a deed by Conger, grantee in the excluded deed, to the defendant R. A. Galliher, registered on 15 May, 1897. These deeds covered the land in dispute. The documentary evidence was all that was offered.

His Honor instructed the jury that if they believed the evidence they should answer in the affirmative both issues: (1) "Is the plaintiff the owner and entitled to the possession of the land described in the complaint?" (2) "Is the defendant in the wrongful possession of the same?"

The real question for decision is, whether a sheriff's deed to land sold for taxes is valid when it is signed, but not sealed, by the maker? It is conceded by the defendant that it is inoperative as a deed unless the form of deed prescribed by Laws 1895, ch. 119, sec. 65, for sheriffs' deeds to land sold for taxes, dispenses with the common law necessity of a seal. The attestation clause of the conveyance prescribed by statute is in these words:

"Given under my hand and seal this blank day of blank, Anno Domini 18.....

.....,

"Sheriff."

It is not to be doubted that the General Assembly could, if it chose to do so, prescribe a form of deed dispensing with a seal, but, has it done so? is the question. Under the common law, and always in North Carolina except for the two years between 7 March, 1879, and 5 March, 1881, a seal has been held to be absolutely indispensable to the validity of deeds in which is conveyed a greater estate in lands than a three-year lease. The conveyance prescribed by statute for sheriffs' deeds (514) for taxes is called a deed in the statute as well as in the body of the instrument; and, as we have said, the attestation clause reads as if a seal was to be affixed. There are no express words used in the statute which alter the general law requiring the affixing of seals to deeds for land, and we cannot arrive at the conclusion that a change so important can be made by implication. The conveyance being called a deed in the statute, and no reference being made in the statute to the dispensing

with the necessity of a seal, the word "deed" must be construed to mean a deed under our general law, and our general law requires a seal to all deeds to land except as to the modification pointed out. In *Kitchen v. Tyson,* 7 N. C., 314, the Court said: "Now, it is a rule that where a statute makes use of a word, the meaning of which was well ascertained at common law, the word shall be understood in the same sense it was at common law."

The same principle of interpretation is adopted in *Adams v. Turrentine,* 30 N. C., 147. The counsel of the defendant suggested that under section 74 of the act above referred to, the failure of the sheriff to affix his seal to the deed was a mere irregularity, which that section cured. That section cured a great many slips between the assessment of taxes and the execution of the deed, but the paper-writing in this case is not a deed. Irregularities in it might be cured, but the failure to affix the seal by the maker is not an irregularity or formal part, but a vital part.

It was also urged for the defendant that under the decision of *Moore v. Byrd,* 118 N. C., 688, it was incumbent on the plaintiff to prove, in order to defeat the tax title acquired by the deed from the sheriff, that the property was not subject to taxation for the years named in (515) the deed, or that the taxes had been paid before the sale. In that case, however, the deed from the sheriff to the purchaser at the tax sale was properly executed in all respects. Here, there is no deed—the paper-writing is invalid as a deed. But the defendant contends that, if the conveyance is not a deed as prescribed by statute, it is at least evidence of an equitable interest and estate in the nature of a receipt from the sheriff for the amount bid for the land at the tax sale, and ought to have been considered to defeat the plaintiff's claim; and the counsel cited to the Court the case of *Tankard v. Tankard,* 84 N. C., 286, to sustain that position. But the defendant is not in a position to get any advantage from that view—for one reason, that he has raised in his answer no such equitable right. The action was commenced for the possession of the land with the ordinary counts in the complaint. The defendant in his answer simply denied the plaintiff's title and right to recover possession. No equities were involved by either side. On the trial the plaintiff offered to show a legal title, and the defendant attempted to prove a better one. The defendant could not have offered evidence on the trial to prove an equitable title, for he had not set up the equity in his answer. *Hinton v. Pritchard,* 102 N. C., 94; *Wilson v. Wilson,* 117 N. C., 351. The defendant's counsel dwelt especially upon *Geer v. Geer,* 109 N. C., 679, as an authority for the position that the defendant ought to have been allowed to defeat the plaintiff's recovery by showing his equitable title, although the facts constituting such alleged title were not set up in the answer. We think the opinion of the

Court in that case will not sustain the view of the counsel. It is true that the Court said in that case that a plaintiff might recover in an action of ejectment upon an equitable title, and that, the (516) record evidence being like that before the Court (in that case), the Court would, in a direct proceeding, as a matter of course, order the correction of a mere formal defect in the execution of its decree, and it would be unnecessary to set forth the facts in the pleadings; but the Court went on to say: "The same is true where it appears from the documentary evidence that the dry legal title only is outstanding in another, but where it is necessary to establish such equitable ownership by extrinsic testimony, then the facts should be pleaded, the rule being that, whenever in such cases it was under the former system necessary to invoke the aid of a court of equity, the facts necessary to warrant such equitable relief must now, under the present practice, be specifically set forth in the pleadings." The plaintiff in this case had more than a dry legal title. By the mortgage from J. A. Galliher he got the legal title, and at the sale the equity of the mortgagor to redeem. Besides, it is doubtful if the defendant's alleged equity is such a one as the courts would respect. A tax title cannot be considered as a meritorious one. We do not decide the point, but it may be of interest to quote a paragraph from the opinion in the case of *Altes v. Hinckler,* 36 Ill., 265 (85 Am. Dec., 405), where it is said that he (purchaser at a tax sale) "has no standing in a court of equity; not because he has done anything at all censurable in purchasing at a tax sale, but because in making the purchase he has paid what the Court, when asked to decree the title of a former owner, can hardly regard as a valuable consideration. True, he was under no obligation to pay more, but, at the same time, in purchasing at that price he should understand that he is not in a position to ask anything further from the courts than that they will give (517) him the land upon his showing a sale and deed made in conformity with the requirements of the law. If he fail in this, assuredly a court of chancery will not aid him."

It is not necessary for us to make any decision on the ruling of his Honor in excluding the sheriff's deed. If it was error, it was harmless, because upon the whole evidence the plaintiff was entitled to recover, for his Honor would have told the jury, as he should have done, that the sheriff's deed was invalid and void.

No error.

Cited: Strain v. Fitzgerald, 128 N. C., 397, 401; *S. c.,* 130 N. C., 601; *Westfelt v. Adams,* 131 N. C., 380; *Johnston v. Case, ib.,* 495; *Fisher v. Owens,* 132 N. C., 688; *S. v. Colonial Club,* 154 N. C., 181; *Buchanan v. Hedden,* 169 N. C., 224; *Howell v. Hurley,* 170 N. C., 800.

M. C. FAGGART ET AL. v. F. W. BOST, ADMINISTRATOR OF J. F. VAN PELT, ET ALS.

(Decided 12 April, 1898.)

Action to Recover Land—Constructive Trusts—Statute of Presumptions—Husband and Wife—Possession.

1. Where a married woman was entitled to have her husband declared a trustee for her of lands purchased with her money and conveyed to him before 1868, the statute of presumptions would not bar her right of action, though *feme coverts* are not included among the exceptions named in section 19, chapter 65 of the Revised Code, the reason being that the husband's possession is considered to be the possession of the wife.

2. Prior to 1868 a husband purchased land with his wife's money, and, contrary to his agreement with her, had the conveyance made to himself. The wife died in 1885; the husband remained in possession and died in 1896. There was no issue of the marriage. The heirs and next of kin of the wife brought suit in 1896. *Held*, that while the statute of presumptions did not run against the wife to have her husband declared a trustee for her and compel a conveyance (his possession being considered hers), it did run against the heirs and next of kin of the wife from the time of his death.

(518) ACTION to recover from the administrator of J. F. Van Pelt proceeds of land sold by his intestate, and to have the other defendants, heirs at law of J. F. Van Pelt, declared trustees of other lands alleged to have been bought with money belonging to the ancestor of plaintiffs (wife of J. F. Van Pelt), and conveyed to J. F. Van Pelt in violation of his promise to have the conveyance made to her, tried before *Coble, J.*, and a jury, at Fall Term, 1897, of IREDELL. At the close of plaintiffs' evidence his Honor allowed the defendant's motion for judgment as of nonsuit, and plaintiffs appealed. The facts appear in the opinion.

No counsel for plaintiffs.

J. A. Hartness, Armfield & Turner and H. P. Grier for defendants.

FURCHES, J. In 1858 Joseph Franklin Van Pelt married Miss Mary Maggie Litaker, and this union continued until 1885, when Mrs. Van Pelt died. The husband continued to live until April, 1896, when he died. There was never any issue born of this marriage, and the said Joseph died without leaving issue. The plaintiffs in this action are the next of kin and heirs at law of Mrs. Van Pelt.

Mrs. Van Pelt inherited from her father, and was the owner in her own right of lands lying in Cabarrus County, a part of which was sold in 1867 to one Blackwelder, to be paid in gold, and a part was sold to one Sumrow, and conveyed to her in part payment for real estate belonging to said Sumrow, in Statesville.

It is alleged by plaintiffs that the money received from Black- (519) welder for the lands of Mrs. Van Pelt also went into the payment for the Sumrow property, in Statesville, and that by the conveyance of the one tract to Miss Ellen Jane Sumrow, and by the money received from Blackwelder for Mrs. Van Pelt's lands, the whole of the purchase price for the Sumrow lands in Statesville was paid.

It is further alleged by plaintiffs that Mrs. Van Pelt agreed to this sale and conveyance of her land, upon Mr. Van Pelt's agreeing to purchase the Sumrow property in Statesville for her, but that, in violation of this promise and agreement, the said Joseph F. procured the deed to be made to him, conveying to him a fee simple estate in said property, in fraud of the rights of the wife. The plaintiffs, as the heirs at law of Mrs. Van Pelt, commenced this action on 29 July, 1896, to set up and declare the trust and recover said lands or the value thereof. At the close of plaintiffs' evidence, defendant demurred *ore tenus.*

The evidence introduced by plaintiffs, we think, tended to establish the trust alleged. *Dula v. Young,* 70 N. C., 450, and that line of cases. This would entitle plaintiffs to a new trial, if there was nothing else in their way. But from the view of the case taken by the Court, it is not necessary that we should discuss the evidence as to the conveyance of Mrs. Van Pelt's land, under the promise and agreement on the part of the husband that the title to the Sumrow property in Statesville was to be taken to her, as the case, in the opinion of the Court, turns upon another point. Nor is it necessary that we should discuss and pass upon the exceptions to evidence.

The several transactions mentioned, of selling the lands of Mrs. Van Pelt and the purchase of the Sumrow property, all took place before the adoption of the Constitution of 1868, and the (520) Code of Civil Procedure.

Plaintiffs' cause of action, if they have one, arose at that time and is governed by the law as it then existed. Mrs. Van Pelt never had the legal title to the Sumrow property, but only the right in equity to have her husband declared a trustee of said property and a decree compelling him to convey. This being so, the statute of presumptions, chap. 65, sec. 19, Revised Code, affects plaintiffs' right to recover, when pleaded and relied upon as in this case.

It is true that plaintiffs had no right of action (and, indeed, no cause of action) until the death of Mrs. Van Pelt, under whom they claim. At that time they succeeded to her estate by descent. And although their *right* of action accrued at that time, their *cause* of action accrued at the time the husband, Joseph F., took the deed for the Sumrow property to himself instead of taking it to his wife, as plaintiffs alleged he was to do. *Dula v. Young, supra; Lyon v. Akin,* 78 N. C., 258. While a cause of

action accrued to Mrs. Van Pelt in 1867, it seems that time did not run against her, although *feme coverts* are not included among the exceptions in chap. 65, sec. 19, Revised Code. This seems to be taken as the law in *Dula v. Young, supra.* In that case, the sale of the wife's lands, and purchase of the "Elk Farm," took place in 1841 or 1842, and the action to declare the trust was brought about 1870 (was tried in 1873), but was brought soon after the death of the contracting parties. But the reason why the statute of presumptions does not run in such cases seems to be owing to the relation of the parties, that the husband's possession is considered to be the possession of the wife also.

(521) 2 Lewin Trusts, 881.

In express trusts no statute as to time runs—that is, a trust declared in the instrument creating the trust and accepted by the trustee —until the trust relation is broken. *Hodges v. Council,* 86 N. C., 181; *Hamlin v. Mebane,* 54 N. C., 20; 2 Lewin Trusts, star p. 886. In such cases the Court does not declare the trust, but enforces it according to the specified terms. 2 Pomeroy Eq. Jur., secs. 988, 989, 991.

But this is not what is known as an express trust, but it is what is called a constructive trust—that is, the facts show such conduct on the part of the defendant that a court of equity, or court exercising equitable jurisprudence, will declare him a trustee.

These trusts are only declared where there has been bad faith—fraud, actual, presumptive or constructive. 1 Pomeroy Eq. Jur., secs. 155, 1030, 1058; 2 Pomeroy, 1044; 1 Lewin Trusts, star p. 180, and note 1.

As in this case, it was not the sale of the wife's land, nor the purchase of the Sumrow property, that the wife or the plaintiffs have anything to complain of. But it was the falsehood—the bad faith of the husband in taking title to himself, and not to his wife, as he promised to do. If A buys land with the money of B, and instead of taking the title to B, as he promised to do, takes it to himself, equity will declare A a trustee for B. The law is the same between a man and his wife as between strangers, when the facts are established.

But as the law at the time the facts in this case transpired made the personal estate of the wife, upon its coming into his possession, that of the husband, and money arising from the sale of the wife's lands his, unless he received it under a promise, and in trust, as plaintiffs

(522) allege was done in this case, the purchase would be with the husband's own money, and there would be no fraud and no consideration to support a declaration of trust. In this case the evidence tended to show that one tract of land belonging to the wife was conveyed directly to E. J. Sumrow, in part payment for the Sumrow property in Statesville. So that no money could have been received by the husband

for this tract of land. And if this is true there seems to be no reason why a trust would not be declared as to this.

But we have said it is not necessary that we should pass upon this question. While the lapse of time and the statute does not affect the rights of parties to an express trust until there is a termination of the trust, it seems not to be so as to constructive trusts—such as we hold this to be. As to such trusts as these—constructive trusts—the statute is emphatically one of repose. *Houck v. Adams,* 98 N. C., 519; *Headen v. Womack,* 88 N. C., 468; 1 Lewin, *supra,* star p. 180; 2 Lewin, *supra,* star pp. 863 and 864. This doctrine is sustained in *Campbell v. Crater,* 95 N. C., 156, although it is held in that case that coverture prevented the statute of limitations from running, as plaintiffs claimed under a legal title.

And while it is suggested that *Summerlin v. Cowles,* 101 N. C., 473, is not in harmony with the above authorities and cited cases, it is contended by the defendant that this case is overruled by *Alston v. Hawkins,* 105 N. C., 3.

Upon examining the case of *Alston v. Hawkins,* we find that it does not overrule *Summerlin v. Cowles* to the extent of making the judgment of the Court in that case erroneous. Indeed, it sustains the correctness of the judgment in that case, which was founded upon the operation of the statute of limitations, this being the only statutory defense set up in that case. But *Alston v. Hawkins* says that what was said (523) by the learned Chief Justice, in discussing *Summerlin v. Cowles,* as to the statute of presumptions, was not necessary to the decision of the case—was *obiter*—and that part of the opinion is declared not to be in harmony with many decisions of this Court there cited, and is overruled. *Alston v. Hawkins* is the latest deliverance of this Court, and is a precedent, and is now held to be the true exposition of the law of presumptions.

Upon the death of Mrs. Van Pelt, the husband, Joseph F., remained in possession under color of title. This possession was adverse to the plaintiffs. The law presumed it to be so, without anything further being proved. *Alexander v. Gibbon,* 118 N. C., 796. And while we hold that time did not run against Mrs. Van Pelt for the reasons we have assigned, it commenced to run against the plaintiff at the death of Mrs. Van Pelt; and there is no saving clause in ch. 65, sec. 19, Rev. Code; it has continued to run from that time until the commencement of this action. This having been more than ten years, the law presumes the plaintiffs to have abandoned any rights they may have had, and they cannot recover.

Affirmed.

Cited: McLeod v. Williams, ante, 460; *Flanner v. Butler,* 131 N. C., 153, 158; *Dunn v. Dunn,* 137 N. C., 534; *Lowder v. Hathcock,* 150 N. C., 439; *Graves v. Causey,* 170 N. C., 176.

(524)

JULIA NEWMAN v. F. W. BOST, ADMINISTRATOR OF J. F. VAN PELT.

(Decided 19 April, 1898.)

Donatio Causa Mortis—Delivery—Constructive Delivery— Symbolical Delivery—Gifts Inter Vivos.

1. To constitute a gift *inter vivos* or *causa mortis* there must be a clear intention to make the gift and a delivery of possession. Such intention need not be announced by the donor in express terms but may be inferred from what he said or did at the time of the delivery.
2. Where the articles are present and are capable of actual manual delivery, such delivery must be made in order to constitute a gift *inter vivos* or *causa mortis;* but where the intention of the donor to make the gift plainly appears and the articles intended to be given are not present, or, if present, are incapable of manual delivery, effect will be given to a *constructive* delivery.
3. A *donatio causa mortis* requires but one witness, and no publicity need be given to it; neither is probate or registration required.
4. Where a donor in his last illness delivered to the donee the keys to a bureau in the room, saying, "What property is in this house is yours": *Held,* that it was a constructive delivery of the bureau but not of a policy of life insurance in a drawer of the bureau, since the policy was capable of manual delivery.
5. Where the circumstances and declarations of the donor showed his intention to give the property in his house to a donee to whom he gave the keys, saying, "What property is in this house is yours": *Held,* that it was a constructive delivery of all furniture locked or unlocked by the keys but not of other furniture in the house.
6. Where a donor bought and placed furniture in donee's bed chamber, over which the latter had control, and the intention to make the gift was shown by uncontradicted testimony: *Held,* that such facts were sufficient to justify a jury in finding that there was a gift and delivery *inter vivos.*
7. Where P. bought a piano and placed it in his parlor, over which he had control, called it "Miss Julia's piano," but insured it in his own name and collected the insurance money, which he retained, saying he intended to buy another piano for her, but never did so: *Held,* that such facts were insufficient to constitute a gift and delivery so as to enable the alleged donee to recover the amount of the insurance money from P.'s administrator.
8. Symbolical delivery of gifts either *inter vivos* or *causa mortis* is not recognized in this State.

NEWMAN *v.* BOST.

ACTION tried before *Coble, J.*, and a jury, at Fall Term, 1897, (525) of IREDELL.

The plaintiff alleged in her complaint that the intestate of defendant, while in his last sickness, gave her all the furniture and other property in his dwelling-house as a gift *causa mortis*. Among other things claimed, there was a policy of insurance of $3,000 on the life of intestate and other valuable papers, which she alleged were in a certain bureau drawer in intestate's bed-room. She alleged that defendant administrator has collected the policy of life insurance and sold the household and kitchen furniture, and this suit is against *defendant as administrator* to recover the value of the property alleged to have been converted by him. There are other matters involved, claims for services, claim for fire insurance collected by intestate in his lifetime, etc.

On the trial it appeared that the intestate's wife died about ten years before he died, and without issue; that the intestate lived in his dwelling, after his wife's death, in Statesville until his death, and died without issue; that about the last day of March, 1896, he was stricken with paralysis and was confined to his bed in his house and was never able to be out again till he died on 12 April, 1896, that shortly after he was stricken he sent for Enos Houston to nurse him in his last illness; that while helpless in his bed soon after his confinement and *in extremis* he told Houston he had to go—could not stay here—and asked Houston to call plaintiff into his room; he then asked the plaintiff to hand him his private keys, which plaintiff did, she having gotten them from a place over the mantel in intestate's bed-room in his presence (526) and by his direction; he then handed plaintiff the bunch of keys and told her to take them and keep them, that he desired her to have them and everything in the house; he then pointed out the bureau, the clock and other articles of furniture in the house and asked his chamber door to be opened and pointed in the direction of the hall and other rooms and repeated that everything in the house was hers—he wanted her to have everything in the house; his voice failed him soon after the delivery of the keys and these declarations, so that he could never talk again to be understood, except to indicate yes and no, and this generally by a motion of the head; the bunch of keys delivered to the plaintiff, amongst others, included one which unlocked the bureau pointed out to plaintiff as hers (and other furniture in the room), and the bureau drawer which this key unlocked, contained in it a life insurance policy, payable to intestate's estate, and a few small notes, a large number of papers, receipts, etc., etc., and there was no other key that unlocked this bureau drawer; this bureau drawer was the place where intestate kept all his valuable papers; plaintiff kept the keys as directed from time

given her and still has them; at the death of intestate's wife he employed plaintiff, then an orphan about eighteen years old, to become his housekeeper, and she remained in his service for ten years and till his death, and occupied rooms assigned her in intestate's residence; in 1895 the intestate declared his purpose to marry plaintiff within twelve months; nobody resided in the house with them; immediately after the death of intestate, Houston told of the donation to Mr. Burke, and the plaintiff informed her attorney, Mr. Burke, of it, and she made known her claim to the property in the house and kept the keys and forbade the
(527) defendant from interfering with it in any way, both before and after he qualified as administrator.

Other facts in relation to the plaintiff's claim appear in the opinion. There was a verdict, followed by judgment for the plaintiff, and defendant appealed.

Long & Long and H. Burke for plaintiff.
Armfield & Turner, J. A. Hartness and H. P. Grier for defendant.

FURCHES, J. The plaintiff in her complaint demands $3,000 collected by defendant, as the administrator of J. F. Van Pelt, on a life insurance policy, and now in his hands; $300, the value of a piano upon which said Van Pelt collected that amount of insurance money; $200.94, the value of household property sold by defendant as belonging to the estate of his intestate, and $45, the value of property in the plaintiff's bed-room and sold by the defendant as a part of the property belonging to the intestate's estate.

The $3,000, money collected on the life insurance policy, and the $200.94, the price for which the household property sold, plaintiff claims belonged to her by reason of a *donatio causa mortis* from said Van Pelt. The $45, the price for which her bed-room property sold, and the $300 insurance money on the piano, belonged to her also by reason of gifts *inter vivos.*

The rules of law governing all of these claims of the plaintiff are in many respects the same, and the discussion of one will be to a considerable extent a discussion of all.

To constitute a *donatio causa mortis,* two things are indispensably necessary: an intention to make the gift, and a delivery of the
(528) thing given. Without both of these requisites, there can be no gift *causa mortis.* And both these are matters of fact to be determined by the jury, where there is evidence tending to prove them.

The intention to make the gift need not be announced by the donor in express terms, but may be inferred from the facts attending the delivery—that is, what the donor said and did. But it must always clearly

appear that he knew *what he was doing,* and that he intended a gift. So far, there was but little diversity of authority, if any.

As to what constitutes or may constitute delivery, has been the subject of discussion and adjudication in most or all the courts of the Union and of England, and they have by no means been uniform—some of them holding that a symbolical delivery—that is, some other article delivered in the name and stead of the thing intended to be given, is sufficient; others holding that a symbolical delivery is not sufficient, but that a constructive delivery—that is, the delivery of a key to a locked house, trunk or other receptacle is sufficient. They distinguish this from a symbolical delivery, and say that this is in *substance* a delivery of the thing, as it is the means of using and enjoying the thing given; while others hold that there must be an actual manual delivery to perfect a gift *causa mortis.*

This doctrine of *donatio causa mortis* was borrowed from the Roman Civil Law by our English ancestors. There was much greater need for such a law at the time it was incorporated into the civil law and into the English law than there is now. Learning was not so general, nor the facilities for making wills so great then as now. But the civilians, while they incorporated this doctrine into their law, did not do so without guarding it with great care. They required that a *donatio causa mortis* should be established by at least five wit- (529) nesses to the facts constituting the gift. And why it was that our English ancestors should have adopted the doctrine, without also adopting the manner in which it should be proved, seems to be unexplained. But they did so, and only required the facts to be proved by one witness, as in this case.

It seems to us that there was greater reason in England, as there is here, for requiring it to be established by five witnesses, than in Rome, after the statute of fraud and of wills, as this doctrine of *causa mortis* is in direct conflict with the spirit and purpose of those statutes—the prevention of fraud. It is a doctrine, in our opinion, not to be extended but to be strictly construed and confined within the bounds of our adjudged cases. We were at first disposed to confine it to cases of actual *manual* delivery, and are only prevented from doing so by our loyalty to our own adjudications. But it is apparent from the adjudications that our precedessors felt the restrictions of former adjudications, and that they were not disposed to extend the doctrine.

We will not go into the general review of the many cases cited in the well-considered briefs filed in the case on both sides. Were we to do this, it would lead us into a labyrinth of discussion without profit, as we would not feel bound by the decisions of other jurisdictions, and would put our own construction on the doctrine of *donatio causa mortis,* but for decisions of our own State. Many of the cases cited by the

plaintiff are distinguishable from ours, if not all of them. *Thomas v. Lewis* (a Virginia case), 37 Am. St., 878, was probably more relied on by the plaintiff than any other case cited, and for that reason we (530) mention it by name. This case, in its essential facts, is distinguishable from the case under consideration. There, the articles present were taken out of the bureau drawer, handed to the donor, and then delivered by him to the donee. According to all the authorities, this was a good gift *causa mortis*. The box and safe, the key to which the donor delivered to the donee, were not present but were deposited in the vault of the bank; and so far as shown by the case it will be presumed, from the place where they were and the purpose for which things are usually deposited in a bank vault, that they were only valuable as a depository for such purposes, as holding and preserving money and valuable papers, bonds, stocks and the like. This box and safe would have been of little value to the donee for any other purpose. But more than this, the donor expressly stated that all you find *in this box and this safe is yours*. There is no mistake that it was the intention of the donor to give what was contained in the box and in the safe.

As my Lord Coke would say: "Note the diversity" between that case and the case at bar. There, the evidence of debt contained in the bureau which was present, were taken out, given to the donor, and by him delivered to the donee. This was an actual manual delivery, good under all the authorities. But no such thing was done in this case as to the life insurance policy. It was neither taken out of the drawer nor mentioned by the donor, unless it is included in the testimony of Enos Houston who, at one time, in giving in his testimony says that Van Pelt gave her the keys, saying "what is in this house is yours," and at another time on cross-examination, he said to Julia, "I intend to give you this furniture in this house," and at another time, "What property is in this house is yours." The bureau in which was found the life insurance (531) policy, after the death of Van Pelt, was present in the room where the keys were handed to Julia, and the life insurance policy could easily have been taken out and handed to Van Pelt, and by him delivered to Julia, as was done in the case of *Thomas v. Lewis, supra*. But this was not done. The safe and box, in *Thomas v. Lewis,* were not present, so that the contents could not have been taken out and delivered to the donee by the donor. The ordinary use of a stand of bureaus is not for the purpose of holding and securing such things as a life insurance policy, though they may be often used for that purpose, while a safe and a box deposited in the vault of a bank are. A bureau is an article of household furniture, used for domestic purposes, and generally belongs to the ladies' department of the household government, while

the safe and box, in *Thomas v. Lewis,* are not. The bureau itself, mentioned in this case, was such property as would be valuable to the plaintiff.

We have very carefully compared the case of *Thomas v. Lewis* and this case for the purpose of noting the distinction between them, and, as we have already said, we have taken this case, since it was pressed upon our attention in the brief of the plaintiff's counsel, as being more nearly like the case at bar than any other cited, and as it was impossible for us to give a separate consideration to all of them.

It is held that the law of delivery in this State is the same in gifts *inter vivos* and *causa mortis. Adams v. Hayes,* 24 N. C., 361. And there are expressions used by Judge Gaston in the argument that would justify us in holding that, in all cases of gifts, whether *inter vivos* or *causa mortis,* there must be an absolute manual delivery to constitute, or probably more correctly speaking, to complete, a gift, as it takes, first, the intention to give, and then the delivery—as it is (532) the inflexible rule that there can be no gift of either kind without both the intention to give and the delivery. *Ward v. Turner,* 1 White & Tudor's Leading Cases, 1205 and notes, English & American. There must be a delivery. *Adams v. Hayes, supra; Shirley v. Dew,* 36 N. C., 130; *Medlock v. Powell,* 96 N. C., 499; *Golding v. Hobery,* 35 Am. St., 357.

The leading case in this State is *Adams v. Hayes* and this cites and approves *Ward v. Turner, supra,* as the leading case on the subject of gifts *causa mortis,* and the correct exposition of the law on that subject. And we have felt it to be our duty to follow that case, so well considered by the very able Court as constituted at that time.

Following this case, founded on *Ward v. Turner,* we feel bound to give effect to *constructive delivery,* where it plainly appears that it was the intention of the donor to make the gift, and where the things intended to be given are *not* present, or, where present, are incapable of *manual* delivery from their size or weight. But where the articles are present and are capable of manual delivery, *this must be had.* This is as far as we can go. It may be thought by some that this is a hard rule—that a dying man cannot dispose of his own. But we are satisfied that when properly considered, it will be found to be a just rule. But it is not a hard rule. The law provides how a man can dispose of all his property, both real and personal. To do this, it is only necessary for him to observe and conform to the requirements of these laws. It may be thought by some persons to be a hard rule that does not allow a man to dispose of his land by gift *causa mortis,* but such is the law. The law provides that every man may dispose of all of his property by will, when made in writing. And it is most singular how guarded the (533)

law is to protect the testator against fraud and imposition by requiring that every word of the will must be written and signed by the testator, or, if written by some one else, it must be attested by at least *two* subscribing witnesses who shall sign the same in his presence and at his request, or the will is void. This is as to written wills. But the law provides for another kind of will, not written before the testator's death, called "nuncupative wills." This kind only applies to personal property, and until recently they were limited to small amounts. See how much more guarded they are than gifts *causa mortis*. Such wills as these must be witnessed by at least two witnesses called by the testator specially for that purpose, and they must be reduced to writing within ten days, and proved and recorded within six months.

In gifts *causa mortis* it requires but one witness, probably one servant as a witness to a gift of all the estate a man has; no publicity is to be given that the gift has been made, and no probate or registration is required.

The statute of Wills is a statute against fraud, considered in England and in this State to be demanded by public policy. And yet, if symbolical deliveries of gifts *causa mortis* are to be allowed, or if constructive deliveries be allowed to the extent claimed by the plaintiff, the statute of wills may prove to be of little value. For such considerations, we see every reason for restricting and none for extending the rules heretofore established as applicable to gifts *causa mortis*.

It being claimed and admitted that the life insurance policy was present in the bureau drawer in the room where it is claimed the
(534) gift was made, and being capable of actual manual delivery, we are of the opinion that the title of the insurance policy did not pass to the plaintiff, but remained the property of the intestate of the defendant.

But we are of the opinion that the bureau and any other article of furniture, locked and unlocked by any of the keys given to the plaintiff did pass and she became the owner thereof. This is upon the ground that while these articles were present, from their size and weight they were incapable of actual manual delivery; and that the delivery of the keys was a constructive delivery of these articles, equivalent to an actual delivery if the articles had been capable of manual delivery.

Still following *Ward v. Turner*, we are of the opinion that the other articles of household furniture (except those in the plaintiff's private bed chamber) did not pass to the plaintiff, but remained the property of the defendant's intestate.

We do not think the articles in the plaintiff's bed chamber passed by the *donatio causa mortis*, for the same reason that the other articles of household furniture did not pass—want of delivery—either constructive

or manual. But as to the furniture in the plaintiff's bed room ($45) it seems to us that there was sufficient evidence of both gift and delivery to support the finding of the jury, as a gift *inter vivos*. The intention to give this property is shown by a number of witnesses and contradicted by none.

The only debatable ground is as to the sufficiency of the delivery. But when we recall the express terms in which he repeatedly declared that it was hers; that he had bought it for her and had given it to her; that it was placed in her private chamber, her bed room, where we must suppose that she had the entire use and control of the same, it would seem that this was sufficient to constitute a delivery. There (535) was no evidence, that we remember, disputing these facts. But, if there was, the jury have found for the plaintiff, upon sufficient evidence at least to go to the jury, as to this gift and its delivery. As to the piano there was much evidence tending to show the intention of Van Pelt to give it to the plaintiff, and that he had given it to her, and we remember no evidence to the contrary. And as to this, like the bed-room furniture, the debatable ground, if there is any debatable ground, is the question of delivery. It was placed in the intestate's parlor where it remained until it was burned. The intestate insured it as his property, collected and used the insurance money as his own, often saying that he intended to buy the plaintiff another piano, which he never did. It must be presumed that the parlor was under the dominion of the intestate, and not of his cook, housekeeper, and hired servant. And unless there is something more shown than the fact that the piano was bought by the intestate, placed in his parlor, and called by him "Miss Julia's piano," we cannot think this constituted a delivery. But, as the case goes back for a new trial, if the plaintiff thinks she can show a delivery she will have an opportunity of doing so. But she will understand that she must do so according to the rules laid down in this opinion—that she must show actual or constructive delivery equivalent to actual manual delivery. We see no ground upon which the plaintiff can recover the insurance money, if the piano was not hers.

We do not understand that there was any controversy as to the plaintiff's right to recover for her services, which the jury have estimated to be $125. The view of the case we have taken has relieved us from a discussion of the exceptions to evidence, and as to the charge of the Court. There is no such thing in this State as *symbolical* (536) *delivery* in gifts either *inter vivos* or *causa mortis*. There is a hint in that direction in the case of *Shirley v. Dew, supra,* and this is now overruled. There is error.

New trial.

Cited: Wilson v. Featherston, post, 751; *Kelley v. Maness,* 123 N. C., 238; *Duckworth v. Orr,* 126 N. C., 676; *Kennedy v. Douglas,* 151 N. C., 340; *Patterson v. Trust Co.,* 157 N. C., 14; *In re Garland,* 160 N. C., 557.

P. A. POSTON, GUARDIAN, ETC. v. H. F. JONES ET AL.

(Decided 26 April, 1898.)

Action to Foreclose Mortgage — Witness — Competency — Evidence— Transaction with Deceased Person—Note—Payment—Presumptive Evidence—Mortgage—Administrator.

1. In the trial of an action to foreclose a mortgage which a deceased administrator had, during his lifetime, assigned to plaintiff as security for his note given in settlement of the balance due from him as administrator, the testimony of defendant that, after the execution of the mortgage, the administrator had agreed to take the mortgaged land in fee and defendant's note for a small amount in settlement of the note secured by the mortgage, was incompetent under section 590 of The Code.
2. While the unexplained possession of a note by the maker is presumptive evidence of its payment, yet, where there was no claim of payment, except under an agreement that was inoperative, the rejection of the note as evidence of its payment was harmless error.
3. A conveyance of land which provides for a reconveyance to the grantor, if the latter shall within a certain time pay to the grantee the consideration named in the instrument, is a mortgage.
4. A mortgage cannot, by any stipulation between the parties thereto, be changed to an absolute deed. "Once a mortgage, always a mortgage."
5. An administrator has no right to take land in payment of a debt due to the estate.
6. A debtor to a trustee has no right to pay the trust debt by a conveyance of land to such trustee.
7. In an action on a note and a mortgage assigned as security for such note, it was error to render judgment against the security for more than was due on the principal debt.

(537) ACTION, tried before *Coble, J.,* and a jury, at August Term, 1897, of IREDELL. There was a verdict for plaintiff, and defendant appealed from the judgment thereon. The facts appear in the opinion.

Armfield & Turner and H. P. Grier for plaintiff.
Long & Long for defendants.

FURCHES, J. On 15 April, 1890, the defendant H. F. Jones became and was indebted to J. A. Hartness, receiver of Poston Brothers, in the sum of $2,051.43, for which he, together with A. A. Hampton, executed a note. Some time after that said Hampton became the administrator *d. b. n.* of J. W. Poston and administrator *c. t. a.* of Nora J. Poston, wife of J. W. Poston; and in that way the Hartness note came into the hands of said Hampton as a part of the estate of the said J. W. and Nora J. Poston. On 1 November, 1894, the defendants H. F. Jones and wife made and executed a deed, in form a mortgage, to the said A. A. Hampton, administrator of J. W. Poston, conveying three several tracts of land therein described, lying and being in Alleghany County. The consideration expressed in said conveyance is $2,144, and the condition expressly provides that if said Jones shall pay said Hampton, administrator of J. W. Poston, this sum, with interest, within the *next two years,* said Hampton "shall reconvey said land to said H. F. (538) Jones."

The defendant alleges that after this, to wit, on 26 November, 1894, it was agreed between the defendant and said Hampton that he (Hampton) would take the fee-simple estate in said land, and a note for $300, in payment of the Hartness note; and at that time Hampton surrendered to the defendant the Hartness note, and that he executed his note to said Hampton for the $300, which he has since paid; that since that time Hampton has had a settlement of his said administrations, when it was found that he was indebted to said estates in the sum of $2,016.40. And the plaintiff, P. A. Poston, having been appointed guardian of Mary and Mattie Poston, to whom said money was due, Hampton executed his note to said guardian for the amount so due by him, and assigned the Jones mortgage to said guardian as collateral security for his note.

This action was brought against said Hampton on his note, and against the defendants Jones and wife, for a foreclosure of the alleged mortgage. Hampton filed no answer, and judgment was taken against him at February Term, 1897, and he has died since then and before August Term, when the case was tried as to Jones and wife.

On this trial the plaintiff introduced the conveyance claimed by him to be a mortgage. The plaintiff then introduced the note of Hampton to plaintiff, which also contained the assignment of the "mortgage" to the plaintiff as collateral security. This was objected to by the defendants. Objection overruled, and defendants excepted. The execution of this paper was duly proved, and defendants do not point out, in their exception, upon what ground it was incompetent. They have not done so by argument or brief, and we are unable to see why it is not competent. It is true that it is called a mortgage in the assignment, but (539)

this does not make it so, unless it is so. *Rawlings v. Neal,* at this term. This is considered by us as only to identify the paper assigned to the plaintiff.

The defendants both went upon the witness stand for the purpose of proving that Hampton, on 26 November, 1894, agreed to take and hold the land in fee and the defendant's note for $300, in payment and satisfaction of the Hartness note. But this evidence was objected to by plaintiff under section 590 of The Code, both Jones and wife being parties to the action, and plaintiff claiming under Hampton, then deceased. This evidence was excluded, and defendants excepted. We see no error in this ruling.

The defendants then offered in evidence the Hartness note, which seems to have been the original evidence of indebtedness of defendant Jones. This was objected to by plaintiff, and ruled out by the court.

The possession of a note has been often held to be presumptive evidence of ownership by the holder. And we would be unwilling to say that the holder of a note, by a party, which he admits that he once owed, would be no evidence of payment. It seems to us that, unexplained, it would create the same presumption as to ownership as the holder of an unpaid note creates, and thus be presumptive evidence of payment. There was error in excluding this evidence, and it remains to be seen whether it was material, that is, whether it might have affected the plaintiff's rights if it had been admitted. If it might have done so, the defendants are entitled to a new trial.

(540) Without specially discussing the various rulings of the Court on other exceptions to evidence, we will say that we have examined them and find no error.

The deed of 1 November, 1894, is so plainly and emphatically a mortgage that it seems to us to be a misnomer to call it anything else. "Once a mortgage, always a mortgage." 3 Pomeroy Eq. Jur., sec. 1193; Bispham, sec. 153. 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 deed. Pomeroy, *ibid.,* sec. 1194; *Halcombe v. Ray,* 23 N. C., 340.

It is not contended that this indebtedness (the Hartness note) has ever been paid, except by this alleged agreement on the part of Hampton, a trustee, to accept the land and the $300 note as payment. If Hampton ever did agree to take the land and the $300 note in payment, this was not a payment. Hampton as a *trustee* had no power to buy land for the plaintiff's wards, and the defendant Jones had no right to pay a *trust debt,* knowing it to be such, in that way; and the plaintiff, in behalf of his wards, has the right to repudiate any such transaction. As defendants were incompetent, under section 590 of The Code, to testify as to

transactions and communications with Hampton, there is nothing to connect the $300 note with the Hartness note. Had there been, it should have been allowed as evidence for the same reason that the Hartness note was competent. But as there was not, it was properly excluded.

As there is an admitted indebtedness (the Hartness note) for which the mortgage offered in evidence was given as security, and there is no evidence tending to prove payment, except the fact that the Hartness note is in the possession of the defendant, which is explained by the allegations of the defendant that he received it from Hampton upon an agreement that Hampton was to take the land in payment of the note, which we hold he had no right to do (supposing defendant's alle- (541) gations to be true), we are unable to see what benefit it would have been to defendants to have admitted the Hartness note in evidence. If the court was in error in excluding this note, as we think it was, it was harmless error.

The $300 note stands on somewhat different grounds. It is not an alleged indebtedness by the plaintiff and admitted by defendants. The only standing it has in court is the allegation of defendants.

But the Jones mortgage is not plaintiff's primary cause of action. This is Hampton's note, and the Jones mortgage is only a security for the payment of the Hampton note. This is less than the amount found to be due on the Jones mortgage. The security cannot be made to pay plaintiff more than is due from the principal. Therefore, plaintiff's recovery against defendant Jones can be for no greater amount than plaintiff's judgment against Hampton. This error must be corrected.

In this case, as in others that have come before us, the appellant has failed to print an index, or to print a division of the subject-matter in lieu of marginal notes, as required by the rule. This must be done or appellants will be taxed with the costs of having it done.

Modified and affirmed.

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(542)

SILVER VALLEY MINING COMPANY v. NORTH CAROLINA SMELTING COMPANY.

(Decided 26 April, 1898.)

Contract, Construction of—Question for Court—Partial New Trial.

1. Where a contract is clear and certain in its terms and meaning, and there is no latent ambiguity necessitating proof of a custom to interpret its meaning, its construction is for the court and not for the jury.

2. Where a contract between a mining company and a smelting company provided that the latter was to smelt ore for the former at $10 per ton, and

to pay to the former 95 per cent of the silver produced, and by another clause it was provided that the 95 per cent of silver "produced from the ore as aforesaid" should not be demanded until a certain time; and on the trial of an action for money due the mining company under the contract the plaintiff mining company contended that the ores were to be paid for at their assay value, according to a custom among smelters, and not on the basis of the silver produced by the smelting process: *Held*, that the contract was not ambiguous in its terms and, therefore, should be construed by the court, and it was error to submit to the jury the question whether the alleged custom existed among smelters.

3. Where, in the trial of an action in which several issues have been submitted and responded to, an erroneous instruction was given upon one issue entirely distinct and separable from the other issues and matters involved in the case, and a new trial can be had upon such issue alone without danger of complication, the new trial will be confined to such issue.

ACTION, tried before *Starbuck, J.*, and a jury, at Spring Term, 1897, of DAVIDSON. There was a verdict for the plaintiff, and from the judgment thereon defendant appealed. The facts are stated in the opinion.

Watson, Buxton & Watson for plaintiff.
E. E. Raper for defendant.

(543) MONTGOMERY, J. On the trial below his Honor instructed the jury that "the amount due to the Silver Valley Mining Company (the plaintiff in the action) by the Smelting Company (the defendant) is $309.96 unless you shall find from the evidence that there is a special custom among smelters that all the ores are to be paid for at assay value, and in case you should find there is such custom, then the amount due on said contract, if you believe the evidence, is $2,803.92."

The correctness of this instruction depends upon whether or not the contract between the parties on its face is clear and certain in its terms and meaning. If it is clear and certain in its terms and meaning, and there is no latent ambiguity which necessitates the proving of a custom to interpret the meaning of the contract, then the instruction was wrong, and the defendant's exception thereto was well taken.

We will examine the contract. It, in substance, provided that the mining company was to furnish to the smelting company 450 tons, more or less, of Silver Valley ore; that the smelting company was to do the work of smelting the ore for $10 for each and every ton of ore so worked and smelted as working charges therefor, and pay to the mining company 95 per cent of the silver contents of the product of the ore after deducting therefrom the smelting charges of $10 per ton.

In our opinion the construction of the contract was one of law, and should not have been submitted to the jury. The words "95 per cent of

the silver contents of the product of said ore" mean 95 per cent of the ore reduced to its smelted condition. It cannot mean 95 per cent of the silver contents of the mass of ore as it was dug from the earth and before it was subjected to the smelting process. The defendants clearly did not contract, nor did they intend to contract, upon an assay made of the ore containing the silver metal before it was smelted, but they (544) contracted upon the basis of the product resulting from the smelting process. If the contract could be made clearer than it is on this point, it is made so by the fourth section of the contract between the parties. There it is agreed between the parties that the smelting company shall not be called on to pay the mining company 95 per cent of silver *"produced from said ore as aforesaid"*; . . . that is, the 95 per cent is not to be paid upon an assay made upon the crude earth containing the metal, but upon the silver which is contained in the product of the smelting process.

His Honor's charge was based upon Ledoux & Co.'s assay, and that assay was made upon the ore before it had been subjected to the smelting process. It was provided in the contract that the 95 per cent of the silver should be the silver produced under the smelting process, and not upon the silver contained in the ore by assay before it was smelted. There was error, therefore, in that instruction of the judge.

That erroneous instruction, however, is entirely distinct and separable from the other issues and matters involved in the case, and there can be a new trial in respect thereto without danger of complication, and the defendants are entitled to nothing more at the hands of the Court.

There was evidence going to show that the deed of trust and confessed judgment in favor of the defendants, Glorieux and Woolsey, were executed and confessed for the purpose of hindering and delaying the plaintiff in the collection of its debts, and to fraudulently subject to execution sale the property of the smelting company, that they might purchase the same for their own advantage and to the injury of the (545) other creditors of the smelting company. The judgment below will be reformed so as to reopen the first issue, which was submitted on the trial.

New trial on first issue.

Cited: Strother v. R. R., 123 N. C., 199; *Benton v. Collins*, 125 N. C., 90.

M. F. WILLIAMS v. GEORGE SCOTT AND WIFE.

(Decided 12 April, 1898.)

Action to Recover Land—Bankruptcy—Homestead—Reversionary Interest—Decree—Collateral Attack—Color of Title—Statute of Limitations—Adverse Possession.

1. A sale by the assignee in bankruptcy of the reversionary interest in land which had been listed by the bankrupt in his inventory as subject to his homestead, previously allotted, carries the title to the purchaser subject to the homestead estate therein.

2. Where a bankrupt in his petition and schedules declared that his homestead had been allotted to him, mentioning the date of the allotment and the names of the appraisers, a claim to the land by his heir by descent, and a contention by her that there was no evidence that the homestead had been legally allotted, are inconsistent.

3. Where the record of the proceedings in bankruptcy is made out according to the requirements of law, and is sufficiently authenticated, the decree of the district court therein is not subject to collateral attack, and, not having been appealed from, is binding on the State courts and upon the bankrupt and all persons claiming under him.

4. There can be no color of title without some paper-writing attempting to convey title, but which does not do it either because of want of title in the person making it or because of the defective mode of conveyance used; and, *semble*, that under the act of 1891 it must not be so plainly and obviously defective that a man of ordinary capacity could be misled by it.

5. The ten years statute of limitations (section 158 of The Code) does not apply to defendants in ejectment who claim the land by adverse possession, where they have recognized plaintiff's claim and title thereto within that time.

(546) ACTION to recover land, tried before *McIver, J.*, at February Term, 1898, of ROWAN. The facts appear in the opinion. At the conclusion of the plaintiff's testimony the defendant moved to dismiss the complaint and for judgment as of nonsuit, under Hinsdale's Act. The motion was allowed, and plaintiff appealed.

S. E. Williams, E. E. Raper, and Long & Long for plaintiff (appellant).

Lee S. Overman and L. S. Clement for defendant.

MONTGOMERY, J. The plaintiff claims the land and seeks to recover possession of it in this action, commenced on 6 January, 1896, under a deed executed to herself and Alice V. Marsh by John S. Henderson,

assignee of Jack Hall, a bankrupt, on 3 March, 1874, and registered on the same day. The defendants denied the plaintiff's right to the land, and pleaded further that the claim of the plaintiff is barred by the ten years statute of limitations and that they have been in possession more than seventeen years under color of title. It was admitted on the trial, on all sides, that Jack Hall, under whom both the plaintiff and the defendants claim, died in 1878, leaving a widow, who died in November, 1895, and the *feme* defendant, his only child and heir at law, who was 31 years old at the death of her father; that the *feme* defendant has been in continuous possession since the death of her father; (547) that the plaintiff's cause of action accrued at the death of Hall in 1878; that Alice Marsh died intestate before this action was commenced, leaving the plaintiff her only heir at law, and that the land in controversy is covered by the deed of Henderson, assignee to the plaintiff. On the trial the plaintiff introduced the deed from Henderson, assignee, to the plaintiff and Alice Marsh, and also the deed of assignment of the bankrupt's effects by the register in bankruptcy to Henderson, assignee, and also an exemplified copy of the record of the proceedings in the District Court of the United States in the matter of Jack Hall, bankrupt; all of which evidence was received under objection of the defendants and subject to objections. The plaintiff also introduced S. E. Williams who, without objection, testified as follows:

"I am a son-in-law of the plaintiff, and had a conversation with Mrs. Scott, the defendant, soon after the death of her mother. I asked her if she would give up possession. She said she knew of our claim, and that she thought it hard that we called on her for possession so soon after the death of her mother, and said that Marsh, the father of the plaintiff, had not offered to buy the life estate, but that they had wanted to sell to him and had written him several letters to that effect. We were talking about homestead rights. Marsh is the father of plaintiff, and was acting as her agent. Mrs. Scott refused to give up possession. I had a conversation with the defendant George W. Scott about six months or a year before the death of Mrs. Hall in regard to this property. It was about the payment of the brick pavement tax. He said, 'We do not own the remainder; you do, and we ought not to have to pay the tax; we do not know when you will put us out, and I don't think (548) we ought to pay all the tax.' After talking the matter over we came to the agreement that I should pay about $90 and they should pay the balance. I was acting as the agent and attorney of the plaintiff."

On cross-examination the witness stated:

"The whole amount of the tax may have been only $90, and I have paid $40. I do not remember the exact amount, but feel sure there was a $40 or a $90 item."

The plaintiff then rested her case, and upon the defendants' motion to dismiss the action under chapter 109, Laws 1897, the motion was allowed and judgment as of nonsuit entered in favor of the defendants, from which the plaintiff appealed.

There was error in that ruling. The deed from Henderson, assignee, to the plaintiff conveyed the reversionary interest in the land, and recognized the right of the bankrupt in the homestead and its allotment to the bankrupt. A sale of the reversionary interest in land by an assignee in bankruptcy, in which a homestead has been allotted, is fully recognized in our courts. *Windley v. Tankard,* 88 N. C., 223; *Murray v. Hazell,* 99 N. C., 168. The laws of North Carolina prohibit a sheriff from selling the reversionary interest in homestead lands under execution, but they do not prevent the homesteader himself from conveying it. *Jenkins v. Bobbitt,* 77 N. C., 385. The assignee takes as a purchaser from the bankrupt under the assignment. *Dudley v. Easton,* 104 U. S., 99. The bankrupt, Hall, in his petition and schedule inventoried the land which is in controversy, and added, "this real estate is covered by the homestead exemption allotted to petitioner on 16 April, 1870, by W. H. Howerton, W. H. Crawford, and F. H. Sprague, and (549) valued by them at $1,000."

The assignment by the register in bankruptcy to Henderson, assignee, conveyed the land subject to the homestead exemption of the bankrupt. It was the assignee's duty to sell all the interest of the bankrupt in the property, subject to the homestead exemption, so that the creditors might receive what was due to them, and the bankrupt be discharged. But the defendants contend that there is no evidence that the homestead has been legally allotted, and that, therefore, the sale of it was unauthorized and the deed conveying it void. This position by the defendants is not a consistent one. The *feme* defendant claims the land by descent from her father, the bankrupt, and in his petition and schedules he declared that his homestead had been allotted to him, mentioning the date of the allotment and the names of the appraisers. The exemption as claimed by the bankrupt was not conveyed to the assignee, and that officer respected the exemption as set out in the petition of the bankrupt, and sold only the reversionary interest in the land. The defendants insist, however, that the record of the proceedings in bankruptcy were incompetent to prove that the defendant had had his homestead allotted and the regularity and right of the assignee to sell the reversion and make the deed therefor. The record was, so far as we can see, made out according to the requirements of the law and sufficiently authenticated. It was not open to collateral attack, and the decision of the District Court in the matter, where it had sole jurisdiction, was, and is, binding on our courts. *Lewis v. Sloan,* 68 N. C., 557; *Michael v. Post,* 21 Wallace, 398.

The decree of the District Court ordering a sale of the reversionary interest in the land, not having been appealed from by the bankrupt, concluded him and binds the defendants who claim under him and are privies in blood and estate. Black on Judgments, Vol. (550) 2, sec. 549.

The defendants insist further that the possession of the *feme* defendant, the heir at law of the bankrupt, since his death in 1878, is color of title by descent. Counsel cited us some authorities from other States to that effect, but upon examination it is found that that has been made so by statute. Whatever the law may be elsewhere, there can be no such thing in North Carolina as color of title without some paper-writing attempting to convey title. In *Tate v. Southard,* 10 N. C., 119, color of title is defined to be "a writing upon its face professing to bear title, but which does not do it, either from a want of title in the person making it or the defective mode of conveyance that is used"; and it would seem, under the act of 1891, at least, that it must not be plainly and obviously defective, so much so that no man of ordinary capacity could be misled by it. And this has been the definition of the color of title by our courts from time to time, and as late as *Avent v. Arrington,* 105 N. C., 377. The case of *Neal v. Nelson,* 117 N. C., 393, is not consistent with the former decisions of this Court, and we feel that we cannot follow it as the true doctrine upon the subject of color of title.

The contention of the defendants that the ten years statute, section 158 of The Code, applies where it is alleged that the defendant holds adversely, need not be considered, for it appears from the testimony of the witness Williams, which must be taken as true in this case, that the defendants recognized the claim and the title of the plaintiff just a year or so before the bringing of this suit. (551)

Error.

CLARK, J., concurring. In addition to what my brother Montgomery has so well said, there is this further consideration. This is not a case of a sale under execution in which the homestead must be set apart, since only the excess can be sold, but the debtor conveys his entire property, subject only to the right to have his homestead set apart by the assignee in bankruptcy. Had the latter failed to set it apart, the debtor could have enforced that right. The property passed to the purchaser by the deed from the assignee in the same plight as the assignee held it, and the right of the debtor to have it allotted by metes and bounds (if it was not done) was personal and determined upon his death, leaving no minor children. Had he left minor children, his right to have an allotment would have survived to them till their coming of age. But the failure to allot would not affect the validity of the conveyance from the debtor

to the assignee, or from him to the purchaser, the estate thereby conveyed being merely subject to the right of the debtor to have the homestead allotted out of said property.

As to the statute of limitations, The Code, section 158, applies only to cases "not provided for," and as to actions for the recovery of real estate there are two express statutes; of these, the seven-year statute (section 141) does not apply because there is no color of title, and the twenty years required under section 144 had not elapsed when this action was brought; besides, the defendant expressly pleads the absence of visible lines and boundaries, which would be necessary to ripen twenty years possession into title.

Cited: Joyner v. Sugg, 131 N.C., 326, 334, 339, 349; *S. c.,* 132 N. C., 590; *Greenleaf v. Bartlett,* 146 N. C., 499; *Barrett v. Brewer,* 153 N. C., 549; *Land Co. v. Cloyd,* 165 N. C., 597; *Realty Co. v. Carter,* 170 N. C., 7; *Holloman v. R. R.,* 172 N. C., 376.

(552)

JESSE MABE v. HAMP MABE.

(Decided 12 April, 1898.)

Action to Recover Land—Trial—Depositions in a Separate Action—Deed—Registration—Presumption.

1. In the trial of an action a deposition regularly taken in another action between the same parties and involving the same subject matter is admissible as substantive evidence, and may be introduced whether the deponent has been examined as a witness in the case being tried or not.
2. The matters involved in an action on a note given for land, and in an action to recover the land itself are so connected as to make a deposition taken in the former competent evidence in the latter when the two actions are between the same parties.
3. In the trial of an action to recover land the defendant introduced a duly registered deed from the plaintiff to himself for the land in controversy. *Held,* that the due registration of the deed created a presumption of its execution which cast the burden of rebuttal on the plaintiff.

ACTION to recover land, tried before *Starbuck, J.,* and a jury, at Fall Term, 1897, of STOKES. The facts appear in the opinion. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

A. M. Stack, Jones & Patterson, and R. L. Haymore for plaintiff.
Scott & Reid and J. T. Morehead for defendant.

FURCHES, J. This is an action of ejectment, and the record presents only two questions necessary to be discussed—one of these is a question of evidence and the other is as to the burden of proof.

The first exception is as to the ruling of the court upon the deposition of one Woolwine, taken in a suit between the same parties in the State of Virginia. This deposition was offered by the defendant, (553) and upon objection on the part of the plaintiff the court allowed a part of it to be read and excluded the other part. The deponent Woolwine had been examined as a witness in the trial of this case, and the court allowed that part of the deposition to be read which, in the opinion of the court, corroborated the testimony of Woolwine as given in this case, and excluded what the court thought did not corroborate Woolwine.

In our opinion there was error in this ruling. It appeared that there was an action pending between the plaintiff and the defendant at the time said deposition was taken; that it was taken on notice and cross-examination; was properly certified to the court where the action was pending, in which it was taken, and was competent evidence in that case. It seems to have been taken in an action for the collection of a note given as the price of the land in dispute in this action. And though the land now in controversy was not directly in issue in the action in which the deposition was taken, yet the matters in that suit and in this are so connected that it makes the deposition competent evidence in this action. *Stewart v. Register,* 108 N. C., 588. It may be, and it is probable, that the part of the deposition the court allowed to be read was competent upon the ground the court allowed it to be read—as corroborative of Woolwine. But if a part of it was competent for that purpose, why was not all competent, as it is a matter for the jury to determine whether it did corroborate Woolwine's testimony or not; and if so, to what extent.

But as we understand, the rule admitting depositions taken between the same parties in another action is not as to whether it is in corroboration of what the same witness has testified to in the (554) action then being tried, but upon the grounds above stated. If it is only allowable as corroborative evidence, then it could only be competent where the witness had been examined and for the purpose of strengthening what he then said. This is not so. When it comes within the rule, it is admissible as substantive evidence, and may be introduced whether the deponent has been examined in the case being tried or not. It seems only just to the other side that the whole deposition should be read (subject, of course, to proper exceptions noted in the deposition), as there may be something in the deposition that would tend to contradict as well as to corroborate.

The other question is as to the burden of proof. The defendant claimed title under a deed from the plaintiff, and for the purpose of making good this defense introduced a registered deed, in terms conveying the land in controversy from the plaintiff to the defendant. This deed purported to be signed by the plaintiff and attested by Woolwine, the witness heretofore mentioned, and to have been proved by him for registration.

Woolwine testified that he did not see the plaintiff sign the deed; that it had been signed some time before he saw it, and appeared to be witnessed by two persons who did not write their names but made their marks; that he was called upon by the plaintiff and the defendant to take probate of the deed, and the plaintiff acknowledged the execution of the same before him, and he then wrote thereon these words: "Acknowledged by Jesse Mabe, 6 November, 1878. R. J. Woolwine."

While the plaintiff denied this testimony of Woolwine, he contended that if true it will not in law amount to an execution and attesta-
(555) tion of the deed, and cited *Latham v. Bowen,* 52 N. C., 337. But *Latham v. Bowen* does not sustain the plaintiff's contention. That case is put upon the ground that Mrs. Wynn was a married woman at the time of the acknowledgment; that she was incompetent to make the conveyance at that time, and as she was incompetent to make the conveyance she could not be bound by her acknowledgment of a deed made when she was *sole.*

It is the most common thing for persons to sign deeds and other instruments and afterwards to acknowledge their signatures before some one whom they ask to sign as a witness. We see nothing wrong in this, and no reason why Woolwine should not have proved its execution for registration.

On the trial the court among other issues submitted the following: "Did the plaintiff Mabe execute to the defendant Smith (who is a party defendant) a deed conveying the land described in the complaint?" Upon this issue the court charged the jury that the registration of the deed, offered in evidence by the defendant, was *prima facie* evidence of its due execution, and upon this evidence alone their verdict should be "Yes." There was no error in this instruction. *Love v. Harbin,* 87 N. C., 249. The court further instructed the jury that this presumption might be rebutted, and as the plaintiff had introduced evidence tending to show that he did not sign and execute the deed, it was for them to say how it was. There was no error in this instruction.

But the court further instructed the jury that the burden was still on the defendant. In this there was error. The probate and registration of the deed created a presumption in favor of its execution, and this imposed the burden on the plaintiff to rebut the presumption. *S. v.*

Rogers, 79 N. C., 609. If this was not so, the defendant would (556) have to offer evidence to sustain a presumption already in his favor. There is error.

New trial.

Cited: Freeman v. Brown, 151 N. C., 114.

R. ROTHCHILD & SON v. A. MCNICHOL AND WIFE ET AL.

(Decided 19 April, 1898.)

Action on Note—Husband and Wife—Trial.

In the trial of an action on a note signed by a married woman for the purchase price of a billiard table, the fact that the husband played pool thereon was not such evidence of ratification by him of his wife's contract as to justify its submission to a jury.

ACTION, tried before *Greene, J.,* and a jury, at Spring Term, 1897, of SURRY, on a note executed by the *feme* defendant M. P. McNichol, and endorsed by Lucius Tilley. On the trial the issues submitted were as follows:

"Is the defendant Lucius Tilley indebted to the plaintiffs? If so, in what amount?"

"Did the defendant A. McNichol satisfy the note made to Mrs. McNichol,"

The plaintiff introduced Mr. W. F. Carter, who testified as follows: "There was a note signed by Mrs. McNichol and endorsed by defendant Tilley, and one payable to plaintiffs, I think, and one to Everett. I don't remember the amount of either. I was in possession of the note to plaintiff, and held it on conditions."

In reply to a question whether witness was at any time sent by defendants to the plaintiffs as their attorney with a request, if so, what the character of such communication was, witness stated: "I was counsel for the defendant in whatever I did relative to this matter, and I decline to answer the question on the ground that any communi- (557) cation or transaction had with them was privileged."

The plaintiffs stated that they proposed to show by this witness that he came at the request of the defendant A. McNichol and Tilley to the plaintiffs' attorney at the date of maturity of the note sued on and asked an extension of time for payment.

T. M. Everett, a witness for plaintiffs, testified: "The pool tables were in the hotel; had been purchased by one Westbrook and myself from the plaintiffs. The plaintiffs retained title. We gave $400 for them when they were delivered. Westbrook left before they were paid for. There was a balance due of $234.17. I undertook to buy them, but could not get the money. Mrs. McNichol was keeping the hotel at Mount Airy, and the tables were there. I told her she could get the tables for the balance of the purchase money. She said she would give plaintiffs' attorney a note on sixty days time, with Tilley as surety. I got blank note and left it with her; also one to be given to me for chairs and fixtures, which were mine. I got my note, which was signed by her, and afterwards paid. She told me she had given both notes to W. F. Carter. I got my note from him. Mrs. McNichol asked me to name some suitable person to take charge of the tables. On my recommendation, she got one Mitchell. The tables were run for pay about one month. Mr. McNichol never came to Mt. Airy until some time after Mrs. McNichol came. After A. McNichol came, I played pool with him sometimes on the table; paid nothing. I don't know of being used for pay after Mr. McNichol came. Mrs. McNichol gave up the hotel in about a year, and it has since been run by Mr. Quincy. She does not hire them. (558) The tables are there in the hotel now and have been ever since."

Defendant introduced no evidence. At the close of the testimony the plaintiff's counsel stated to the court that Mrs. McNichol being a married woman, they did not claim that she could be held liable on her note, and they would ask no issue as to her.

Defendants demurred to the evidence *ore tenus* on the ground that the evidence showed that the note had never been delivered to plaintiffs' attorney on conditions; and as to Mr. McNichol, that upon the whole evidence the plaintiffs were not entitled to recover against him.

The court declined to so hold, but submitted two issues to the jury and instructed them that if they found that the note had been signed by Mrs. McNichol, with defendant Tilley as surety, and that the note was delivered to plaintiffs or their agent, that the plaintiffs were entitled to recover against Tilley; but that if they found from the evidence that the note had been signed by Mrs. McNichol and Tilley as surety for her, and had been handed to their attorney to be held by him until some conditions were performed, and that he had never delivered it to plaintiffs or their agents, the plaintiff would not be entitled to recover against Tilley.

And as to the second issue, that if the jury found from the evidence that defendant A. McNichol, after coming to Mt. Airy, used the pool tables, and thereby ratified the purchase by his wife, they should find the second issue "Yes."

The jury responded to the first issue "No" and to the second issue "Yes."

There was judgment for plaintiffs against defendant A. Mc- (559) Nichol, and he appealed.

Watson, Buxton & Watson for defendant.
No counsel contra.

FAIRCLOTH, C. J. The plaintiffs abandoned their claim against Mrs. McNichol. The jury rendered a verdict in favor of the defendant Tilley, from which no appeal was taken by the plaintiffs. The jury rendered a verdict in favor of the plaintiffs against A. McNichol, and judgment for the plaintiffs was entered and he appealed. This was done on the ground that he had ratified the personal contract of his wife. We find no evidence of such ratification in the record, and the question of his liability should not have been submitted to the jury. There was

Error.

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(560)

A. B. GORRELL ET AL. V. J. W. ALSPAUGH ET AL.

(Opinion filed 22 March, 1898.)

Deed Absolute on Face—Security for Loan—Mortgage—Trusts—Extinguishment.

[For Syllabus see 120 N. C. R., 362.]

PETITION by plaintiffs to rehear the case between same parties decided at February Term, 1897, 120 N. C., 362.

Jones & Patterson and A. E. Holton for plaintiffs.
Watson, Buxton & Watson for defendants.

DOUGLAS, J. This is a rehearing of the case heard here at February Term, 1897, and reported in 120 N. C., 362. Few cases that have come before this Court have received more careful consideration, not only on account of the important and interesting principles involved, but from the exhaustive argument and reargument of learned counsel and the very able dissenting opinion. In adhering to our judgment, it is unnecessary to go over again the same line of argument that brought us to our former conclusion, or to review the large number of authorities cited on either side. Many of the principles so strenuously urged by the plaintiffs will be unhesitatingly admitted, and the long line of eminent authorities would be conclusive did they apply to what we believe to be the essential facts in the case. At the outset we are met with the solemn admission

of the plaintiffs that there was no *actual* fraud. There could have been no intent to defraud creditors in the inception of the transaction, because there were then no creditors to defraud. If there is any fraud,
(561) it is purely one of construction, springing from the conscience of the court, and in this case we are asked to construe as fraudulent as to creditors, then neither in being nor in contemplation, a deed admittedly good between the parties, and on the faith of which the defendant Hines has paid the full value of the land. The deed from Alspaugh as administrator to Hines cannot be treated purely as a mortgage. Even to effectuate the contention of the plaintiffs it must operate as a deed in fee simple to take out of Norwood's heirs the full legal and equitable estate in the land conveyed. This deed was not void in its inception, certainly not as to these creditors who had no existence. At best it was only voidable by the heirs of Norwood, and conveyed to Hines the legal title which would vest in him until divested by proper conveyance or legal proceedings. *Highsmith v. Whitehurst,* 120 N. C., 123. It might be that if there had been an actual fraudulent intent a court of equity might construe Hines into a trustee for the creditors of Alspaugh, but this question is not now before us, as it is admitted there was no actual fraud.

In the argument the plaintiffs lay great stress upon the leading case of *Halcombe v. Ray,* 23 N. C., 340, the well-settled doctrine of which we have no inclination to dispute, but which has no application here. In that case, Bailey, the former owner, did not convey to Ray, but conveyed to Tredway, who executed to Ray the deed construed to be a mortgage, and which was in fact intended simply as a security. This deed was attacked by Tredway's creditors as being void to them, and upon its defeasance the land would have reverted to Tredway, the mortgagor, and have been liable for his debts. It was not necessary that the
(562) deed should operate as a conveyance in fee simple as well as a mortgage in order to bring the land within reach of Tredway's creditors, and when declared void it was set aside entirely as to them. In the case at bar it is sought to give the deed of Alspaugh, as administrator, to Hines the double effect produced by the deeds of Bailey to Tredway and Tredway to Ray combined. In other words, the deed now attacked must operate as a deed in fee from Norwood's administrator to Hines and as a mortgage from Alspaugh personally to Hines. This we think clearly distinguishes this case from that of *Halcombe v. Ray* and the line of decisions based thereon. The case of *Thorpe v. Ricks,* 21 N. C., 613, was in actual fraud of creditors, and, moreover, was tainted with usury. We see no error in our former judgment and must deny the petition to rehear.

Petition denied.

FURCHES, J., dissenting. I must again dissent from the opinion of the Court in this case upon the ground that the transactions between Alspaugh and Hines were in violation of our registration laws, and therefore fraudulent as to the plaintiffs.

In support of this opinion I will only cite, in addition to the authorities cited in my former dissenting opinion, the case of *Blalock v. Strain, ante,* 283.

(FAIRCLOTH, C. J., did not sit on the hearing of this case.)

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(563)

CROMER BROTHERS v. R. MARSHA.

(Decided 5 April, 1898.)

Action on Account—Justice of the Peace—Jurisdiction—Sum Demanded.

1. In an action on contract it is the sum demanded in the summons or complaint that fixes the jurisdiction.
2. Where the amount claimed in the summons issued by a justice of the peace was $200 and no other complaint was filed, and the account offered in evidence amounted to $242, but plaintiff stated that he remitted the excess over $200: *Held,* that the justice of the peace had jurisdiction.
3. When the pleadings before a justice of the peace in an action on contract did not show a want of jurisdiction, and no objection was made thereto, such objection cannot be made on appeal to the Superior Court.

ACTION, tried before *Starbuck, J.,* and a jury, at December Term, 1897, of FORSYTH, on appeal from a judgment of a justice of the peace. There was a verdict for the plaintiffs, and from the judgment thereon the defendant appealed.

Watson, Buxton & Watson for defendant.
L. M. Swink and Glenn & Manly for plaintiffs.

FURCHES, J. This action commenced before a justice of the peace and, by successive appeals, has come to this Court. The amount claimed in the summons is $200, and there was no other complaint filed. The defendant denied owing the plaintiff anything, plead statute of frauds and coverture.

Upon the trial the plaintiff offered in evidence a store account, consisting of many items on different days, amounting to $242—stating

(564) that while the whole of said account was due he only claimed $200, and that he remitted the excess. The trial proceeded upon this contention on the part of the plaintiffs and these pleas of the defendant, when the court rendered judgment for plaintiff for $200, and defendant appealed to the Superior Court, where it appears the defendant, in addition to the defenses pleaded and relied on before the justice of the peace, insisted that the sum demanded exceeded $200, and that the justice had no jurisdiction. Judgment again being entered against the defendant, she appealed to this Court. In stating the case on appeal, it is expressly stated that all other pleas and defenses were abandoned except the question of jurisdiction.

This defense cannot be sustained. Section 832 of The Code provides that the summons shall state the amount claimed. This was done, and the amount claimed was $200. Section 834 of The Code gives justices of the peace original and exclusive jurisdiction of all actions upon contract where the sum demanded does not exceed $200. The sum demanded in this action did not exceed $200.

In *Allen v. Jackson,* 86 N. C., 321, it is held that in a justice's court the summons is a substitute for the complaint, where no other complaint is filed. There was no other complaint filed in this case. It is true that the plaintiff used on the trial an account aggregating the sum of $242. But it appears that, while he stated that the whole amount was due, he only claimed $200 and remitted the excess, and the judgment was for $200 only. There was no objection to this in the justice's court, where it should have been made, if there was objection; and as there was none made there, it does not seem to us that it should be made for the (565) first time in the Superior Court (*Cotton Mills v. Cotton Mills,* 115 N. C., 475), as the jurisdictional question did not appear upon the pleadings. And while it seems to us that justices should observe the formula provided in section 835 of The Code, that there may be no mistake about the remitter, it appears to us that this case is fully covered by *Brantley v. Finch,* 97 N. C., 91. And being governed by the ruling of the Court in that case (*Brantley v. Finch*) we must hold that there was no error in the judgment of the court below.

Affirmed.

Cited: Knight v. Taylor, 131 N. C., 85; *Parker v. Express Co.,* 132 N. C., 130; *Harvey v. Johnson,* 133 N. C., 361; *Teal v. Templeton,* 149 N. C., 34; *Brock v. Scott,* 159 N. C., 516; *Fields v. Brown,* 160 N. C., 300.

M. LEVI v. R. MARSHA.

(Decided 12 April, 1898.)

Action on Contract—Married Woman—Alien Husband.

A married woman whose husband is an alien and never visited or resided in the United States is personally liable on her contracts.

ACTION, tried before *Starbuck, J.*, at December Term, 1897, of FORSYTH, on appeal from a justice of the peace.

L. M. Swink for plaintiff. (566)
Watson, Buxton & Watson for defendant (appellant).

FAIRCLOTH, C. J. It is admitted that the defendant is a married woman and that her husband, who has never been in the United States, either as a resident or visitor, resides in Assyria, Turkey, and that neither has ever been naturalized; that the defendant contracted with and became indebted to the plaintiff to the amount claimed by the plaintiff, and the sole question is whether she is liable on her personal contract. The only defense relied upon is her coverture.

This question has not heretofore been presented to this Court. We must answer it upon such authorities as we find and upon the reason, principle, and policy of the admitted facts. At common law a married woman could not make a binding personal contract, nor can she do so under our Constitution and statutes, except in certain cases, and this case does not fall within those exceptions. The Code, secs. 1825, 1826, and 1832, by their express terms, do not apply. There is nothing very anomalous in a married woman being allowed the capacity (567) of a *feme sole* under special circumstances. Her disability to contract, to sue and be sued is not like that of a child or lunatic, arising from the presumed want of judgment or discretion. It arises from the nature of the marriage relation. It is intended to secure the husband's right to the person and society of his wife, and to protect the wife against any misuse of the power intrusted to the husband by the marital relation, inasmuch as he is primarily liable for her support and maintenance and for certain of her acts and contracts.

There are, however, some exceptions to the general rule declaring her incapacity. These exceptions are from necessity, and require, in order that natural justice may be done, the protection of those with whom she may contract.

In *Troughton v. Hill*, 3 N. C., 614, the plaintiff's husband was called upon to take the oath of allegiance or incur the penalty of the crime of high treason if he returned. He left the State, and in 1793 she sued

defendant for her money and property in his hands, and it was held that she might sue and be sued, acquire and transfer property, and that she was for all purposes a *feme sole* except marriage. It was considered that if the husband was banished or had abjured the realm, or if the husband be an *alien residing abroad,* the wife had the rights of a *feme sole.* Co. Litt., 133a. "If the husband be an alien always living abroad, the reason of the exception also applies," and it was held that the wife could sue as a *feme sole* in like manner as if the husband had abjured the realm. *Deerly v. Duchess of Mazarin,* 1 Lord Raymond, 147. In *Walford v. Duchess of Pienne,* 2 Esp., 554, it was held that the (568) wife was liable as a *feme sole* for goods sold, when the husband was a foreigner residing abroad, and that the case was similar to that of a husband abjuring the realm, and it was reasonable; that otherwise she would be without credit and might starve. The same reasoning and conclusion were adopted in *Gaillon v. L. Aigle,* 1 Bos. & P., 357, and in *Gregory v. Paul,* 15 Mass., 31.

In *Robinson v. Reynolds,* 1 Aiken, 174, it was held that "she may, however, sue or be sued alone, when the husband is, in law, *civiliter mortuus,* or is an alien who has never resided in this government, or where he is exiled or banished for life or has abjured the realm." Similar conclusions are found in *Bean v. Morgan,* 4 McCord, 148; *Gregory v. Pierce,* 4 Met., 478. Chancellor Kent finally remarks: "It is probable that the distinction between husbands who are aliens and who are not aliens cannot long be maintained in practice, because there is no solid foundation in principle for the distinction." 2 Kent. Com., 157.

As the wife's incapacity is not due to a natural cause, but is imposed by a rule of public policy, it ceases with the reason on which it is placed, and she is then like any other competent person, capable of transacting business.

For these reasons and authorities we find no error in the record.

Affirmed.

Cited: Harvey v. Johnson, 133 N. C., 361; *Smith v. Bruton,* 137 N. C., 81.

(569)

FIRST NATIONAL BANK OF WINSTON v. W. B. TAYLOR ET AL.

(Decided 12 April, 1898.)

Action to Recover Money Paid Through Mistake—Voluntary Payment.

1. A voluntary payment, with knowledge of the facts, under a mistake as to the law, cannot be recovered back.
2. When a bank charged a customer's account with the amount of a matured note endorsed by him and protested for nonpayment, and subsequently, with full knowledge of the facts, repaid the amount, no action will lie by the bank for the recovery of the amount so paid.

ACTION, tried before *Starbuck, J.*, at December Special Term, 1897, of FORSYTH, on an agreed statement of facts which are set out, substantially, in the opinion. Judgment for the plaintiff, and defendants appealed.

Watson, Buxton & Watson for plaintiff.
Glenn & Manly for defendants.

CLARK, J. The note on which the defendants were endorsers was discounted by the plaintiff bank, which rediscounted it in New York. It fell due 18 February, 1893, and was protested for nonpayment in Alabama, where the maker lived. The notice of protest was not received by the defendants, but on March 9th they received a letter from the maker stating the fact, and saying if the note was sent to the bank where he lived he would try to pay it. The defendants carried this letter to cashier Alspaugh of plaintiff bank, told him they did not consider themselves responsible on the note and to act on that letter; he replied, "all right, it will be attended to." The defendants heard nothing more of the matter till the last of June, when they found the amount charged to their account; whereupon they saw the cashier and (570) asked to have the account corrected, that they were not properly chargeable with the note, and he promised to look into the matter. On 9 July the plaintiff bank closed its doors till 19 September, when it reopened with a new cashier, Miller. The defendants soon thereafter saw him and explained the facts. He told the defendants that the item had been improperly charged against them, and on 6 November, 1893, ordered the books corrected, and the sum of $220, the amount of said note, was credited to the defendants, this being in effect a payment, as that sum has long since been drawn out. In February, 1896, the plaintiff demanded said sum of $220 from the defendants, which they refused, and this action was brought. The maker of the note died insolvent in May, 1893.

There is no evidence that the cashier was not authorized to act for the bank or that this transaction was not within the scope of his authority. It is unnecessary to decide whether or not the defendants were originally responsible for the protested note, or had been absolved by the negligence of the plaintiff, for the latter, having voluntarily paid back to the defendants the amount of the note which had theretofore been charged up to them, and having done so with full knowledge of the facts, or at least with the means of knowledge within its reach, cannot now recover back from the defendants the sum thus paid, even if the bank in truth was not legally bound to pay the same. *Brummitt v. McGuire,* 107 N. C., 351.

A voluntary payment, with knowledge of the facts, under a mistake as to the law, cannot be recovered back. A payment under a mistake of fact may be. *Adams v. Reeves,* 68 N. C., 134; *Matthews v.* (571) *Smith,* 67 N. C., 374; *Comrs. v. Setzer,* 70 N. C., 426; *Comrs. v. Comrs.,* 75 N. C., 240; *Devereux v. Ins. Co.,* 98 N. C., 6. The judgment rendered upon the agreed state of facts must be

Reversed.

WACHOVIA NATIONAL BANK v. H. B. IRELAND AND WIFE.

(Decided 12 April, 1898.)

Action to Enforce a Charge Upon Separate Estate of Married Woman—Husband and Wife—Charge on Wife's Separate Estate—Consent of Husband—Privy Examination of Wife—Acknowledgment—National Banks, Suit by—Counterclaim—Usury.

1. Where an instrument executed by a husband and wife specifically charges the latter's land with the payment of a debt, the consent of the husband need not be specifically set out in the deed, since his joining in the conveyance is sufficient evidence of his consent.

2. Unless a different intent appears, a deed executed to secure the payment of a note will secure all renewals thereof.

3. As between the parties, a married woman may, with the written consent of her husband, charge her land with the payment of a debt without executing a mortgage, and her privy examination is not required.

4. Where a husband and wife convey the wife's land to secure a debt specified in the mortgage, her privy examination is necessary.

5. A defense by a married woman that her privy examination as to her execution of a deed was procured by fraud and imposition is unavailable unless supported by an allegation that the grantee had notice of or participated in the same.

6. The privy examination of a married woman as to her execution of a deed is not invalid because taken by a notary public who was a clerk in the office of the grantee, but had no interest in the transaction.

7. Under the act of Congress, 12 July, 1882, conferring upon State courts jurisdiction of actions by and against national banks, a defendant in an action by a national bank in a State court may set up a counterclaim founded on the State usury law.

ACTION, tried before *Starbuck, J.*, at January Special Term, (572) 1898, of FORSYTH, on complaint and answer. His Honor rendered judgment for the plaintiff, and defendants appealed. The nature of the action and the contentions of the parties sufficiently appear in the opinion. The instrument by which the charge was made upon the separate estate of the *feme* defendant was as follows:

STATE OF NORTH CAROLINA—Forsyth County.

This paper-writing witnesseth: That whereas H. B. Ireland and his wife, A. S. Ireland, of said county and State, have executed and delivered to the Wachovia National Bank, of Winston, N. C., their following notes for borrowed money, to wit: One note in the sum of $1,000, dated 5 November, 1894, payable 4 months after date; one note in the sum of $1,000, dated 1 November, 1894, payable 4 months after date; one note in the sum of $1,000, dated 3 November, 1894, payable 4 months after date; one note in the sum of $1,000, dated 1 December, 1894, payable 4 months after date; one note in the sum of $1,000, dated 13 December, 1894, payable 4 months after date; one note in the sum of $1,000, dated 12 January, 1895, payable 4 months after date; and whereas the said A. S. Ireland has endorsed the following notes, signed by H. B. Ireland, executed to E. A. Elbert & Co., and endorsed over to the said Wachovia National Bank, and now held by it, to wit: one note in the sum of $1,040.67, dated 3 October, 1894, and payable 6 months after (573) date; one note in the sum of $1,080.67, dated 3 October, 1894, and payable 12 months after date; one note in the sum of $1,120.67, dated 3 October, 1894, and payable 18 months after date; and whereas the said H. B. Ireland and his wife, A. S. Ireland, have executed and delivered said notes, and the said A. S. Ireland has endorsed the said notes with good faith, and with full intention to pay the same according to the terms thereof; and whereas the said H. B. Ireland desires to give his written consent to the signing and endorsing of said notes by his said wife, A. S. Ireland; and whereas the said A. S. Ireland desires to bind her separate estate for payment of her aforesaid obligations, and to mention specifically the separate estate so bound and charged by her: Now, therefore, the said H. B. Ireland, for himself, does hereby ratify and confirm and give his written consent to the signing and execution

and delivery and endorsement of the aforesaid obligations, and any and all renewals of the same by his said wife, A. S. Ireland, and also gives his written consent to the execution of this paper-writing by his said wife, A. S. Ireland; and the said A. S. Ireland, for herself, and by the written consent of her husband, as aforesaid, does hereby charge and specifically bind her following separate estate for the payment of all her aforesaid obligations and any and all renewals thereof, the said separate estate so charged and bound by her being as follows, to wit: First, a tract of land containing 350 acres, lying in or near Fulton, in Fulton Township, in Davie County, N. C., and known as the home place, and being the land which descended to the said A. S. Ireland from the estate of her mother, Emma Sharpe; second, also a tract of land
(574) containing 500 acres, known as the county line place, in Calahan Township, in Davie County, N. C.

The consideration for the execution and delivery of this paper-writing to the Wachovia National Bank is for the aforesaid purposes, and the further consideration of the sum of one dollar in hand paid to the said H. B. Ireland and his wife, A. S. Ireland, by the said Wachovia National Bank, the receipt of which is hereby acknowledged.

In testimony whereof, the said H. B. Ireland and his wife, A. S. Ireland, have hereunto set their hands and seals, the day and year first above written.

H. B. IRELAND. [SEAL]
A. S. IRELAND. [SEAL]

E. E. Gray for plaintiff.
Glenn & Manly for defendants.

CLARK, J. The deed executed by the husband and wife charging her land is full and explicit. It specifies and describes the property to be charged, itemizes the debts for which said lands were charged, and sets out that the charge was executed with the written consent of the husband (though that sufficiently appears by his joining in the execution of the deed. *Jones v. Craigmiles,* 114 N. C., 613; *Bates v. Sultan,* 117 N. C., 94). The deed contains a covenant that the charge shall be binding for all renewals of the debts specified. This would be so without any agreement, unless a different intent appeared. *Hyman v. Devereux,* 63 N. C., 624; *Bank v. Mfg. Co.,* 96 N. C., 298.

The wife's privy examination was duly taken. There is a most rigorous compliance with the specific *charge* required under *Flaum v. Wallace,* 103 N. C., 296, and *Farthing v. Shields,* 106 N. C., 289, for
(575) it is needless to say that the statute (Code, sec. 1826) does not require any charge, but merely the written consent of the husband. Those decisions do not require that the charge shall be made by mortgage (*Bates v. Sultan, supra*), and it would be judicial legislation,

and, hence, retroactive, to hold that the carefully drawn charge in this case is insufficient. A mortgage would doubtless be essential as to third parties, but there is nothing that requires that the charge shall be made in that mode as between the parties themselves.

The *feme* defendant sets up that the privy examination is invalid because she was imposed upon by her husband's representations, was ignorant of the legal purport of the charge, and the officer who took the examination did not explain her rights to her. To this it must be observed: (1) No statute requires that the charge shall be made with privy examination. This is not a conveyance of real estate as to which the statute (Code, secs. 1246 (5), 1256, 2106) still requires privy examination of the wife, but merely the contract of the wife, as to which the simple requirement of The Code (section 1826) is "with written consent of her husband." (2) The allegation of ignorance, and being imposed upon by her husband, would not be sufficient even when a privy examination is required by statute, since she does not allege that the party to whom the instrument was made had knowledge of or participated in the alleged fraud or imposition. *Riggan v. Sledge,* 116 N. C., 87. (3) Laws 1889, ch. 389, provides that where a privy examination is duly certified it shall not be held invalid because procured by fraud, duress, or undue influence, unless the grantee had notice of or participated in the same. Nor was it material, even if privy examination had been required by (576) statute, that it was taken by a notary public who was an officer (a clerk) in plaintiff's bank. He was not a party to the action, and is not shown to have been a stockholder of the bank or to have had any interest therein. It may be further noted that the notes specified in the charge were all signed, and likewise endorsed, by the *feme* defendant. She had the fullest knowledge.

The male defendant sets up in his answer specific allegations as to usury, and demands forfeiture of the interest, and as a counterclaim, the recovery of double the interest paid by him. The Code, sec. 3836, gives the action to recover double the interest, and it has been repeatedly held that this can be done by way of counterclaim to an action upon the note or bond. *Smith v. B. and L. Assn.,* 119 N. C., 257, 261. Indeed, chapter 69, Laws 1895, specially provides that this recovery may be had as a counterclaim in the action. The plaintiff not having replied to the counterclaim, the defendant would have been entitled to judgment thereon (Code, section 249); but, as the case goes back, the court in its discretion will doubtless permit the reply to be filed. Code, sec. 274.

The plaintiff relied chiefly upon the ground that, being a National bank, the defendant could not sue it in a State court for the recovery of double the interest, and therefore, of course, could not set up that demand

as a counterclaim in this action. But by the act, approved 12 July, 1882, Congress conferred the jurisdiction of such actions upon the State courts. *Morgan v. Bank,* 93 N. C., 352.

It was error to render judgment upon the pleadings, ignoring
(577) the defense of usury and counterclaim set up in the answer of H. B. Ireland.

Error.

FURCHES, J., concurring. I concur in the judgment of the Court, but not in the intimation, if made therein, that the *feme* defendant might have bound her real estate without acknowledgment and privy examination.

To hold that she could have done so, without acknowledgment and privy examination, would be contrary to the traditions of the common law and to all our adjudged cases.

Whether the Legislature could provide for the conveyance of the land by *feme covert* without acknowledgment and privy examination, is not the question. If it could do so, it has not done so, and I hope it will not. They have little enough protection now. Do not take this little from them.

Cited: Butner v. Blevins, 125 N. C., 588; *Brinkley v. Ballance,* 126 N. C., 396; *Blanton v. Bostic, ibid.,* 420; *Bank v. Ireland,* 127 N. C., 240; *Benedict v. Jones,* 129 N. C., 474; *Marsh v. Griffin,* 136 N. C., 334; *Ball v. Paquin,* 140 N. C., 93, 94; *Smith v. Lumber Co.,* 144 N. C., 48; *Davis v. Davis,* 146 N. C., 165; *Council v. Pridgen,* 153 N. C., 446.

(578)

E. BRYAN JONES, ADMINISTRATOR OF WALTER L. JONES, v. THE NEW YORK LIFE INSURANCE COMPANY.

(Decided 19 April, 1898.)

Action on Life Insurance Policy—Forfeiture of Policy by Nonpayment of Premium—Agent.

1. In the trial of an action on a life insurance policy which contained a provision that the policy should be forfeited in case of a failure to pay the premium when due or within the time of grace allowed, it appeared that A. the treasurer of a corporation (of which the insured was an employee, and C., the general agent of the defendant insurance company, was a stockholder and director), was in the habit of receiving and remitting to C. premiums due by employees of the corporation, but in doing so acted at the request of such policyholders and not under the instructions of C.

It also appeared that on one occasion, at the request of J., the plaintiff's intestate, C., sent a receipt to A., who delivered it to J., on receipt of the premium, and when the next premium came due J. requested A. to forward to C. the amount due to J. from the corporation in payment of the premium, which A. neglected to do within the time limited for such payment: *Held*, that A., being in such transactions the agent of J., and not of the insurance company, the forfeiture of the policy for nonpayment of the premium was not avoided by the arrangement between J. and A.

2. In such case, the fact that A. had frequently, at the request of C., written letters to the latter concerning policyholders, was not, of itself, evidence of any right on A.'s part to transact business for the insurance company, of which C. was general agent.

ACTION, tried before *Greene, J.*, and a jury at Fall Term, 1897, of CALDWELL. The facts are sufficiently stated in the opinion. There was a verdict followed by judgment for the plaintiff, and defendant appealed.

Edmund Jones for plaintiff.
Jones & Tillett for defendant.

MONTGOMERY, J. The intestate of the plaintiff insured his (579) life in the defendant company in June, 1893. The insured died on 23 May, 1896, and this suit is brought to recover the amount of the policy. The company resists the payment on the ground that, according to the terms of the policy, the intestate had forfeited all rights in the same by his failure to pay the semi-annual premium due on 29 November, 1894. The policy of insurance contained a provision in the following words:

"All premiums shall be due and payable at the home office of the company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice-president, actuary, or secretary, and countersigned by such agents. If any premium is not thus paid on or before the day on which it is due (except as herein provided), this policy shall become void, and all premiums previously paid shall become the property of the company."

Another provision of the policy allowed thirty days grace on each payment, provided the insured should pay interest for the number of days during which the premium remained unpaid. The home office of the company was in New York City. J. D. Church, the general agent for North Carolina, resided in Charlotte, and the insured, up to the time of the alleged forfeiture of the policy, lived in Hickory, N. C. Church was a stockholder and director in the Piedmont Wagon Company. H. D. Abernathy was treasurer of the wagon company at the time of the alleged forfeiture, as well as when the policy was taken out, and J. G. Hall was president of the wagon company when the policy was issued. The plaintiff alleges that Abernathy was the agent of the defendant to collect the

premium due in November, 1894, and that he collected the same
(580) but neglected and failed to remit the amount to the company before the day of forfeiture; and the plaintiff further alleged that if Abernathy was not the agent of the company at the time of the alleged payment to him of the premium, nevertheless he collected the same; that the defendant knew of the collection and ratified it, although it did not receive the money. The defendant denied the agency of Abernathy and refused to receive from him the amount of the premium after the day of forfeiture.

The defendant asked the court to instruct the jury that there was no evidence that Abernathy was the defendant's agent, authorized to receive payment of the premiums due on the policy, and even if they should believe from the evidence that the intestate (the insured) placed money in Abernathy's hands with instructions to pay the premium before the day of forfeiture, that that would not be a payment, and they should find that the policy issued by the defendant had been forfeited, and that the defendant was not indebted to the plaintiff.

From a careful examination of the testimony we are well satisfied that the defendant was entitled to the instruction as asked. The insured had been employed by the wagon company, and at the time he requested Abernathy to pay his premium, some time before it fell due, the wagon company owed the insured a sufficient amount to pay the premium, and Abernathy promised the intestate he would pay it. But Abernathy stated on the trial that he had charged to the insured on the books of the wagon company the price of a wagon, which the company had sold to the insured's father, of greater value than the amount the wagon company owed to the insured, and this without the knowledge of the insured. And in one of Abernathy's letters to Church he stated that
he held off remitting this money to the company, hoping that the
(581) insured could get the amount in some other way in order that the amount to the credit of the insured in the wagon company might be applied to the debt of the insured's father for the wagon sold him.

The purpose of Abernathy, followed by his failure to remit the premium to the insurance company, was the real cause of the forfeiture of the policy. And it may not be out of place to note in this connection that it had been a habit of the former president of the wagon company, Hall, to collect premiums for this insurance company, and retain the money from thirty to sixty days, using the same in the business of the company before making remittances, and that, too, with the knowledge and consent of Church, the general agent of the defendant.

On 27 May, 1894, the insured wrote to Church, the general agent, to send a receipt for the May payment to Abernathy, and that Abernathy would send a check for the amount; that the insured was from home

nearly all the time; that he would leave in the morning for a trip, and that Abernathy had promised to look after the premium for him. On the next day Church sent the receipt for the premium to Abernathy, and mentioned in his letter that Jones had requested him to send the receipt to him (Abernathy). In the same letter, Church asked Abernathy to send a check for the amount of the premium. On the next day Abernathy sent the check.

The plaintiff contended that this was some evidence that Abernathy was the defendant's agent. It certainly was not, but on the contrary was evidence that Abernathy was the insured's agent. As to the premium due in November, 1894, there is not a particle of evidence that the receipt for the same was ever sent to Abernathy to collect. There was evidence, however, to the effect that a notice was mailed to the insured by the general agent, Church, thirty days before the November premium fell due, notifying him of the day of payment, and requesting (582) him to remit to him (Church). And a letter was also introduced from Abernathy to Church, dated 30 November, 1894, in which the writer stated that the insured would remit the amount of the premium before the thirty days grace was out. But Abernathy himself furnished direct proof on the trial that he was not the agent of the defendant. He said, "I do not remember that Church ever instructed me to collect premiums. When the policyholders paid me I would draw check to Church. I remitted what the policyholders told me." Abernathy was asked, as a witness for the plaintiff, if he had ever acted in behalf of the insurance company in other matters, and he answered that he had to the extent of having written to Church a good many letters in regard to policyholders at the request of Church. If this were admitted it created no agency. There was not enough stated by the witness, as to the particulars of this correspondence, to show any right given to Abernathy to transact any kind of business for the company.

There was no evidence that Abernathy ever held himself out as the agent of the company, or that the insured ever acted on the assumption that Abernathy was the defendant's agent to collect the premiums on this policy, and his Honor's charge on this point was erroneous in that there was no evidence to sustain it.

The view of the case makes it unnecessary to consider the other questions raised on the appeal.

New trial.

(583)

HUNTSMAN BROS. & CO. ET AL. v. LINVILLE RIVER LUMBER COMPANY.

(Decided 19 April, 1898.)

Creditor's Bill — Appeal — Practice—Exception to Judgment—Lien—Mechanic's Lien—Right of Mechanic to Hold Personalty for Lien—Sale—Receiver.

1. If an inspection of the record proper on appeal discloses error in the judgment below it will not be affirmed, although no exception was entered thereto or particular assignments of error therein were set out by appellant.
2. Under section 1783 of The Code, one who cuts timber and manufactures it into lumber for a corporation before a receiver is appointed therefor, has the right to retain the possession of such lumber until his lien is discharged by payment.
3. Where one, who has the right under section 1783 of The Code to retain possession of and to sell personal property for the purpose of defraying his charges, is made a party to an action in the nature of a creditor's bill against the owner, in which the nature and amount of claimant's debt are in dispute, he will be restrained from making a sale of the property until such contentions are settled.

ACTION in the nature of a creditor's bill against the defendant,. an insolvent corporation, heard before *Greene, J.,* at August Term, 1897, of MITCHELL. The facts appear in the opinion. From the judgment rendered C. B. Deming, one of the creditors, appealed.

E. J. Justice for appellant.
S. J. Ervin and W. B. Council for receiver, appellee.

MONTGOMERY, J. The statement of the case on appeal is a most unsatisfactory one, and we are not aided in the least by a reference to the transcript of the record. The case appears to be one in the nature
(584) of a creditor's bill against the defendant company, wherein a receiver was appointed to take charge of the property of the defendant corporation "of whatever nature and kind, and in whosesoever hands and wheresoever located," and to hold the same without prejudice to the rights, priorities, and liens of any of the parties or creditors until further orders of the Superior Court of Mitchell County. It was further ordered that the officers of the company or other persons having the charge or custody of any of the property of the defendant turn the same over to the receiver, and that all further proceedings be stayed till the further order of the court. Afterwards, at the August Term, 1897, of the Superior Court, a certain order in the nature of a judgment was made consolidating all actions then pending in that court against the

defendant and requiring the plaintiffs to file their claims and demands in the consolidated action, due regard to be had to the rights and priorities and liens of the creditors. It was further ordered that all creditors of the defendant be notified according to law to come in and make themselves parties to this action and file their claims. The judgment contained a further order as follows:

"And it further appearing that a creditor of the defendant company, one C. B. Deming, claims a lien on the lumber stacked on the land leased by him, to wit, 100 acres of land leased from one D. M. Puett, the said creditor, C. B. Deming, having manufactured said lumber from standing timber, claims a right to hold and retain possession thereof until his alleged debt for manufacturing same is discharged by the company or the right to sell the same under the provision of 1783 of The Code is passed upon, and contends that this Court cannot, without an issue of fact as to C. B. Deming's right to hold possession thereof being submitted to a jury, order the possession surrendered by said (585) Deming.

"And it further appearing that the amount of said indebtedness is in dispute and contested, and the existence of any lien or right in the said Deming being also contested, and the court being of opinion that all of said questions should be settled in this action:

"It is ordered by the court that the possession of said property be surrendered by the said C. B. Deming to the receiver appointed in this cause, and that said receiver take possession of said lumber, and that the right of said C. B. Deming be preserved, and his claim to priority be preserved, and the same shall be passed upon in the further progress of this cause without prejudice to the rights of the said C. B. Deming as they now exist. And it is further ordered that the plaintiffs herein have leave to file an amended complaint."

Just how Deming was made a party to the suit does not appear in the record, but it must have been in consequence of the service of the order on him to deliver the lumber in his possession to the receiver appointed by the court. He appealed from the judgment of the court without a particular assignment of errors in the judgment, and the counsel of the plaintiffs and of the receiver insisted here that the judgment ought to be affirmed because of the failure of Deming to point out particularly the nature of his exceptions to the judgment. The point would be well taken if upon an inspection of the record such judgment ought to be affirmed. The judgment below in its recitals declared that Deming claimed the right to hold and retain possession of the lumber of the defendant under a lien for manufacturing the same, and that the receiver ought not to deprive him of its possession until his lien was discharged by a payment of the amount due to him. The recital (586)

in the judgment of the plaintiff's claim is a presumption that the same was set up by a proper pleading, and we are compelled to notice it as a part of the record. In *Carter v. Rountree,* 109 N. C., 29, the Court said, "It is our duty, however, to look through the record proper and to see whether it warrants the judgment appealed from, although no exceptions appear." And in *Thornton v. Brady,* 100 N. C., 38, the Court construed the record as referring "only to such constituent matters of the action as must necessarily go upon and constitute the record of it, and which the Court sees and must take notice of, such as the pleadings, the verdict, and the judgment." Upon the inspection of the record, then, we are of the opinion that the judgment, in so far as it orders Deming to surrender the possession of the property to the receiver, ought not to be affirmed. If he has a lien upon the lumber which he cut for the company, he cannot be deprived of the possession of it until his lien is discharged by payment. He has possession of the lumber, and under section 1783 of The Code he has a right to retain possession for the purposes therein set forth. His lien, if he has one, appears to have attached the lumber before the appointment of a receiver, and he has the clear right under section 1783 of The Code to the full amount of any lien he may be entitled to, free from any possible or probable charges which might be fixed upon it, if it went into the hands of a receiver, for costs and expenses of the suit, including the receiver's charges.

The court below will proceed in the usual way to have the indebtedness of the company to Deming, if any indebtedness there be, ascer-
(587) tained, and also the matter of whether he be entitled to a lien on the lumber. Until these matters are passed upon Deming should be ordered to withhold from selling the lumber, or any part of it, until his rights have been adjudicated. He will not be allowed, pending the dispute between him and the other creditors as to the amount and nature of his debt, to sacrifice the property by a sale made under section 1783 of The Code. Of course if Deming fails to take proper care of the lumber or should undertake to dispose of it without the order of the court, the receiver will be instructed by a judge of the Superior Court, upon application to him, to take possession of the property for safe keeping, pending the determination of Deming's rights in the action. The judgment is affirmed and modified as we have pointed out.

Modified and affirmed.

Cited: Griffith v. Richmond, 126 N. C., 380; *Thomas v. Merrill,* 169 N. C., 627.

J. M. BERNHARDT ET ALS. v. G. W. BROWN ET ALS.

(Decided 19 April, 1898.)

Action to Recover Land—Trial—Evidence—Tracing Title—Deed—Exceptions in Deed—Deed Absolute in Form as Security for Debt—Fraudulent Conveyance—Registration—Execution—Docketing Judgment—Collateral Attack.

1. Where, in an action to recover land, the parties claimed title from a common source and on appeal the assertion of such title by the defendants was adjudged invalid, such adjudication does not set them free, in a subsequent trial of the action, to assert a superior title in some one else with whom they do not connect themselves.

2. Where, in an action to recover land within the boundaries of plaintiff's deed, the defendant claims the same under exceptions in such deed, it is incumbent on the defendant to bring himself within the exceptions by proof.

3. While payment of taxes is some evidence of title, it is unavailing in the trial of an action to recover land when the party offering it has not connected himself with any outstanding title or shown adverse possession of the land for the requisite time.

4. A deed absolute on its face, but intended as a security for a debt, is void as against the creditors of the grantor.

5. Where, in the trial of an action to recover land, the plaintiffs contended that a deed under which the defendants claimed, although absolute on its face, was really a mere security for a debt, and therefore void, an unregistered deed of defeasance and bonds secured thereby produced by the defendants in pursuance of an order of court, under sections 578 and 1373 of The Code, were competent as evidence tending to show the nature of the transaction, without proof of their execution.

6. The probate of a deed of a corporation by the acknowledgment of individuals instead of by its officers, is fatally defective and its registration, in consequence, is a nullity.

7. Where the probate and registration of a deed under which defendants claim, in an action to recover land, were defective, a re-probate and registration after the plaintiffs' title accrued and after the institution of the action can have no effect (section 1, chapter 147, Laws 1885).

8. The proceedings under a voidable execution cannot be collaterally attacked.

9. The docketing of a judgment is not an essential condition of its efficacy, except for the purpose of giving a lien, nor a condition precedent to issuing an execution thereon to the sheriff of the county where it was rendered or to any other county.

10. The requirement in section 448 of The Code that the date of docketing the judgment should be stated in the execution is directory.

11. A recital, in an additional paragraph in an execution issued to B. County, of a levy on certain personal property in C. County (where the judgment was rendered) and an order to the sheriff of the former county to sell it (although an attachment against such personal property had been vacated) was a clerical error which did not invalidate the other part of the execution, and strangers to the execution cannot complain of such recital.

(589) ACTION to recover land, tried at June Special Term, 1897, of BURKE, before *Robinson, J.*, and a jury. There was a verdict for the plaintiff, and defendants appealed from the judgment thereon. The facts necessary to an understanding of the opinion sufficiently appear therein.

J. T. Perkins and Edmund Jones for plaintiff.
S. J. Ervin and Avery & Avery for defendants.

CLARK, J. Upon the complaint and answer it appears that both sides claim under the "North Carolina Estate Company, Limited." The eighth prayer for instruction by the defendants is that, ordinarily, when it is shown that both parties hold through a title from a common source it is not necessary to go beyond the common title, unless a superior title be shown by one of the parties with which he connects himself by a chain of title, but in this case the title of the defendants derived from the common source having been adjudged void (upon the former appeal in this case), the defendants are not estopped from showing a better outstanding title in any person other than the common source of title. There is not a scintilla of evidence connecting the defendants with any outstanding title; and upon their pleadings they are estopped to deny the common source of title. The fact that their assertion of having that title in themselves has been adjudged invalid in this action, does not set them free now to assert a superior title in some one else with whom they do not connect themselves. But if it did, it would not avail the defendants, as the holders of the alleged outstanding title of a past interest, if such were shown, would be merely tenants in common with the plaintiff, who (590) can therefore recover as against these defendants. *Moody v. Johnson,* 112 N. C., 804; *Gilchrist v. Middleton,* 107 N. C., 663. Therefore it is unnecessary to consider any of the exceptions in this case as to matters prior to the common source of title. The title was shown to be out of the State.

The defendants except because "5,000 acres being excepted from the grant of 1,795 under which the plaintiffs claim, the burden is on the plaintiffs to show that the land sued for is not the excepted part." The law is well settled otherwise. "The *locus in quo* being within the boundary of plaintiffs' deed, and defendant claiming under exceptions in said deed, it is clear that it is incumbent on him to bring himself within the

exceptions by proof." *Steel Co. v. Edwards,* 110 N. C., 353; *Gudger v. Hensley,* 82 N. C., 481. Besides, the complaint is to recover "the lands remaining unsold and not excepted from the boundaries of the grant," and the answer says the defendants "are in possession of the land sued for and in controversy."

Payment of taxes is some evidence of title (*Austin v. King,* 97 N. C., 339; *Ruffin v. Overby,* 105 N. C., 78), but if it was offered to be shown here by competent proof, its exclusion was harmless error, for it having already been adjudged in this case (118 N. C., 700) that the defendants did not have the title of the "North Carolina Estate Company, Limited," which they set up in their answer, and not having connected themselves with any outstanding title nor shown possession for seven years under color of title, proof of payment of taxes for two or three years before action brought could have availed them nothing. Even evidence of adverse possession for a period less than the prescribed time is not a circumstance to go to the jury. *King v. Wells,* 94 N. C., 344; *Melvin v. Waddell,* 75 N. C., 361. (591)

The jury found, on competent evidence and proper instruction, that the conveyance to Hatterby and Clarkson, though absolute on its face, was a mere security for debt. It was therefore void as to the creditors of the North Carolina Estate Company, Limited, and to the plaintiffs who hold under a judgment and execution sale in favor of one of such creditors. *Gregory v. Perkins,* 15 N. C., 50; *Gulley v. Macey,* 84 N. C., 434. The unregistered deed of defeasance and bonds secured thereby, produced by the defendants in response to an order of the court (under The Code, secs. 578 and 1373), were competent to submit to the jury as evidence tending to show the nature of the transaction, without proof of their execution. Being in possession of the defendants, and the facts peculiarly within their knowledge, it devolved upon them to negative any inference arising from the existence of such papers. But this conveyance, even if it was an absolute deed, was not proved by the officers of the corporation, but by the individual acknowledgment of Matthew Robins and Walter Mullens, and the probate was fatally defective. *Clark v. Hodge,* 116 N. C., 761; *Plemmons v. Improvement Co.,* 108 N. C., 614; *Duke v. Markham,* 105 N. C., 131; *Bason v. Mining Co.,* 90 N. C., 417. Its registration was therefore a nullity. *Quinnerly v. Quinnerly,* 114 N. C., 145; *Long v. Crews,* 113 N. C., 256; *Duke v. Markham, supra; Todd v. Outlaw,* 79 N. C., 235; *DeCourcy v. Barr,* 45 N. C., 181. The subsequent reprobate and registration in 1897, since the plaintiff's title accrued and since this action was brought, can have no effect. Laws 1885, ch. 147; *Waters v. Crabtree,* 105 N. C., 394.

This brings us to the point most earnestly debated in this case, *i. e.,* whether the plaintiffs have acquired the title of the North (592)

Carolina Estate Company, Limited, under the execution sale. At January Term, 1890, of Catawba Superior Court, John Paalzo obtained judgment against the North Carolina Estate Company, Limited. On 8 March, 1890, a transcript of the judgment was sent to the Superior Court of Burke County and was entered on the docket there, on 10 March, 1890. An execution on this judgment, under seal of the court, which states on its face that it was issued from Catawba, on 8 March, 1890, was sent to the sheriff of Burke County who endorsed thereon its receipt by him, 31 May; after due advertisement the land in question, the property of the defendant in the execution, was sold on the 8th of July of the same year, at which sale the plaintiff in the execution bought, and received the sheriff's deed for the land, and in 1892 duly conveyed the same to the plaintiffs in this action. The defendants contend that said sale was void because on 8 March, 1890, when the execution purports to have been issued to the sheriff of Burke County, the transcript of the judgment had not then been docketed in the latter county. From the official entries it appears, therefore, that the execution and transcript of judgment were sent to Burke County on the same day, the latter being docketed on 10 March, and the former endorsed by the sheriff, "Received 31 May," and the advertisement and sale were long after the judgment had been docketed, but the defendants contend that the sale thereunder was void unless the judgment had already been docketed in Burke County when the execution issued, on the ground that this is a prerequisite under the words of The Code, sections 443 and 444, that

(593) execution "may be issued to any county where the judgment is docketed," and because section 448 provides that the execution must state, *inter alia,* "the time of docketing in the county to which the execution is issued." The defendants' counsel contend that such docketing is a condition precedent, and that an execution issued before the condition is complied with, is absolutely void. The customary practice in this State has been that which seems to have been pursued in this case, *i. e.,* to send to the other county at the same time the transcript of the judgment for docketing and the execution. It has not been usual to require a certificate of the docketing in another county before issuing execution to the sheriff thereof. If such practice rendered this execution absolutely void, a great many titles are worthless. Even if it is voidable, it would not avail the defendants, who could not attack such proceedings collaterally, unless they are void. *Bernhardt v. Brown,* 118 N. C., 700. The very able brief of the defendants' counsel concedes that The Code, secs. 433-436, inclusive, require docketing "in order to secure a lien for that purpose alone." This is also apparent from chapter 439, Laws 1889. *Alsop v. Moseley,* 104 N. C., 60. But they insist it is otherwise as to sections 443, 444, and 448, above quoted. The last three

sections, however, on their face apply to executions issued to the county in which the judgment is rendered fully as much as to those issued to any other county, and it has been repeatedly held that a sale under an execution levied on realty carries a good title though the judgment was not docketed or the lien of the docketing has expired. *Sawyers v. Sawyers,* 93 N. C., 321, at the bottom of page 324; *Spicer v. Gambill,* 93 N. C., 378; *Coates v. Wilkes,* 94 N. C., 174, at page 181. In *Lytle v. Lytle,* 94 N. C., 683, the very point here presented is passed (594) upon. "The docketing of a judgment is not an essential condition of its efficacy *nor a precedent requisite* to an enforcement by final process. It is only necessary to create and prolong the lien thus acquired for the benefit of the creditor against subsequent liens, encumbrances, and conveyances of the same property." In that case execution issued to Buncombe County upon a judgment rendered in McDowell, without docketing the judgment in Buncombe at all. In *Holman v. Miller,* 103 N. C., 118, it is said: "Under the present system no lien is acquired upon land in *the absence of an execution and levy,* until the judgment has been docketed."

Our conclusion upon the authorities is that docketing is only for the purpose of giving a lien, and is not a condition precedent to issuing an execution. If there is a docketed judgment in force at the sale of realty under execution the sale relates the title back to the date of such docketing. If no docketed judgment is in force under which the execution is issued, the title as against the defendant relates back to the levy but is subject to docketed judgments in favor of the plaintiffs in force at the date of the sale. *Pipkin v. Adams,* 114 N. C., 201; Code, sec. 435.

The requirement in section 448 that the date of the docketing should be stated in the execution is like the requirement to *test* the execution of the preceding term which is held directory. *Bryan v. Hubbs,* 69 N. C., 423; *Williams v. Weaver,* 94 N. C., 134.

The recital in an additional paragraph in the execution issued to Burke County of a levy on certain uncut walnut timber in Catawba County, and the order to the sheriff of Burke County to sell it, though the attachment on the timber had been vacated, was a pure clerical error, which did not invalidate the other part of the execu- (595) tion, and of which certainly the defendants in this action, who were strangers to the execution, cannot complain.

Affirmed.

Cited: Redman v. Ray, 123 N. C., 507; *Ridley v. R. R.,* 124 N. C., 39; *Wyman v. Taylor, ibid.,* 430; *Gates v. Max,* 125 N. C., 144; *Evans v. Alridge,* 133 N. C., 380; *R. R. v. Land Co.,* 137 N. C., 332; *Martin v. Knight,* 147 N. C., 581; *Cox v. Boyden,* 153 N. C., 525; *Blow v. Harding,* 161 N. C., 376; *Riley v. Carter,* 165 N. C., 338.

R. K. PRESNELL v. J. W. GARRISON.

(Opinion filed 19 April, 1898.)

Petition for Rehearing—Practice—Appeal—Record—Parol Evidence—Exceptions to Evidence.

1. On appeal or on petition to rehear a case formerly decided, this Court will not consider matters not contained in the transcript of the record.
2. A petition to rehear must be upon the record as it was at the former hearing.
3. Since all conveyances of land are required to be in writing, parol evidence of a verbal agreement establishing the boundaries between the owners of adjoining tracts of land is not admissible in the trial of an action to establish such boundaries.
4. Where, in the trial of an action, objection is made to evidence upon an improper ground, this Court will treat the evidence as not objected to.
5. While the general rule is that this Court will not review evidence as to its competency or incompetency, yet, where a trial judge admits evidence which is made incompetent by statute, and which it is his duty of his own motion to exclude, this Court will permit the error to be assigned at the argument, though not excepted to on the trial below.

PETITION by plaintiff to rehear the case between same parties, decided at September Term, 1897, of this Court, 121 N. C., 366.

(596) *S. J. Ervin for plaintiff (petitioner).*
A. C. Avery and W. S. Pearson contra.

FURCHES, J. This case is before us on petition to rehear. The application is largely based upon new matter not in the record at the former hearing. We have no precedent for this practice and do not care to make one. We have held in two cases at this term that we could not consider matters not contained in the transcript of the record on appeal. *Howard v. R. R., post,* and *Byrd v. Bazemore, ante,* page 115. An application to rehear must be upon the record as it was at the former hearing. This being so, it remains to be seen whether there is error in the former judgment of the Court.

On the trial the plaintiff, Presnell, was introduced as a witness in his own behalf, and testified as follows:

"To a certain parol agreement made by him with one George Deal, then deceased, establishing an agreed line between the plaintiff and the said Deal, which said line was the east and west line (marked) shown the jury on the trial in the map of the survey at the instance of the plaintiff, and used in the trial without objection from the defendant."

This is all that the record shows as to the trial except the verdict and judgment for plaintiff and appeal by defendant. This evidence was objected to under section 590 of The Code, and we held that the section did not apply.

But suppose it had been objected to upon the ground that the plaintiff could not establish title to land by parol evidence, would it be claimed that it was competent for any purpose shown by the record? We think not.

But as a wrong reason was assigned for the objection, we treat (597) the case as if no objection had been taken. This is as favorable to the plaintiff as he can ask. But if it was the duty of the judge to exclude it, then it stands as if a good reason had been assigned.

The rule, as we understand it, is that where evidence is offered that has been made incompetent to prove the fact for which it was offered, it is the duty of the court *ex mero motu* to reject it. This has been expressly held in *S. v. Ballard,* 79 N. C., 627, and we see no reason why the same rule of evidence should not prevail in civil as well as in criminal actions. The evidence was clearly incompetent under the statute of frauds (Code, sec. 1245), if proper objection had been made.

The general rule undoubtedly is, as the plaintiff contended, that this Court will not review evidence as to its competency or incompetency where there is no exception. But the courts have made this exception to the general rule, and we have only done what has been done by the courts. We cannot commend the practice of a party's remaining silent and depending upon the judge to make objection for him. In this case, the defendant did object, which called the attention of the court to the evidence, and he assigned a wrong reason for his objection. We have given this petition full consideration, and find no error in the former judgment of the court. But we feel that if any injustice has been done the plaintiff in making up the case on appeal, he may have this inadvertence corrected in the new trial.

Petition dismissed.

Cited: Ridge v. R. R., 167 N. C., 528; *Renn v. R. R.,* 170 N. C., 141.

(598)

N. J. MORRISON ET AL. v. WILLIAM MORRISON ET AL.

(Decided 26 April, 1898.)

Action to Restrain Waste—Tenants in Common—Injunction.

1. The right to sue for waste includes the right to restrain its commission.
2. Under section 627 of The Code, providing that one tenant in common may maintain an action for waste against his cotenant or joint-tenant, tenants in common may maintain an action to restrain waste by their cotenant.

ACTION heard before *Robinson, J.*, at July Term, 1897, of BURKE, on a motion to dissolve a restraining order theretofore issued by *Greene, J.* The motion was allowed, and plaintiffs appealed.

S. J. Ervin for plaintiffs.
A. C. Avery and R. C. Strong for defendants.

FAIRCLOTH, C. J. This is an action to restrain the defendants from committing waste on the land described in the pleadings. The plaintiffs claim as remaindermen in said property. The defendant claims as a tenant for life under a will, as the owner in fee of one forty-eighth interest by descent from one of the common ancestors. The court held that the defendant was a tenant in common with the plaintiffs to the extent of said interest by descent and could not be enjoined as prayed for by his cotenants, and dissolved the restraining order, from which plaintiffs appealed. Other questions relating to the law of waste and the rights of parties therein were discussed, but the holding of his Honor as above stated disposes of this appeal.

(599) It is quite useless to enter into the field of learning on this subject at common law in England, or as it was applied by our ancestors to the conditions which they found in this country. Those considerations evoked much learning and lead to many intricate and embarrassing distinctions. One of the settled rules was that one tenant in common could not sue his cotenant, except for partition, and our Legislature, feeling the practical difficulties at an early date, enacted that one tenant in common might maintain an action for waste against his cotenant or joint-tenant. Rev. Stat., ch. 119; Code, sec. 627. The right to sue for the waste included the right to restrain its commission. The same question upon a similar state of facts was presented in *Hinson v. Hinson,* 120 N. C., 400, and the right to sue was sustained. This conclusion allows the parties to try the case upon its merits if they so desire. His Honor's ruling was erroneous.

Error.

GENERAL ELECTRIC COMPANY v. MORGANTON ELECTRIC LIGHT AND POWER COMPANY ET AL.

(Decided 26 May, 1898.)

Corporation — Mortgages — Material Furnished Corporation — Lien — Priority.

An electric dynamo or other like machinery, perfect in itself and capable of being used in one place as well as in another, is not such "material" as, when furnished to a corporation, will give to the seller a priority over mortgage bonds of the corporation as provided in section 1255 of The Code.

ACTION, tried before *Starbuck, J.,* at March Term, 1898, of BURKE, on an agreed statement of facts, the material parts of which are stated in the opinion. From a judgment refusing to allow the plaintiff, the General Electric Company, a priority over the mortgage debts of the defendant company, the said plaintiff appealed. (600)

Martin & Webb for plaintiff.
F. H. Busbee for defendant.

MONTGOMERY, J. The defendant company had erected a plant upon its own land in Morganton and was engaged in the business of generating electricity for the purpose of furnishing light to its customers, when it became necessary to enlarge the power of the dynamos they were using in order to serve the increasing patronage of the company. The dynamos in use were removed from their position and two larger ones were furnished by the plaintiff company and were placed into positions of the ones removed, and fastened by iron bolts to a wooden frame on which the metallic part of the dynamos is built; the wooden frames with the dynamos fastened thereon is built into a brick foundation and firmly held into position by cement, and connected with the other appliances in the usual way.

The claim of the plaintiff is that it has a lien for the price of the dynamos, from the date of furnishing them, on the property of the defendant, and that the lien is superior to the lien of certain bondholders under a deed of trust which was executed by the defendant company prior to the sale and delivery of the dynamos. The plaintiff further contends that the dynamos constitute "materials" within the meaning of section 1255 of The Code, and that out of the proceeds of the property of the defendant company that may be derived from a sale of that property, a sufficiency thereof ought to be applied to plaintiff's debt in preference to the payment of the bonds secured in the deed of (601) trust.

We are of the opinion that the plaintiff's claim cannot be upheld. A case exactly like this one (*James v. Lumber Co.*) as to the question of law involved has been decided, *ante,* 157. Whether the opinions in chief, or the view of the two justices who filed concurring opinions in that case, is taken as the true reasoning, is a matter immaterial, for, under either view, the plaintiff cannot recover. The argument of Mr. Martin was strong, but we cannot come to the conclusion that a sale of a piece of machinery like a dynamo, perfect in itself and capable of being used in one place as well as another, is "material" under our statutes. If so, there would be no security for creditors who might lend reasonable amounts of money on manufacturing plants. Imprudent changes that might be made in the machinery—in the method of manufacturing, or experiments tried with new machinery—all in good faith—might turn out disastrously to the business and jeopardize or even ruin the security. Besides, as was said in *James v. Lumber Co., supra,* the vendors of machinery to be used in manufacturing establishments can protect themselves by retaining title, as by conditional sale, or taking a mortgage on the property sold. Against this last proposition Mr. Martin cited us to the case of *Pierce v. George,* 108 Mass., 78. The case sustained him fully, but this Court has laid down a different view of the law in the case of *Feimster v. Johnson,* 64 N. C., 259.

There was no error in the judgment of the court below, and the same is Affirmed.

Cited: Fulp v. Power Co., 157 N. C., 155.

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(602)

CITY OF CHARLOTTE v. E. D. SHEPARD & CO.

(Decided 19 April, 1898.)

Municipal Corporation—Municipal Bonds, Prerequisites to Issue—Power to Levy Tax Implied in Power to Issue—Constitutional Law—Statute, Defective Passage of.

1. When a municipal corporation by a valid act of the General Assembly and an affirmative vote of approval by a majority of its qualified voters, has acquired the right to create a debt and issue bonds therefor (section 14, Article II of the Constitution), such authority carries with it the power to levy the taxes necessary to pay such bonds and the accruing interest thereon. (Reasons for former decision in same case, 120 N. C., 411, overruled.)

2. Section 7 of Article VII, forbidding a municipal corporation to levy any taxes except for necessary expenses, unless by the approval of a majority

of the qualified voters therein, does not require that the power to levy a tax shall be *expressly* granted in a legislative act authorizing the creation of a debt and the issuing of bonds therefor and the submission of the same to the vote of the qualified voters. (Reasons for former decision in same case, 120 N. C., 411, overruled.)

3. That part of section 7 of Article VII of the Constitution forbidding the levy of any taxes by a municipal corporation except for necessary expenses, unless by a vote of the majority of the qualified voters, if intended to have any separate and independent meaning, applies only to such indebtedness as has not been submitted to a vote of the people.

4. Chapter 255, Private Acts of 1891, not having been passed with the formalities required by section 14 of Article II of the Constitution, is void, and confers no authority upon the city of Charlotte to create the debt and issue the bonds therein provided for.

PETITION by plaintiff to rehear the case between same parties, decided at February Term, 1897, 120 N. C., 411.

Burwell, Walker & Cansler for plaintiff (petitioner). (603)
James A Bell, contra.

FURCHES, J. To make the bonds of a municipal corporation valid and binding as evidence of an indebtedness of such municipality, two things are necessary:

There must be an act of the General Assembly passed and ratified as required by the Constitution, Art. II, sec. 14, authorizing the creation of such debt and the issue of such bonds; and, upon this legislative authority, the proposition to create such debt and to issue bonds thereon must be submitted to the popular vote of the municipality, and must receive the sanction of a majority of the qualified voters at an election held for that purpose.

When this is done, that is, when the municipality has the legislative authority, as provided by the Constitution, to submit the question; has submitted the same, and it has been approved by a majority of the qualified voters, the municipality then has the power to create the debt and to issue the bonds. *R. R. v. Comrs.*, 116 N. C., 563.

When such corporation has thus acquired the right to create the debt and to issue the bonds, this power carries with it the power to levy the taxes necessary to pay said bonds and the accruing interest thereon. *Rawls County Court v. U. S.*, 105 U. S., 733; *U. S. v. New Orleans*, 98 U. S., 381. It is admitted that these cases are direct authority for this position, if there is no public law to the contrary, but it is suggested that Article VII, section 7 of the Constitution, provides otherwise, and therefore the doctrine declared in these cases does not apply, and that it is

necessary that the power to tax should be *expressly* granted in the legislative act. We do not think Article VII, section 7, nor any other
(604) provision of the Constitution, contains any such requirement as this. If it did, we would feel bound by it, no matter what might be held to be the general rule in other jurisdictions. That clause of Article VII, section 7 of the Constitution, if intended to have any separate and independent meaning, was only intended to apply to such indebtedness as had not been submitted to the vote of the people.

We cannot believe that it was ever intended by this section of the Constitution to authorize the creation of a debt without authorizing the power to pay the same. And a municipal corporation has no other means of paying but by taxation.

This provision of the Constitution has been a part of the organic law of the State for thirty years, and while our reports are full of cases arising under this section of the Constitution, this construction has not been contended for until now. We do not mention this as a sufficient reason for holding as we do in this opinion, if it plainly appeared that the construction contended for by the plaintiff is the correct construction of the Constitution, but only as a reason why this construction contended for by the plaintiff is not manifestly correct.

Our opinion, then, is that where the act authorizes the creation of the debt and the issue of the bonds, and is approved by the vote of the majority, this, by necessary implication, authorizes the payment and the necessary levy of taxes to do so. In this case the plaintiff had an act of the Legislature, in form authorizing the creation of the debt, the submission of the matter to the voters, and the issue of bonds.

But the facts agreed, and as they appear in the record, show that the act of 1891 (this being the act that authorizes the creation of this debt, the issue of bonds and the levy of taxes, if any act does), was not
(605) read on three several days, and the yeas and nays recorded as provided by Article II, section 14 of the Constitution. This being so, the said act, so far as giving authority for the creation of this debt and the issue of bonds, is a nullity and affords no authority therefor. *Bank v. Comrs.*, 119 N. C., 214; *Comrs. v. Snuggs*, 121 N. C., 394; *Mayo v. Comrs., ante*, 5; *Lewis v. Pine County*, 156 U. S., 55.

The learned counsel for the plaintiff undertook to distinguish this case from *Bank v. Comrs.* and *Comrs. v. Snuggs*, but we are not able to see the distinction. And this case, so far as it depends on the passage of the act, is governed by those cases.

The judgment of this Court at the last term is affirmed, but for reasons given in this opinion, anything that may have been said in the former opinion in conflict with this opinion is overruled.

Judgment affirmed.

FAIRCLOTH, C. J., concurring. The act of 1891, ch. 252, authorized the Board of Aldermen of Charlotte to issue coupon bonds for such purposes as in their opinion will promote the general welfare of the city; provided, the whole bonded indebtedness of the city should at no time exceed $500,000, and provided that no debt shall be created nor bonds issued, unless the question of creating the debt and issuing the bonds be approved by a majority of the qualified registered voters, at an election provided for in the act. It is admitted that such approval was given by the majority; also, that if the bonds for the $250,000 were issued the whole city indebtedness would be less than $500,000. No question of levying a tax to pay said bonds was submitted to the people, and has at no time been voted on by the voters. The question, then, (606) is presented whether the board, having acquired authority by complying with the provisions of said act, to contract the debt and issue bonds for paying the same, and having made such contracts, has an implied authority to levy taxes to meet this obligation. I think they have. This is the only question.

I think Article VII, section 7, contains, in substance, two clauses on the condition expressed therein: (1) Authority to contract a debt. (2) Authority to pay the debt by levying a tax, which is the only way a city corporation can pay anything. If the question submitted both clauses, there would be no controversy.

If A. owes B. $100, it is not necessary for A. to promise to pay it. The law implies the promise and compels payment. That is to say, when the *indebitatus* is legally established, the law implies the *assumpsit* and compels payment.

Therefore, I conclude when the voters have authorized their agent to contract a debt for their benefit, and it has been done, they are at liberty to repudiate by voting against a tax levy. In Article VII, section 7, I see a limitation, when the proposition to contract a debt and levy the tax is made, without the taxpayers' approval, but when he has authorized the debt to be contracted and the bonds issued, then there is no longer any limitation. I would not like, in the absence of express language, to hold, by construction merely, upon a given state of facts, that the Constitution intends to forbid what is required by general law and equity to be done. *Ralls v. U. S.*, 105 U. S., page 733.

On the question of going behind the ratification of an act of the Assembly and receiving the journals to show that the words "aye" and "nay," etc., were not entered on the journals, I have fully (607) expressed my opinion in *Carr v. Coke,* 116 N. C., 223; *Blank v. Comrs.*, 119 N. C., 214, and *Comrs. v. Snuggs,* 121 N. C., 394.

The majority of the Court having announced a different opinion, I feel it now my duty to acquiesce in their conclusion.

Cited: Rodman v. Washington, ante, 41; *Comrs. v. Call,* 123 N. C., 310; *McGuire v. Williams, ibid.,* 356; *Comrs. v. Payne, ibid.,* 487, 493; *Slocomb v. Fayetteville,* 125 N. C., 363; *Smathers v. Comrs., ibid.,* 486; *Hornthall v. Comrs.,* 126 N. C., 32; *Glenn v. Wray, ibid.,* 732; *Black v. Comrs.,* 129 N. C., 125; *Cotton Mills v. Waxhaw,* 130 N. C., 294; *Comrs. v. McDonald,* 148 N. C., 129, 131; *Charlotte v. Trust Co.,* 159 N. C., 391; *Cottrell v. Lenoir,* 173 N. C., 145.

JOSEPH M. SMALLEY v. BOARD OF COMMISSIONERS OF RUTHERFORD COUNTY.

(Decided 26 April, 1898.)

Injunction—Fence Law—County and Township Elections for Fence Law—Constitutional Law—County Charge.

1. The provisions of chapter 20, Vol. II of The Code, relating to the submission of the stock or fence law to the electors of counties or smaller territorial divisions thereof, are not inconsistent with the principle of local self-government.

2. While certain townships or smaller subdivisions of a county have adopted the fence law the electors therein may petition and vote in an election for its extension to include the county limits. In such case, however, the expense of the township or smaller territorial adoption of the law, previously incurred, should be made a charge upon the county.

MOTION for an injunction to restrain defendants from levying an assessment on lands of plaintiff and from attempting to build a fence and enforce the stock law in a certain territory in RUTHERFORD County, heard before *Greene, J.,* at chambers in Lincolnton, on 8 April, (608) 1898.

His Honor rendered judgment denying the motion for injunction, dissolving the temporary restraining order, and taxing the plaintiff with costs of the motion.

To which ruling and judgment the plaintiff excepted and appealed, and assigned the following as errors:

1. That it being admitted in the answer that the voters in a large portion of Rutherford County, which was already under the operations of the stock law, were allowed to vote and did vote in the election held in said county on 1 February, 1898, on the question of extending the stock law over that portion of said county which was not theretofore under the operation of the stock law, it was error in the court to refuse to grant an injunction until the hearing.

2. That it being admitted in the answer that a part of Rutherford County, which had voted on the question of stock law or no stock law within one year prior to 1 February, 1898, was allowed to vote and did vote in the election on said 1 February, 1898, it was error to deny the motion to continue the injunction till the hearing.

3. That it being admitted in the answer that the order of the commissioners providing for the election on 1 February, 1898, was based upon petitions signed by voters of Rutherford County, many of whom resided in that portion of said county where the stock law already prevailed, the plaintiff insists that the said order was improvidently made and the injunction ought, therefore, to have been continued till the hearing.

4. It being doubtful, from the complaint and answer, whether or not a majority of the qualified voters, either in the old or new territory to be affected, signed the petitions upon which the order of (609) election was made, and it appearing from the complaint that the main relief sought is an injunction, the same should have been continued till the hearing."

R. C. Strong, A. C. Avery, and Avery & Erwin for plaintiff.
M. H. and T. B. Justice for defendants.

FAIRCLOTH, C. J. The subject of "Fences and Stock Law" is regulated by The Code, Vol. II, ch. 20. We find that prior to 1898 certain townships, districts, or territories in Rutherford County had, in pursuance of sections 2813 and 2814 of The Code, by regular proceedings, adopted the stock law, and that the county commissioners, on petition of the required number of qualified voters, caused a county election under section 2812 to be held on 1 February, 1898, at which election a majority of the voters of the county, including those already under the law and those not under the stock law, voted in favor of the "stock law," and that the regulations, fencing, etc., were about completed on 1 April, 1898.

This action, commenced 26 March, 1898, by a citizen of the territory not within the limits of the territories already under the stock law, is brought to restrain the defendants from proceeding under the election of 1 February, 1898, and to restrain them from levying a county tax to defray the expenses thereof. His Honor refused to issue such an order, and the plaintiff appealed to this Court.

The underlying idea in this purely statutory law, ch. 20, is to refer the question to the will of the people in the counties, and (610) in less territorial divisions, when circumstances and different local conditions justify or require it. It is difficult to see how such a law can be inconsistent with the principle of local self-government. It appears to be just the reverse. The plaintiff's contention is that those townships already under the operation of the law have no right to petition or vote

for its extension to include county limits. If that be so, it would be within the power of one township to adopt the law, and the county would be thereby deprived of its privilege under section 2812. So that if a large majority of townships desired the law they must have it as townships only, resulting in "stock law" and no "stock law" territories lying around each other, with separate fences and gates across the public roads at an expense much greater than one county system. This would be an extreme view of the principle of local self-government, and we cannot believe the Legislature so intended.

The imposition complained of by the plaintiff is the imposition necessarily imposed by the principle that the majority must rule. A government which protects must control, and when it does so through the will of the majority, there is no wrong done, except the rule that minorities must submit to the will of the majority. *Damnum absque injuria.* We approve his Honor's ruling, but we think the cost and expense of the township or territorial adoption of the law, previously incurred, should not be made a charge on the county.

Affirmed.

FURCHES, J., dissenting. Soon after the adoption of the first Constitution of North Carolina, the State, by legislative enactment, changed the English rule of fencing in, and adopted the rule of fencing
(611) out stock. This remained the law until within the last twenty-five years, when a revolution was commenced. It is said revolutions never go backwards, and certainly this has not. It commenced by the passage of local acts, many of them against the expressed will of the people, who had voted against the change, as in Rowan and other counties. Other acts were styled local option acts, but many of them were not submitted to a vote of the people, but by allowing the board of county commissioners to determine upon petition when a majority of the county wanted it, as in Davie County, where all the names signed to the petitions were counted; whether they were nonresidents or minors made no difference. *Cain v. Comrs.,* 86 N. C., 8.

In the history of fence laws, to be found in our statute books and in our Supreme Court Reports, it will be found that the means of making these changes was always adequate to effect the end in view—the "no fence law" side of the question. *Cain v. Comrs.,* 86 N. C., 8; *Newsom v. Earnheart,* 86 N. C., 391; *Simpson v. Comrs.,* 84 N. C., 158.

At the commencement of this revolution against the fence law, as it had stood for more than a hundred years, there was not a man in North Carolina who did not hold his outlying lands (those not inclosed) subject to the right of common pasture, and this change was a great hardship on the poor non-landowners of the State and those who only owned a small piece of land with a cabin on it filled with tow-headed children.

I do not deny but what the old law of fencing out stock might be changed by legislation, but I do deny that it has been done in many instances by the fair honest vote of a majority of the qualified voters. There may be exceptional cases where this has been done, but the rule has been the other way. This revolution will move on, and what I may say will not arrest it in its movements. It is not said with (612) that expectation.

But the opinion in this case is put on the ground of *local self-government,* the right of the majority to govern. I am a friend of local self-government, but it is a mistake to call this local self-government. It is true that section 2812 of The Code provides for submitting the question to the vote of the county; section 2813 for submitting the question to a township; and section 2814 for submitting the question to a territory less than a township. Upon these sections the opinion of the Court is placed, and I rest this dissenting opinion upon these sections.

The election was ordered in January, 1898, and it is admitted that several townships of Rutherford County were then under the operation of the no fence law, by reason of former elections in those townships. It is admitted that citizens in these townships already under the no fence law petitioned for and voted in this election of January, 1898. That while the law provides for a resubmission of the question of no fence to territories, where it has failed to carry, there is no authority for submitting the question to a county, township, or territory where it has carried. This being so, I hold that it was error, and the commissioners had no right to submit this question to such townships or territories as already had the law.

The outside territory had not been allowed to vote in the elections that had established the no fence law in the territories that had adopted it; then why should they be allowed to interfere and vote it upon other townships that did not want it? Suppose upon the whole vote of the county (election January, 1898) a majority in the county had been against the no fence law, will it be contended that the town- (613) ships that had theretofore adopted it would be deprived of it by this vote? That is, would the no fence law right have been taken from them and they remitted to the old law? If not (and it is not contended that they would) what right had they to vote? The right to vote when they would not be affected by the result, let that be one way or the other? A right to vote to place a burden on others that does not affect them? My idea of local self-government has been the submission of a question to the vote of the people to be affected by the result. This is the true theory of local self-government. But to submit the rights of one territory to the vote of another territory, not to be affected by the result of their vote, is not local self-government.

It is said that unless this were so that the territory already having the no fence law are allowed to vote, the outside territory is powerless, that they can never have the benefit of this law. I do not admit the truth of this proposition. The whole of the outside territory can join and have an election, or any one or more of the townships may do so. This had been done as to the township that already had the no fence law. Why may not the other townships do like those that had the no fence law?

Cited: Perry v. Comrs., 130 N. C., 559.

(614)

AHOLIBAMAH McARTER v. S. B. RHEA, ADMINISTRATOR OF R. A. RHEA.

(Decided 11 May, 1898.)

Action on Contract—Depositions—Clerk of Superior Court—Seal of Office—Process—Waiver of Objections—Witness, Interested—Evidence.

1. When a commissioner to take depositions or any other process is issued to be executed within the county where it is issued, no seal is required to be affixed thereto; otherwise, when it is to be executed outside of such county. (CLARK, J., dissents.)

2. Where a party attends upon and takes part in taking depositions he thereby waives all objections of a formal character, but a void process will not be vitalized unless there is an amendment without prejudice to third parties.

3. Where the testimony of a witness is objected to because of his interest in the action, such objection cannot be sustained where it is shown that such witness has no such interest.

4. In an action against an administrator for money loaned to his intestate, the plaintiff testified as to a mark on an almanac and when it was placed there. The defendant objected to the testimony as showing a transaction with the deceased: *Held,* that the testimony was properly admitted since it appeared from other testimony that the mark was not placed on the calendar at the time the money was loaned.

ACTION, tried before *Norwood, J.,* and a jury, at Spring Term, 1897, of CLEVELAND. There was a verdict for the plaintiff, and defendant appealed. The facts sufficiently appear in the opinion.

W. J. Montgomery for plaintiff.
J. W. Gidney and Webb & Webb for defendant.

FAIRCLOTH, C. J. This action is against the defendant S. B. (615) Rhea, as administrator *d. b. n.* of R. A. Rhea, for money loaned and for other matters due on an open account. At the trial defendant objected to the reading of the deposition of the plaintiff and Julia Patterson, a sister of the plaintiff. The exception was solely on the ground that the commission issued by the clerk of Cleveland County to H. T. Hudson to take the deposition had no seal attached and was void according to The Code, 1357. The defendant failed to observe other provisons of the law. The act of 1797, Rev. Stat., ch. 31, sec. 125, provided "that in all cases where the clerk of a county or Superior Court issues process to the county of which he is clerk, it shall not be *necessary* for him to affix the seal of his office thereto." This provision has been continued, Rev. Code, ch. 31, sec. 63, and is now found in The Code, 1247. The Legislature thought it unnecessary to require a seal in such case, as the officers of the court would be known officially to the citizens of the county, whereas, when beyond its limits, they would not, and their official acts could be recognized only when evidenced by the seal of the court whose officers they were. The rule, then, is that when the process is to be executed within the county where it issued, no seal is required, but if it goes beyond such county the seal is required, and without it the process is void. This difference applies to all precepts or process, such as summons, execution, and the like. This distinction has been sustained by numerous decisions of this Court. *Freeman v. Lewis,* 27 N. C., 91; *Taylor v. Taylor,* 83 N. C., 116.

Parties may attend and defend, and this would waive all objections of a formal character, but would not vitalize *void* process except by amendment without prejudice to third parties. *Barnhardt v. Smith,* 86 N. C., 473; *Davidson v. Land Co.,* 118 N. C., 368. It was admitted that the commission issued to take the deposition and was taken in Cleveland County at the residence of the witnesses in (616) said county.

Another objection to Julia Patterson's evidence was that she was interested. On cross-examination she was asked by defendant, "Did you have no interest in it?" A. "No, I didn't"; and there was no other evidence to show any interest. Exception overruled.

The third exception was to the evidence of the plaintiff, under The Code, sec. 590. His Honor admitted only the following: "State your name." A. "Aholibamah McArter." "What year is that almanac?" A. "1887." "Is there any mark on that almanac of any kind?" A. "Only what I put on it." "What month is the mark on the almanac?" A. "January." To these rulings the defendant excepted.

We see nothing in the above examination tending to show any "conversation or transaction" with the deceased. It seems to be only a mark

by which the witness refreshed her mind as to a certain date of some transaction. It appeared by another witness that the mark was put on the almanac at the time when the money was paid. There is no error.

Affirmed.

CLARK, J., dissenting from the *obiter dictum.* The expression in the opinion, "and without it (a seal) the process is void," is an *obiter dictum,* since the expression is not called for by the exception, and its omission (as will be seen at a glance) will not affect the reasoning in the opinion or the result. As an *obiter dictum* it can have no weight as a precedent, and its presence can serve no beneficial purpose. As is said by *Faircloth, C. J.,* in his concurring opinion in *Williams v. Gill, post,*
(617) 967: "The facts in this case do not authorize or call for an expression. Too much *dicta* leads to confusion and requires too much subsequent explanation. The proposition would certainly require very serious consideration."

Besides, if the point arose in this case, the expression could not be sustained by reason and precedent, and if held in this way would create serious and grave inconveniences, affecting the validity of judgments and titles, for if process issued to another county is in fact void, it cannot be vitalized by amendment. On the contrary, it has been too often held by this Court to be now questioned that "where a clerk has omitted to affix the seal of his court to writs of the county, the court may at a subsequent term order him to affix the seal *nunc pro tunc.*" *Purcell v. McFarland,* 23 N. C., 34; *Clark v. Hellen, ibid,* 421; *Henderson, C. J.; Seawell v. Bank,* 14 N. C., 279. In these cases the Court says: "This omission of the clerk to affix the seal was but a misprision in him" and "the writ is not defective. It only lacked authentication. The clerk knew whether he issued it, and if true, the court possessed the means of giving it authentication as to the rest of the world by stamping it with the seal of the court. The Revised Statutes (ch. 58, sec. 1) declare that the court in which an action shall be pending shall have power to amend any *process,* pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment. This act is very broad and we think covers this case." The present statute (The Code, sec. 273) is in the same words as that above cited (except that it is broader by giving power to amend "before *or after* judgment") and cannot be more narrowly
(618) construed. If under the Revised Statutes a seal could be affixed to process issued out of the county after its return, it can certainly be done now, and process that be thus amended is not "void" for, as the opinion in the present case properly says, "void process cannot be vitalized," a dead body cannot be galvanized into life. The above cases are

cited as authority in *Smith v. Spencer,* 25 N. C., 256; *Freeman v. Morris,* 44 N. C., 287; *Phillipse v. Higdon, ibid.,* 380; *Williams v. Weaver,* 101 N. C., 1; *Henderson v. Graham,* 84 N. C., 496, and in other cases. In the last-named case the clerk had omitted to sign the summons, and this Court held that his signature could be added by amendment after return of summons as "served," and say, in reference to cases in which it had been held that process issued to another county under seal was void, "but it is decided in those cases that they may be rendered effective by amendment and attaching the seal when the rights of other persons are not affected"—thus conclusively showing that process issued to another county not under seal is not void, notwithstanding unguarded expressions, but merely voidable.

It is to be regretted that the necessity of comparing the above decisions, and showing that there is no real conflict between them, has arisen upon an *obiter dictum,* but it is proper to show that the Court has not by the use of five words, by a wave of the hand, so to speak, overruled a line of decisions by some of the most eminent judges who have sat upon this bench, and jeopardized titles which rest upon the power of amendment to add the omitted seals to process issued to other counties "before or after judgment," as the amended statute now reads. (619)

In the present case the order to take depositions had issued to a commissioner out of the county (which it did not), and on its return, not being under seal, the judge had amended by permitting the clerk to append his seal, as the above cases hold can be done after sale under execution or return of service of summons, then, if an exception had been made on that ground, the point would have been raised. As it is, the expression is purely *obiter,* and this dissent therefrom is in the interest of the integrity of titles and of our decisions which might well be shaken if attention were not called to the fact that the expression is only *obiter* and contrary to settled precedents and the statutes above cited.

Cited: Love v. Huffines, 151 N. C., 381; *Calmes v. Lambert,* 153 N. C., 251.

JONES COPELAND v. JAMES COLLINS, ADMINISTRATOR OF THOMAS COLLINS.

(Decided 26 May, 1898.)

Action on Note—Evidence—Statutes of Another State—Interest—Usury—Statute of Limitations—Payment on Note—Administrator.

1. Whether a contract is usurious is a question to be determined by the laws of the State where the contract is made.
2. A printed copy of a statute of another State contained in a book purporting to have been published by the authority thereof is admissible to prove the existence of such statute. (Section 1338 of The Code.)
3. A partial payment by the maker of a note keeps the note in force against a surety for three years after such payment.
4. When the statute of limitations begins to run against a right of action it is not arrested by a change in the condition of the parties, such as the death of the debtor and lack of administration on his estate.
5. A payment on a note does not "stop" the running of the statute of limitations, but is only a renewal of the obligation and fixes a new date from which to make a computation of time; and hence, where a surety to a note was deceased at the time of a partial payment by the principal, and no administrator had been appointed, the statute of limitations ran from the time of such payment and not from the qualification of the administrator.

FAIRCLOTH, C. J., and CLARK, J., dissent.

(620) ACTION, heard before *Hoke, J.,* and a jury, at Fall Term, 1897, of POLK, on appeal from a judgment of a justice of the peace. The facts appear in the opinion. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

S. Gallert for defendant.
No counsel contra.

FURCHES, J. This is an action on a promissory note executed in South Carolina, bearing 10 per cent interest, payable to the plaintiff, and signed by W. E. Collins as principal and Thomas Collins as surety, dated 4 March, 1886, and due 9 months after date.

There had been several payments made on said note, the first within less than three years from the maturity of said note, and the others within less than three years of each other, the last payment being made by W. E. Collins on 28 October, 1892. Thomas, the surety, died intestate 2 June, 1892, and there was no administration on his estate until 30 November, 1894, and this action was commenced 26 July, 1897.

The statutes of limitations and of usury are pleaded and relied on as defenses to this action.

It being admitted that this is a South Carolina contract, the question of interest is governed by the statute law of that State.

The plaintiff produced on the trial a bound volume, purporting (621) to be the published laws of South Carolina in 1883, in which it appeared that 10 per cent interest was allowed in that State. This book was objected to by the defendant; objection overruled and exception. There was no error in this ruling. *Hilliard v. Outlaw,* 92 N. C., 266; *McDugald v. Smith,* 33 N. C., 576, The Code, sec. 1338.

As to the plea of the statute of limitations, there is more trouble than there was as to the plea of usury. Our statute of limitations—especially as applied to dead men's estates in the hands of personal representatives—is a subject fruitful of much trouble, and it would be difficult to reconcile our opinions upon this subject. We will not attempt to do so in this opinion. But it seems to us that there are a few well-established principles that are not affected by what appear to be conflicts in reported cases that should govern our judgment in the case at bar.

The note sued on became due on 9 December, 1886, and plaintiff's right of action accrued at that time. Defendant's intestate was then alive and continued to live until 2 June, 1892. The statute then commenced to run on 9 December, 1886, and plaintiff's right of action would have been barred before intestate's death but for the repeated payments made on the note. These payments kept it alive—whether paid by defendant's intestate or his co-obligor, who was the principal in the note. *Green v. Greensboro College,* 83 N. C., 449; *Moore v. Goodwin,* 109 N. C., 218. And it is contended for the plaintiff that this payment—28 October, 1892—made after the death of defendant's intestate stopped the statute, and as there was no one to sue until 30 November, 1894, when defendant qualified as administrator of the intestate obligor, and this action having been commenced on 26 July, 1897, was (622) within less than three years from the date of the defendant's qualification, and in time. We do not agree with the plaintiff in this contention.

It seems to be conceded that plaintiff's right of action would be barred but for this last payment, and his right of action seems to hinge upon the effect of this last payment. Does it stop the statute and create a new *causa litis,* or is it a mark *in viam* by which time is counted?

It has been held without any break in the line of decisions, from the time of our earliest reported cases, that when the statute of limitations commences to run no changed conditions in the parties will affect its running, that when it commences to run it continues to run. The earlier cases in our own reports announcing this doctrine will be found in *Cob-*

ham v. Neil, 3 N. C., 5; *Anonymous,* 2 N. C., 416; *Pearce v. House,* 4 N. C., 722. And there will not be found a discordant sound upon this point from those decisions until this time. If the plaintiff's contention is true, these opinions are erroneous and should be so pronounced.

But this very point has been before this Court several times and has been thoroughly considered, and, as we think, settled.

In *Jones v. Brodie,* 7 N. C., 594, the very point was presented and decided by the Court, *Taylor, C. J.,* delivering the opinion of the Court. This opinion distinctly holds that where there is a party capable of suing after the right of action accrues, the statute commences and never stops for any changed condition in the parties. In that case the defendant's intestate died about a year after the plaintiff's cause of action accrued, and there was no administration for seven years. De-
(623) fendant plead the statute of limitations. The plaintiff there, as the plaintiff here, contended that the statute did not run during the seven years when there was no administrator—no one to sue. But the court held that as the statute started to run in the lifetime of defendant's intestate, it continued to run, and plaintiff's action was barred. This case was affirmed in *Goodloe v. Taylor,* 14 N. C., 178, and in *Armistead v. Bozman,* 36 N. C., 117, the opinion in this case being delivered by *Daniel, J.* The question seems to have been settled by these opinions and has rested from that time until now.

McKinder v. Littlejohn, 23 N. C., 66; *Buie v. Buie,* 24 N. C., 87, and *Long v. Clegg,* 94 N. C., 763, have been called to our attention. But they are not in point; they do not refer to or pretend to overrule any of the cases we have cited. There was no need that they should do so. They are not decided upon the statute of limitations but upon the statute of presumptions, which is not the statute of limitations.

The statute under which these decisions were made only presumes a payment. This presumption may commence at any time after the cause of action accrues, and may be rebutted by showing that the defendant was and had been all the time insolvent, or that he had been absent from the country, or that there had been no one to pay—no administrator. These are all evidentiary facts offered to the *jury* for the purpose of proving that the debt had not in fact been paid. This evidence is for the *jury* and not for the court.

So we can see why such evidence, under the statute of presumptions, is competent to the jury, to disprove payment in fact; and that these and like cases are not in conflict with *Jones v. Brodie, supra,* and that line of cases.

(624) The statute of limitations was suspended from 20 May, 1861, till January, 1870, but this was done by the Legislature, the same

power that created the statute, and of course had the power to suspend it. So this suspension has nothing to do with the question we are now considering.

Our opinion, then, is that a payment does not *stop* the running of the statute of limitations. It is only a renewal of the original obligation—a mark in the race of time, and the running of the statute, behind which the defendant cannot go in the computation of time. The acts of the parties have so fixed it, and they must be governed by it. But it does not *stop the running of the statute,* it runs on, and this is in harmony with all our cases that say when the statute commences to run it continues to run, and no changed condition of the parties can arrest it.

It having been more than three years from the date of the last payment to the commencement of this action, the plaintiff's cause of action was barred, and he cannot recover. There is

Error.

FAIRCLOTH, C. J., dissenting. This action is on a note payable to plaintiff and signed by W. E. Collins, principal, and Thomas Collins, istrator 30 November, 1894. There was several credits on the note, bears 10 per cent interest, and it was a South Carolina contract. Thomas Collins died intestate, 2 June, 1892, and defendant qualified as his administrator 30 November, 1894. There were several credits on the note, the last one paid by the principal on 28 October, 1892, a few months after the death of the surety, Thomas Collins. This action was commenced on 26 July, 1897.

In order to prove that the legal rate of interest in South Caro- (625) lina was 10 per cent at the date of the note, his Honor allowed the plaintiff to put in evidence "a bound printed statute law, purporting to be statutes published by authority, as the public statute law of the State of South Carolina, of date for 1883." Defendant excepted.

Our Code, sec. 1338, provides that "a printed copy of a statute or other written law of another State . . . contained in a book or publication purporting or proved to have been published by the authority thereof, shall be evidence of the statute law, etc." *Hilliard v. Outlaw,* 92 N. C., 266; *McDugald v. Smith,* 33 N. C., 576, and The Code just cited support the ruling of his Honor. Exception not sustained.

The defendant relied upon the statute of limitations, and insisted that the death of the surety severed his joint obligation and devolved the liability on his principal. He cited good authorities in other States to support his proposition as to *joint* obligations, but furnished none to support it when the obligation is *joint* and *several,* as it is under our statute. When a partial payment on a note is made, either by the prin-

cipal or any of the sureties, before it is barred, the payment continues in force as to all the obligors. *Green v. Greensboro College,* 83 N. C., 449; *Moore v. Goodwin,* 109 N. C., 218.

The payment before the bar stops the course of the statute as to all, and becomes a new starting point, from which the statute runs as if that was the day of maturity of the debt. And so at each payment. *Green v. Greensboro College, supra.* These results follow from the fact
(626) that all are obligors, and because it is their common liability and they have a community of interest. They constitute a *class,* and the act of one, as a payment, becomes the legal act of the whole class. This effect does not reach any other *class* connected with the same transaction, as drawers, acceptors, or joint endorsers, except those in the same class. *Wood v. Barber,* 90 N. C., 76, and cases cited. On the death of the surety, his liability fell upon his representatives. The administrator qualified 30 November, 1894, and the last payment was made 28 October, 1892. After some debate, it was settled that the time between the death and the issuance of letters of administration should not be counted against the creditor, for, in the language of *Gaston, J.,* in *Buie v. Buie,* 24 N. C., 87, "It cannot be doubted, we think, that the want of a person against whom to bring suit rebuts the presumption of payment arising from forbearance to sue." The reason is equally applicable to the statute of limitations, when there is no one to sue. *Lee v. Gause,* 24 N. C., 440; *Jolliffe v. Pitt,* 2 Vern., 694. This doctrine was reconsidered and sustained in *Long v. Clegg,* 94 N. C., 763.

Our effort to reconcile the decisions on this question has not been successful. It has been generally stated that when the statute begins to run nothing can stop it, unless the statute contains some limitations. In some cases a literal interpretation worked gross injustice, and the Court was induced to find some reasonable exception in such cases when it could do so. Soon after the act of 1715 our predecessors were perplexed with the same difficulty that we have. The difficulty arises from facts like these: When the creditor dies before the right of action accrues, or before the claim is barred, and no representative is appointed until after the bar intervenes; when the debtor dies before the action
(627) is barred, and no personal representative is appointed until after that time; when payments are made by either before or after the death of the debtor, principal, or surety, and there is no one in being to sue or be sued, with a statute fixing a different period of limitation as to a principal or surety, and the statute for settling the estates of deceased persons, and other conditions presented in the course of affairs, and the provisions of The Code, 164. Out of these and other conditions we might expect some contradictions in the decisions, but we think the principle on which we can put this case is well settled. This Court, at an early date,

after holding that until there is some person to make claim, such as can be prosecuted, there is no cause of action, and the bar does not begin to run, said: "The moment it is established that this act is in the nature of an act of limitations, the bar of which does not begin to run until there is a cause of action, that moment it follows that the want of a representative of the debtor, as well as of a representative of the creditor, takes the case out of the bar of the statute. Cause of action is the right to prosecute an action with effect, and legally, a cause of action does not exist until there be a person in existence capable of suing, and also a person against whom the action may be brought." *McKinder v. Littlejohn,* 23 N. C., 66, citing several English cases. This reasonable rule has not been overruled, but was reconsidered and sustained in *Buie v. Buie,* 24 N. C., 87, and in *Long v. Clegg,* 94 N. C., 766. We do not now feel at liberty to upset a rule so long established if we had any doubt about its correctness. As the plaintiff had no opportunity to present his claim against the surety after his death until the administrator was appointed, and as the summons was issued within three years after that time, the plea in bar does not defeat the action. (628)

Affirmed.

CLARK, J. I concur in the dissenting opinion.

Cited: Balk v. Harris, ante, 65; *Winslow v. Benton,* 130 N. C., 60; *Phifer v. Ford, ibid.,* 208; *Menzel v. Hinton,* 132 N. C., 662; *Lassiter v. R. R.,* 136 N. C., 91; *Dobbins v. Dobbins,* 141 N. C., 219.

H. G. SPRINGS v. J. W. McCOY ET AL.

(Decided 26 April, 1898.)

Action for Money Loaned—Note—Endorser—Partnership.

Where one endorsed a note at the request of a member of a firm for the purpose of obtaining money for the use of the firm, and the proceeds were so used, the endorser, upon payment of the note, can recover therefor against the firm, though no member of such firm signed the note.

ACTION, tried before *Hoke, J.,* and a jury, at October Term, 1897, of MECKLENBURG, upon the issue, "Are the defendants indebted to the plaintiff, and if so, how much?"

There was a verdict for the plaintiff, and from the judgment thereon the defendants appealed. The facts appear in the opinion.

Jones & Tillett for plaintiff.
Osborne, Maxwell & Keerans for defendants.

MONTGOMERY, J. The plaintiff commenced this action to recover of the defendants $250, with interest, which he had been compelled to pay on their account to the city of Charlotte. The defendants were (629) partners in trade, and in 1895 procured E. F. McCoy to take out, in his own name, a license to retail liquor from the authorities of the city of Charlotte, under which they intended to, and did afterwards, sell liquor themselves for their own benefit and advantage. The license charged was not paid in cash, but through the courtesy of the board of aldermen or the treasurer of the city, in lieu of cash several notes were given and received, each in the sum of $250, payable to W. B. Gooding, treasurer of the city, with interest after maturity, the consideration expressed being *money loaned.* These notes were signed by E. F. McCoy and B. L. Wedenfeller as principals, and were endorsed by the plaintiff. The plaintiff in his complaint alleged that he endorsed these notes at the request of the defendants and for their benefit, and that he was compelled to pay one of them at the suit of the city of Charlotte against him, the makers of the note being insolvent. There was evidence going to show that the plaintiff endorsed the note at the request of J. W. McCoy, one of the partners, and that J. W. McCoy at the time of the endorsement stated to the plaintiff that the note was to be used by the firm to procure from the city the license to sell liquor for the year 1895. The plaintiff had leased the house in which the liquor was to be sold to the defendants, and it was there that the plaintiff endorsed the note at the request of J. W. McCoy. The defendant Bowles testified that he did not take out the license himself but that he left that for his partner, J. W. McCoy, to do. He admitted that liquor was sold by the defendants under the license obtained by E. F. McCoy, and that he (Bowles) with his own hands sold liquor.

His Honor instructed the jury in part as follows: "The issue for the jury to determine is, Are the defendants indebted to the plaintiff, (630) and if so, in what amount? The burden is on the plaintiff to satisfy the jury by the greater weight of evidence that the defendants are indebted in such amount as they may recover. If the jury find from the greater weight of evidence that the defendants were partners, selling liquor in Charlotte in 1895, and that they sold whiskey during the said year under the license taken out in the name of E. F. McCoy, for which the note was given, and this note was endorsed by the plaintiff at the request of J. W. McCoy, one of the partners, and for the accommodation of the firm, and the note was for license under which the firm were to sell and did sell whiskey, and the plaintiff was forced to pay

said note by a suit on the part of the city, the payee, then both defendants, members of the firm, are responsible to the plaintiff, and must reimburse him the amount he is out of pocket, and in such case the jury should answer the issue 'Yes, $272.88, with interest from 12 August, 1896.'"

The defendants excepted to that part of the charge. There was no error in the instruction. If the consideration for which the note was executed inured to the benefit of the defendants, and the note was endorsed by the plaintiff at their request and for their benefit, certainly the law would raise a promise by implication on the part of the defendants to pay the plaintiff the amount which he was compelled to pay to the city on account of the endorsement. *Springs v. McCoy,* 120 N. C., 417.

J. W. McCoy was, according to the evidence of Bowles himself, the managing partner at the time the endorsement was made, and he, Bowles, left it to J. W. McCoy to take out the license—in his own words, "I did not take out the license myself, but left that for J. W. McCoy to do." This is not the case of one partner borrowing (631) money upon his own credit and giving his own personal obligation for the amount, using the same in the partnership business, as was the case in *Willis v. Hill,* 19 N. C., 231. Here the act of J. W. McCoy was the act of the partnership, and the benefit was intended to accrue, and did accrue, to the advantage and benefit of the partnership.

The special instructions asked by the defendants were merely the contrary of the principles laid down by the judge in his instructions, and we, having approved of the charge of his Honor, have, therefore, approved of his ruling in refusing to give the defendants' instructions.

No error.

LILLIAN M. RITCH ET AL. v. R. M. OATES ET AL.

(Decided 26 April, 1898.)

Action to Recover Land—Fraudulent Conveyance—Homestead—Estoppel—Trust Deed—Joinder of Wife—Non-Age.

1. Where a partner wrongfully used partnership funds for the purchase and improvement of real estate which he caused to be conveyed to his wife, and thereafter, in order to secure the repayment of such funds, he and his wife (who was under age) executed a deed of trust, under which the land was sold; and in the trial of an action by the wife, who repudiated the trust deed, the jury found that the funds had been invested in the land with intent to defraud the creditors of the husband. *Held:*

(1) That the conveyance to the wife was invalid as to the creditors of the husband.

(2) That the deed to the wife being a nullity as to the husband's creditors, and the husband having never had the legal title, but only the right to call for a conveyance, the wife is not entitled to a homestead in the land.

(3) That the husband is estopped by the trust deed to claim a homestead as against the beneficiary therein or the purchaser at the sale thereunder.

(4) That the interest which the husband had in the land—a mere right to call for a conveyance—was not such an interest as to require the legal assent or joinder of his wife in the conveyance to bar his right to claim a homestead in the property.

(632) ACTION, tried before *Norwood, J.*, and a jury, at March Term, 1897, of MECKLENBURG, for the recovery of a lot in the town of Huntersville.

The facts are sufficiently stated in the opinion. There was a verdict for defendants, and from the judgment thereon the plaintiffs appealed.

Osborne, Maxwell & Keerans for plaintiffs.
Jones & Tillett for defendants.

CLARK, J. The jury, upon the issues submitted, find that the husband, H. E. Ritch, furnished the entire consideration for the purchase of the lot, and caused it to be conveyed to his wife (his coplaintiff), with intent to hinder, delay, and defraud his creditors; that his wife contributed nothing in money or credit towards the purchase of the lot or in putting improvements thereon; that in putting the improvements on the lot, H. E. Ritch used $700, wrongfully taken from partnership assets without the consent of his partner, J. R. Wallace, and that to secure to Wallace the repayment of the same, Ritch and his wife executed a deed of trust on said lot. She was under age at the time, but this was unknown to Wallace. The deed in trust was foreclosed in 1892, and the property was conveyed by the trustee therein to the purchaser, R. M. Oates, who has been in possession ever since, and is codefendant with Wallace in this action, in which the *feme* plaintiff seeks to recover the land.

(633) The lot having been bought by the husband upon a consideration proceeding solely from him, and title at his instance having been made to the wife without any consideration, and (as the jury find) with intent to hinder, delay, and defraud his creditors, the conveyance was invalid as to them, and upon proper proceedings would be set aside.

The answer raises that issue and, it having been found by the jury, the same relief can be decreed herein. The deed to her being a nullity as to the defendants, creditors of the husband, she is entitled to no homestead therein in her own right. The husband never had the legal title in himself, only the right to call for a conveyance. The deed in trust

given by him and his wife to Wallace to secure the $700 wrongfully abstracted and used in building upon the premises was in equity a direction that the legal title should be assigned to Wallace, and by such trust deed he is estopped to claim a homestead in the property as against the money used in the improvements. She being under age, her assent, though given with privy examination, is invalid, but the interest of the husband, a mere right to call for the title, was not such an interest as to require her legal assent to the conveyance to bar the husband's assertion of a homestead therein. This is not a case wherein a party having a legal title makes a fraudulent conveyance. There, if the fraudulent deed is set aside, he can claim his homestead in the property, which is restored to him. But here, the husband never had the legal title, and if the only conveyance, that to the wife, is set aside, the title revests in the vendor subject to the husband's right to call for a conveyance, which right in equity he conveyed to Wallace by the mortgage to secure the money wrongfully used to put up the buildings on the (634) property.

It does not appear in the findings of the jury but there was evidence that only a part of the purchase money was paid by the husband, he having given his note for the balance. This does not affect the question, for the entire consideration proceeded from him, and he could not have the property abstracted from liability to his creditors by causing the title to be made to his wife "with intent to hinder, delay, and defraud his creditors," whether he bought for cash or on credit.

If the plaintiffs so desire, the judgment may be modified by a direction that the wife be declared a trustee of the legal title, that the property be sold for the benefit of defendants by a commissioner appointed by the court, the surplus, if any, after paying the husband's indebtedness to Wallace and the costs of this action, to be paid to the *feme* plaintiff. This, however, will be needless expense if the husband's indebtedness to Wallace exceeds the value of the property.

The statute of limitations is not pleaded, but if it had been, the plaintiffs cannot rely upon Wallace not having proceeded against Ritch within three years after discovery of the misappropriation by him of partnership funds, for he did take steps within the three years but was stopped by Ritch who gave him a mortgage to secure the return of the fund, and the property has been sold thereunder.

It is unnecessary to consider the exceptions in detail. So far as not covered by the above discussion, the rulings are immaterial, and if erroneous, are harmless errors.

Modified and affirmed.

Cited: Jackson v. Beard, 162 N. C., 109.

(635)

W. H. KERR v. SANDERS, ORR & CO.

(Decided 26 April, 1898.)

Action on Contract of Employment—Contract—Canceling Contract of Employment—Negotiations Leading to Contract—Accord and Satisfaction—Evidence.

1. Where a written contract of employment did not require the employee to furnish a fidelity bond, his failure to do so is no ground for cancellation of such contract, although in the correspondence preceding the signing of the contract a bond had been demanded by the employer.
2. The fact that an employee, whom his employers wished to discharge, refused an offer of a certain sum "in full for services" a few days before his receipt of a letter of discharge containing a check for the amount on which was written, "In full for services," is no evidence that he did not accept the offer when he cashed the check and used the proceeds.
3. The acceptance of a less amount than that claimed, in satisfaction thereof, is a complete discharge of the same (section 574 of The Code); hence,
4. Where an employee was discharged and received and cashed a check for $125, on which was written, "In full for services," which amount was less than claimed, he cannot recover more, although he attempted to qualify his acceptance of the proceeds of the check by writing across the check, above his signature, the words, "Accepted for one month's services."

ACTION, tried before *Greene, J.*, and a jury, at Jannary Term, 1897, of MECKLENBURG. The facts appear in the opinion. The plaintiff appealed.

Jones & Tillett for plaintiff.
Burwell, Walker & Cansler for defendants.

FURCHES, J. Defendants employed the plaintiff to buy cotton for them for a term of six months at the price of $75 per month, each month's wages to be due at the end of the month. This contract was sub-
(636) stantially made by letter correspondence between the parties commencing in July; but on 5 September, 1896, they closed the contract, commenced by the letter correspondence, by a formal written contract signed by both parties. In this signed contract the defendants reserved the right to dismiss the plaintiff without notice and without further liability to him. The grounds stated in said contract for which the defendants may discharge the plaintiff without notice or further liability are, "That if he fails to discharge the duties required of him to the satisfaction of said Sanders, Orr & Co. either from inability or neglect on his part." On the 25th of August defendants wrote to plaintiff, saying that they required of him a bond of $3,000. The plaintiff

undertook to give this bond but failed to do so, and then wrote defendants that this bond was not included in the contract and he thought his references ought to be sufficient. It does not appear that anything was said in the signed contract about plaintiff's giving a bond.

But defendants' counsel contends that the plaintiff had been notified, before the formal contract was signed, that defendants would expect him to give a bond, and therefore it constitutes one of the conditions of the contract as much as if it had been incorporated into the contract, and cites *Kitchen v. Grandy,* 101 N. C., 86, as authority for this contention. But we do not think so. In that case the correspondence was used in construing a contract. To use it for the purpose claimed by defendants would be to incorporate a new condition into the contract. This cannot be done. The correspondence was the chaffering between the parties, and would probably have amounted to a contract if nothing further had taken place between them. But all this was merged into the formal written contract of 5 September, which was signed by both parties. We cannot hold that the conditions contained in the contract (637) authorized the defendants to discharge the plaintiff without liability upon the ground that the plaintiff failed to give them the bond they required of him.

But the defendants had the right to discharge the plaintiff from their service without any stipulation to that effect in the contract, but in doing so they took the responsibility of being held in damages therefor. This they did, after some correspondence, on 25 September, in a very curt manner, in the following note: "W. H. Kerr, Elberton, Ga., Dear Sir:— We have no further use for your services and you are hereby discharged. Yours truly, Sanders, Orr & Co." But accompanying this note of discharge was a check drawn by defendants on the Commercial National Bank of Charlotte, payable to plaintiff or his order, for $75, in which was written *"In full for services."* Upon this check the plaintiff's endorsement was, "This check accepted for one month's services, beginning 4 September and ending 4 October, 1893." He then collected the check and used the money. The plaintiff had refused a proposition to this effect from defendants a few days before that, and the plaintiff argues that this is evidence that he did not intend to waive any rights he had by accepting the check, collecting the same, and using the money. But we do not see how these acts of plaintiff can be construed to have any other meaning. *Non constat,* he refused it on one day that he might not accept it on another day. But if it was some evidence to support the plaintiff's contention, it has been fairly left to the jury, and decided against him. *Sampson v. Pegram,* 112 N. C., 541.

The plaintiff must have known what was meant by the words written on the face of the check, "in full for services," enclosed (638)

in the letter discharging him from the service of the defendants. It is certain he was not inadvertent to this language, "in full for services," as he would not have endorsed on it "accepted for one month's service," etc., and the jury have found against him. The plaintiff had no right to change this check or to accept it for any other purpose than that stated in the letter and check. *Long v. Miller,* 93 N. C., 233; *Pruden v. R. R.,* 121 N. C., 509.

This doctrine is based on the idea of contract. "It takes two to make a contract." The offer of the defendants and the acceptance by the plaintiff was a contract—a meeting of minds. If plaintiff were allowed to accept it for a different purpose than that stated by defendants, it would be to allow him to make a contract with defendants without their knowledge or consent. *Pruden v. R. R., supra; Petit v. Woodlief,* 115 N. C., 120; *King v. Phillips,* 94 N. C., 555.

We see no error in refusing the plaintiff's prayer for instruction, nor do we see any error in the instruction given. We do not think the plaintiff could have recovered against the defendants in this action without sections 574 and 575 of The Code, but certainly not since their enactment. If the plaintiff had any grounds outside of the written contract of 5 September, it has been fairly submitted to the jury and decided against him. We do not think there was such a failure on the part of the court to array the evidence as to bring this case within the ruling in *S. v. Groves,* 121 N. C., 563. Nor do we think the exception to the issues can be sustained. The judgment below is

Affirmed.

Cited: Cline v. Rudisill, 126 N. C., 525; *Wittkowsky v. Baruch,* 127 N. C., 315; *Ore Co. v. Powers,* 130 N. C., 153; *Norwood v. Lassiter,* 132 N. C., 56; *Armstrong v. Lonon,* 149 N. C., 435; *Drewry v. Davis,* 151 N. C., 297; *Colvard v. R. R., ibid.,* 523; *Aydlett v. Brown,* 153 N. C., 336; *Woods v. Finley, ibid.,* 499; *McCullers v. Cheatham,* 163 N. C., 64; *Rosser v. Bynum,* 168 N. C., 342; *Mercer v. Lumber Co.,* 173 N. C., 54; *Moore v. Accident Corporation, ibid.,* 538.

(639)

E. D. LATTA ET AL. v. JAMES A. BELL, TRUSTEE OF FARINTOSH & AMER.

(Decided 3 May, 1898.)

Personal Property Exemptions—Assignment—Nonresident.

Where a resident of this State executed a deed of trust in which he reserved his personal property exemption and before it was allotted assigned it to A. and became a nonresident: *Held*, that neither A. nor attaching creditors are entitled to the benefit of the exemption, but the title to the whole vested in the trustee.

ACTION, tried before *Hoke, J.*, and a jury, at October Term, 1897, of MECKLENBURG. The facts are stated in the opinion. From a judgment declaring that the title to the property in controversy was vested in the defendant Bell, trustee, both Edith J. Amer and the attaching creditors of Farintosh & Amer appealed.

Jones & Tillett and Clarkson & Duls for Edith Amer (appellant).
Burwell, Walker & Cansler for Bell, Trustee.

MONTGOMERY, J. Alfred Amer, at the time of the execution of the deed of trust to Bell by himself and his partner Farintosh, on 26 September, 1895, was a resident of the State of North Carolina, as he was likewise on 27 September, 1895, when he assigned and conveyed to Edith J. Amer the personal property exemptions which he had reserved in the deed made by him and Farintosh to Bell. After Bell took possession of the property conveyed to him in the deed of trust, and after Amer, the debtor, had become a nonresident of the State, under an execution in favor of one Evans issued upon a judgment obtained after the execution of the deed of trust, the officer in charge laid off and (640) allotted the debtor Amer's exemptions in the property, in the hands of Bell, the trustee, to Edith Amer, but without taking them out of Bell's possession. Bell claims them under the assignment to him by Farintosh and Amer on the ground that the personal property exemption received by Amer in the deed to him was personal to the debtor; that having left the State and become a nonresident without having had the exemptions allotted to him, he was not entitled to the benefit of the same; and that the title to the whole of the property mentioned in the deed of trust passed to him as trustee.

All these facts were admitted on the trial, and his Honor instructed the jury that in no aspect of the case was Edith J. Amer, the appellant, entitled to the property in controversy, and directed the jury to answer the seventh issue ("Is Edith Amer entitled to the property in controversy under and by virtue of her assignment from Alfred Amer, of date 27 September, 1895?") "No."

There was no error in this instruction. *Norman v. Craft,* 90 N. C., 211; *Bruno v. Hardie,* 88 N. C., 243. The assignability of articles of personal property allotted to a debtor as his personal property exemption is not in question here.

No error.

APPEAL OF ATTACHING CREDITORS IN SAME CASE.

H. W. Harris for appellant.
Burwell, Walker & Cansler for appellee.

MONTGOMERY, J. For the reasons set out in the appeal of Edith Amer, the attaching creditors were not entitled to the proceeds of the goods in the hands of Bell, trustee. His Honor's instructions to that effect (641) were proper.

No error.

E. D. LATTA ET AL. v. J. A. BELL, TRUSTEE, ET AL.

(Decided 3 May, 1898.)

Chattel Mortgage — Description — Construction of Deed — Mistake— Evidence.

1. Where a chattel mortgage conveyed all the property in the "room or rooms known as the 'B. Hotel bar,' or the 'B. Hotel billiard room' and the 'B. Hotel barber shop,'" it cannot be construed to include liquors from which the bar was supplied but which were in a cellar on a different floor from and unconnected by door or otherwise with the barroom, billiard-room and barber shop. Such description was not ambiguous and should not have been submitted to the jury.
2. The fact that on the morning on which a chattel mortgage was executed the mortgagor promised to include certain property is not evidence that it was omitted from the mortgage through the mutual mistake of the parties or the inadvertence of the draftsman.

ACTION, tried before *Hoke, J.,* and a jury, at October Term, 1897, of MECKLENBURG. There was a verdict for the defendant, and from the judgment thereon the plaintiff appealed. The facts are stated in the opinion.

Burwell, Walker & Cansler for plaintiff.
Jones & Tillett for J. A. Bell, Trustee.

MONTGOMERY, J. Farintosh & Amer, who were the lessees of the Buford Hotel in Charlotte, executed on 10 August, 1895, a deed

of trust to E. T. Cansler to indemnify and save harmless E. D. (642) Latta, who had endorsed, for discount, the note of Farintosh & Amer. Latta was compelled to pay the note. The property conveyed in the deed of trust is described in these words: "The following property in the city of Charlotte, N. C., in that room or rooms known as the Buford Hotel Bar, or Buford Hotel Billiard Room and the Buford Hotel Barber Shop, to wit: one billiard table, the only one we own and which we purchased from the Brunswick Balke Company, two pool tables, the only two we own, and which we purchased from the Brunswick Balke Company, one ice box, one bar counter, all mirrors and glasses and all glassware, all barber shop fittings, one cash register, all furniture in bar or billiard rooms, all chairs and all other personal property of every class, kind, and description now owned by us in the said room or rooms in the said city known, as before mentioned, as the Buford Hotel Bar, or the Buford Hotel Billiard Room and the Buford Hotel Barber Shop."

On 26 September, 1895, Farintosh & Amer executed to James A. Bell, as trustee, a deed of assignment in which they conveyed "all and singular the lands, goods, chattels, promissory notes, debts, claims, and property and effects of every class, kind, and description, belonging to the parties of the first part, wherever the same may be situated, and especially all that property of every class, kind, and description in the hotel known as the Buford Hotel in Charlotte, N. C., and the Buford Hotel Bar and the Buford Hotel Barber Shop . . . except such property as is exempt by law from levy and sale under execution."

There was a clause in the assignment making it subject to the lien of the deed of trust to Cansler for the benefit of Latta. The defendant Bell, the assignee, took possession of the property mentioned (643) in the deed to him and which is described in the plaintiff's complaint. By agreement between the plaintiff and defendant, Bell sold the property for $500, and holds the proceeds subject to the determination of the rights of the parties under law.

The whole question depends, therefore, upon whether or not the deed to Cansler conveyed the property turned into cash by defendant Bell.

The property was found by Bell in a cellar or basement of the Hotel Buford, unconnected by doorway with the barroom and on a different floor from the barroom. The contention of the plaintiff is that the goods taken into possession by Bell and sold, consisting of liquors, and from which the bar was supplied, was in contemplation of law a part of the barroom, and that the property passed to Cansler because the cellar or basement was included in the words in the deed, "room or rooms" known as the Buford Hotel Bar, or Buford Hotel Billiard Room and the Buford Hotel Barber Shop. His Honor deeming the language of the deed of

trust as to what passed under the deed ambiguous, submitted this issue to the jury, "Was the property in dispute included in the mortgage to E. T. Cansler, mortgagee, and E. D. Latta?" for them to find whether the terms of the deed of trust, as intended and used by the parties, included the cellar. We think he was in error in submitting that issue to the jury. We think that the language used in the deed, "room or rooms known as the Buford Hotel Bar, or Buford Hotel Billiard Room and the Buford Hotel Barber Shop," have a definite legal meaning, and their meaning one of construction for the Court. The hotel bar meant the room in which liquors were sold. The lexicographers define bar
(644) to be an enclosed place of a tavern, inn or coffee house, where the landlord or his servants delivers out liquors and waits upon customers. The jury, however, found the issue correctly and no harm has been done by its submission to them.

But in his complaint for a separate cause of action the plaintiff alleged that it was the intention and purpose of the parties in the deed of trust to Cansler that the property should be included in the description in the deed, and that it was omitted by the mutual mistake of the parties or the inadvertence of the draftsman; and there was a prayer that the deed should be amended and reformed so as to express the true intention of the parties. Under this view his Honor submitted this issue, "Was said property omitted from such mortgage by mutual mistake of the parties?" The answer to the issue was "No." If there had been any sufficient testimony going to prove that there was any mistake in the execution of the deed of trust as alleged in the complaint, then it would be necessary for us to consider the plaintiff's first alleged ground for a new trial, that is, the nature and character of the argument of the defendant's counsel to the jury. But there was an absolute lack of proof tending to show a mistake of any kind in the deed of trust to Cansler. It is true that Latta testified that on the morning on which the deed of trust was executed to Cansler the debtors, Farintosh & Amer, promised him to mortgage all the wine and whiskey they had on hand, but not a word did he say about that being the understanding and agreement at the time when the deed was actually made, and that it had been omitted by
(645) mistake of the parties or the draftsman. The judgment is Affirmed.

Cited: White Co. v. Carroll, 147 N. C., 334.

J. B. CARSON ET AL. v. SARAH J. CARSON ET AL.

(Decided 26 April, 1898.)

Tenants in Common—Husband and Wife—Limitations—Title—Color of Title—Estoppel.

1. Where A., a married woman, inherited part of a tract of land and her husband acquired title to another undivided part of the same tract, and both lived upon the tract until the death of the wife, who had no children, and the husband married again and died, leaving a widow: *Held*, that the statute of limitations did not run against A. during her life, and her heirs, becoming tenants in common with her husband, were not barred of their action brought within twenty years from her death.
2. Where several persons inherited land which was divided into three tracts, and deeds were exchanged so as to vest title in severalty, and in the conveyance of one tract to husband and wife the deed was made in the name of the husband: *Held*, that the wife's interest, having vested by descent, was not divested by the conveyance to the husband, she not joining in the deed.
3. A deed by heirs to land which the wife inherited, being made to the husband alone, could not be color of title, since it did not convey the wife's interest.
4. Where tenants in common by inheritance divided the same and exchanged deeds so as to hold their interests in severalty, and one of the heirs died, whose interest descended to the others: *Held*, that the survivors were not estoppel by their deed from asserting their claim as heirs, since it only released their interest as tenants in common.

ACTION brought before the Clerk of the Superior Court of GASTON by the plaintiffs as heirs of Robert Carson, to have the dower of his widow, the defendant Sarah Jane Carson, allotted in the lands described in the complaint, and transferred to and tried before *Greene, J.*, (646) at February Term, 1898, of GASTON, upon an agreed statement of facts set out substantially in the opinion. His Honor rendered judgment for the defendants and the plaintiffs appealed.

A. G. Mangum for plaintiffs.
O. F. Mason for defendants.

DOUGLAS, J. The facts submitted for the judgment of his Honor show that Edward, Mary, and Margaret Whitesides, Isabella Carson, and Annie Carson, were tenants in common in a tract of land by descent from their brother, who died in the summer of 1849. On 21 September, 1849, the said Isabella Carson executed to Robert Carson, then the husband of said Annie Carson, a deed for her one-fifth undivided interest in the tract of land. On 22 September, 1849, there was a consent par-

tition of the said tract of land by deeds with metes and bounds, and seventy-one acres were allotted to Mary and Margaret Whitesides, which was two-fifths in value of the entire tract; seventeen acres were allotted to Edward Whitesides, which was one-fifth in value of the entire tract; sixty acres, or the remainder, was allotted to Robert Carson, which was two-fifths in value of said tract. Annie Carson joined in the deeds of release to the Whitesides but not to Robert Carson, her husband; and nothing was deeded to her in return. Immediately after the partition of the tract of land as aforesaid, Robert Carson entered upon the said sixty-acre lot, and he and his wife, the said Annie Carson, lived on the same until her death, which occurred about sixteen years before the commencement of this action, and Robert Carson continued to
(647) hold possession of the same until his death in 189.., all the while receiving the rents and profits, without claim from any one. The defendants other than Sarah Jane Carson, who are the children of Isabella Carson, and the said Edward Whitesides, and the only heirs at law of Annie Carson, deny that Robert Carson died having title to all of the sixty-acre lot, and allege that in the partition of the tract of land as aforesaid the name of Annie Carson, by mistake, was omitted from the deed for the sixty-acre lot.

The plaintiffs reply and plead the statute of limitations to any action reforming or correcting said deed.

His Honor held that Annie Carson was a tenant in common with her husband, Robert Carson, in one-half of said sixty-acre lot, and plaintiffs appealed.

Upon the foregoing facts we are of opinion that the judgment should be affirmed. Annie Carson was a *feme covert* at the time of the partition and remained so until her death. Therefore no statute of limitation ever began to run against her, even if she had not been in unity of possession with her husband. As she was tenant in common with her husband, her heirs also became tenants in common at her death, and are barred by the exclusive possession of their co-tenant only after the lapse of twenty years. As she apparently never had any children, her husband had no curtesy, and hence the statute began to run against her heirs at her death. But there is no proof of ouster, nor presumption thereof, as she had not been dead for twenty years when this suit was brought, and therefore the statute had not matured. *Linker v. Benson,* 67 N. C., 150;
Caldwell v. Neely, 81 N. C., 114; *Page v. Branch,* 97 N. C., 97;
(648) *Gilchrist v. Middleton,* 107 N. C., 663; *Lenoir v. Mining Co.,* 113 N. C., 513.

It is contended by the plaintiffs that the share of Annie Carson was conveyed to her husband by the deed of the Whitesides, and that an

abandonment of all equitable interests by her heirs is presumed from lapse of time. This contention cannot be sustained, as the title to an undivided one-fifth of the estate was already vested in her by descent, and therefore needed no conveyance to her. It was never divested, as she did not join in the deed to her husband, and her deed to her other co-tenants was, in effect, a mere consent that they might take a certain part of the land as their share in the partition. It was held in *Harrison v. Ray,* 108 N. C., 215, that upon an actual partition of lands among tenants in common, the tenants take their respective shares or allotments by descent and not by purchase, and that their deeds conveyed no real estate, but simply ascertained by metes and bounds the interest of each. If the deed of the Whitesides was a mere allotment and did not convey to Robert Carson any part of their own interest in the land, how could it convey to him the interest of Annie Carson, who was not a party to the deed? The plaintiffs also contend that in any even the Whitesides' deed to Robert Carson was color of title to the sixty acres, and that under it he held for more than seven years after the death of his wife adversely to her heirs. This position is equally untenable. This Court has held that a deed is never color of title for more than it professes to convey. *McRae v. Williams,* 52 N. C., 430. The deed to Robert Carson on its face professed to be in partition of the lands descended from John Whitesides, deceased, and therefore did not profess to convey any land in fee, either in law or in fact. As Annie Carson released all claim to three-fifths of the land but did not release to her husband, it is evident that her share was intended to be included in the remaining two-fifths, of which she remained in possession with him as co-tenant during her life. This being so, her title, vested in her by descent and never (649) divested, descended to her heirs without further conveyance.

The doctrine of estoppel cannot be invoked in this case, as it has no application. It is true that the defendants could not set up after-acquired title in derogation of their deed of release to Robert Carson, but that deed did not profess to convey or release any claim that Annie Carson might have to the land, nor did it profess to convey the land itself, but only to release their interest therein as tenants in common. As heirs of Annie Carson, they now claim a share which in effect was set aside for her in the partition, and which during her lifetime they never pretended to own or dispose of in any way. The judgment is

Affirmed.

Cited: Harrington v. Rawls, 131 N. C., 41; *Carter v. White,* 134 N. C., 480; *Cameron v. Hicks,* 141 N. C., 37; *Lumber Co. v. Price,* 144 N. C., 54; *Sprinkle v. Spainhour,* 149 N. C., 266; *Jones v. Myatt,* 153 N. C., 230; *Speas v. Woodhouse,* 162 N. C., 68; *Weston v. Lumber Co., ibid.,* 171.

(650)

JAMES RHYNE v. E. H. LIPSCOMBE.

(Decided 22 February, 1898.)

Jurisdiction—Superior Courts—Circuit or Inferior Courts—General Assembly—Power to Establish Courts and Allot Jurisdiction Below Supreme Court—Appeal from Justices of the Peace—Constitutional Law.

1. The Superior Courts and courts of justices of the peace were created by the Constitution (section 2, Article IV), and the General Assembly cannot abolish them.

2. While the General Assembly may, under section 12 of Article IV of the Constitution, allot and distribute the jurisdiction of the courts below the Supreme Court, it must be done without conflict with other provisions of the Constitution.

3. In construing legislation establishing courts inferior to the Supreme Court and affecting the jurisdiction of the Superior Courts, the term "Superior Court" must be interpreted in the sense it had at the time of the adoption of the Constitution which established such court, which was that it was the highest court in the State next to the Supreme Court and superior to all others from which alone appeals lay direct to the Supreme Court, and possessed of general jurisdiction, criminal as well as civil, and both in law and equity.

4. The Superior Court cannot, under section 12, Article IV of the Constitution, be deprived of the preëminence and superiority attaching to it at the time of its adoption by the Constitution or shorn of either its criminal or civil jurisdiction without conflict with the constitutional provisions creating it; and, while its jurisdiction may be made largely appellate by conferring such part of its original jurisdiction on such inferior courts as the General Assembly may provide, its jurisdiction must be retained by original or appellate process.

5. The allotment and jurisdiction provided for in section 12 of Article IV of the Constitution cannot be such as to take from justices of the peace the jurisdiction conferred by section 27 of such article, or to repeal the right of appeal given by that section, both in criminal and civil actions, to the Superior Court from the courts of justices of the peace.

6. Subject to the restrictions that it cannot deprive either justices of the peace of the jurisdiction conferred by the Constitution or the Superior Court of its constitutional position as superior to all other inferior courts and having at least appellate jurisdiction of all matters from which appeals would lie to the Supreme Court, the General Assembly may create courts inferior to the Supreme Court with all, or such part as it thinks proper, of the original criminal or original civil jurisdiction above that given by the Constitution to justices of the peace (of which, even, concurrent jurisdiction may be given), provided that the right of appeal to the Superior Court, as in all other cases where an appeal lies, shall not be taken away.

7. Appeals from such courts, inferior to the Supreme Court, as the General Assembly may establish, lie (mediately or immediately as the General Assembly may prescribe) to the Superior Courts, and thence only to the Supreme Court.

8. Where no appeal to the Superior Court from a circuit, criminal, or other inferior court is prescribed by the statute creating such court, and where an appeal would otherwise lie, a *certiorari* in lieu of appeal will issue from the Superior Court as in other cases in which an appeal is not provided for. (Section 545 of The Code.)

9. Section 2 of chapter 6, Acts of 1897, conferring upon the judge of the Circuit Court of Buncombe, Madison, Haywood, and Henderson counties concurrent equal jurisdiction, power, and authority with the judges of the Superior, to be exercised at chambers or elsewhere in said counties, "in all respects as judges of the Superior Courts of this State have such power, jurisdiction, and authority," is unconstitutional and void in that by its allotment of jurisdiction to such court it conflicts with the provisions of the Constitution, deprives the Superior Court of its constitutional position and appellate jurisdiction, and, in effect, creates a Superior Court and judge by legislative enactment contrary to sections 10, 11, and 21 of Article IV of the Constitution.

ACTION tried before a justice of the peace, from whose judg- (651) ment there was an appeal to the Superior Court of BUNCOMBE. The Criminal Circuit Court of Buncombe, Madison, Haywood, and Henderson counties assumed jurisdiction, and the case was tried before *Ewart, J.*, and a jury, at June Term, 1897, of said Circuit Court for Buncombe. There was a verdict for the plaintiff, which the defendant moved to set aside upon the ground that the court had no jurisdiction. The motion was denied, and the defendant appealed from (652) the judgment rendered on the verdict.

J. C. Martin and George A. Shuford for appellant.
James H. Merrimon for appellee.

CLARK, J. The Constitution, Article IV, section 2, establishes the Supreme Court, Superior Courts, and justices of the peace, and authorizes the Legislature to create other courts inferior to the Supreme Court. Section 12 of the same article provides that the General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it, but that it "shall allot and distribute that portion of this power and jurisdiction, which does not pertain to the Supreme Court, among the other courts prescribed in this Constitution, or which may be established by law, in such manner as it may deem best . . . *so far as the same may be done without conflict with other provisions of this Constitution.*"

Under the Constitution of the United States, Article III, section 1, the Supreme Court alone is created, and all other courts are the creatures

of Congress, hence Congress has created and abolished districts, and also created and abolished a system of circuit courts at will. But under our State Constitution the Superior Courts and courts of the justices of the peace are created by the Constitution itself, and the General Assembly cannot abolish them. The term "superior court" had a well defined signification at the time of the adoption of the Constitution, and the language of that instrument must be taken as referring thereto.

(653) The Superior Court was considered of so much importance that, by sections 10, 11, and 21, Article IV, the people are guaranteed the right to elect the judges, their terms are fixed, and it was provided that each judge thereof shall reside in the district for which he is elected; that the judges shall rotate, and that no judge thereof shall hold the courts of the same district oftener than once in four years, and that at least two terms thereof shall be held annually in each county, and by section 22 these Superior Courts shall at all times be open for the transaction of all business except the trial of issues of fact by a jury. Sections 16 and 23 give the people the right to elect the solicitors and clerks of said court, and also fixes their terms. While the General Assembly is given the power to allot and distribute the jurisdiction of the courts below the Supreme Court, this is with the important limitation that it must be done "without conflict with other provisions of this Constitution." This renders it essential to consider what is the inherent nature of the Superior Courts created by those "other provisions" of the Constitution itself, which treats them with so much consideration, prescribing the election and terms of whose officers, besides the other provision above recited. The General Assembly may allot and distribute the jurisdiction below the Supreme Court, but it cannot in doing so create new courts with substantially the same powers as the Superior Courts and make the officials thereof elective otherwise than by the people, subject to be abolished by legislative enactment, and hence without independent tenure of office as prescribed by the Constitution and freed from the provisions as to rotation, the residence of the judges, and the requirements as to two terms annually in each county, and being always open. All this cannot be done simply by creating new Superior

(654) Courts, styling them "Circuit Courts" or "Criminal Courts" or otherwise.

The United States Constitution, 6th and 7th Amendments, provides for the right of trial by jury in the United States Courts. It has been held that the word "jury" must be interpreted in the sense it had at the time of the adoption of those amendments, and hence that in the Federal courts a jury must consist of twelve men and their verdict must be by unanimity because this was the accepted meaning of the right of trial by jury at that time, notwithstanding this meaning no longer universally

attaches, as many states provide now for juries less than twelve and have abolished the requirement of unanimous verdicts. *Am. Pub. Co. v. Fisher,* 166 U. S., 464. This has also been held under the state constitutions which provide for trial by jury, except in those states whose constitutions expressly permit juries less than twelve or dispense with the common law requirement of unanimity. Cooley Const. Lim. (6 Ed.), 390, 395, and cases therein cited; 1 B. & H. C. R. Cases, 482 and notes.

Applying this reasonable and settled rule of construction to the Superior Court established by the Constitution, and fenced about, as its importance demanded, by so many provisions in the Constitution, what was the "Superior Court" as the term was well understood at the time of the adoption of the Constitution? It meant the highest court in the State, next to the Supreme Court, and superior to all others, from which alone appeals lay direct to the Supreme Court, and possessed of general jurisdiction, criminal as well as civil, and both in law and equity. It cannot be deprived of that superiority and preëminence, or deprived of either its criminal or civil jurisdiction wthout conflict with the constitutional provisions creating it. The jurisdiction may be made largely appellate by conferring such part of its original jurisdic- (655) tion on inferior courts as the General Assembly may provide, but it cannot retrench the extent of its jurisdiction which it must retain either by original or appellate process. It is made flexible, so that more than two terms can be held in each county annually if the General Assembly thinks proper, which can also increase the number of the Superior Court judges with the increase of population and legal business in the State, but when they are increased all the officers of such courts must be elected by the people at the next general election and they must hold for the fixed term named in the Constitution and the judges must rotate in regular succession. The constitutional guarantees and the inherent nature and general jurisdiction of the Superior Court, recognized by the historical and legal meaning of the term at the adoption of the Constitution, cannot be held revoked and discarded by the incidental authority to the Legislature to create criminal courts in cities and "other inferior courts" (which the Constitution did not deem of enough importance even to name) and to allot the jurisdiction among them. Even this provision is guarded, as already stated, by the requirement that the allotment shall not conflict with the other provisions of the Constitution. Nor can the allotment be such as to take from the justices of the peace the jurisdiction conferred by section 27 of Article IV, nor to repeal the right given by that section, of appeal both in criminal and civil actions to the Superior Court from the court of justices of the peace. There are these restrictions and the further inherent one, as above stated, that the Superior Court is at the head of the court system below the Supreme

Court, and that from it alone appeals can come up to this Court. From the inferior courts, therefore, appeals must go to the Superior
(656) Court of the county and not direct to this Court. Subject to these constitutional restrictions, the General Assembly may allot the jurisdiction below the Supreme Court. It may create criminal courts or circuit courts, city courts or any other courts, and give them all, or such part as it thinks proper, of the original criminal or original civil jurisdiction above that given by the Constitution to justices of the peace, and even as to that it may confer concurrent original jurisdiction with the justices of the peace (for their jurisdiction is not exclusive), but if it gives such courts concurrent jurisdiction, civil or criminal, of such portion of the original jurisdiction which is left to be exercised by the Superior Court, still in such cases an appeal must lie from such inferior or intermediate courts to the Superior Court, as in all other cases in which there is a right of appeal, for the General Assembly cannot, "without conflict with other provisions of the Constitution," either deprive the justices of the peace of the jurisdiction conferred on them by the Constitution or deprive the Superior Courts of their constitutional position as Superior Courts over all other inferior courts, and with at least appellate jurisdiction of all matters from which appeals would lie to this Court. While appeals have been often brought to this Court direct from criminal inferior courts, the right to do so has never been adjudged by this Court.

From these considerations, it follows that appeals lie from the circuit or criminal or other inferior courts (mediately or immediately as the General Assembly may prescribe) to the Superior Courts, and thence only to this Court. Judgments heretofore rendered in such courts (within the jurisdiction conferred by the General Assembly) and not appealed from are necessarily valid. Where appeals have been
(657) taken direct from such criminal or circuit courts to this Court, the objection not having been taken, the decision of this Court is valid. As to matters hereafter adjudged in the criminal or circuit courts, the right of appeal given by statute direct to this Court, being unconstitutional, must be disregarded. Where no appeal to the Superior Court from such court is prescribed by statute, if an appeal would otherwise lie, a *certiorari* in lieu of appeal will issue from the Superior Court, as in other cases in which an appeal is not provided for (The Code, sec. 545; *Thompson v. Floyd,* 47 N. C., 313; *State v. Herndon,* 107 N. C., 934; *King v. R. R.,* 112 N. C., 318, and cases cited in Clark's Code, 2 Ed., p. 550), until the Legislature shall amend the statute so as to provide a system of appeals from the criminal, circuit, or other inferior courts to the Superior Court of the county in which any action shall be pending.

The provision in sec. 1, ch. 6, Laws 1897, which confers upon the judge of the Circuit Court of Buncombe, Madison, Haywood, and Henderson counties "concurrent, equal jurisdiction, power, and authority with the judges of the Superior Courts of this State, to be exercised at chambers or elsewhere, in said counties, *in all respects* as judges of the Superior Courts of this State have such power, jurisdiction, and authority," is unconstitutional and void. It is in effect the creation of a Superior Court and judge, by legislative enactment, by the easy process of denominating him a circuit judge, disregarding the constitutional provision which gives to the people the right to elect the judges, solicitors, and clerks of such courts, and which also confers a fixed term of office on them, and requires the judges to rotate with the other Superior Court judges from a wise provision of public policy engrafted in (658) the Constitution. The act is further in derogation of the Constitution in that under the terms of section 27, Article IV, this case having originated before a justice of the peace, an appeal lay from his judgment to the Superior Court, and the appeal would not lie to the Circuit Court "without conflict with other provisions of the Constitution." The plea to the jurisdiction should have been sustained. From the transcript it appears that the appeal from the justice was in fact regularly and properly taken to the Superior Court of Buncombe County, the assumption of jurisdiction thereof by the aforesaid Circuit Court was without warrant of law, and the proceedings therein had were *coram non judice*. The judgment and proceedings in said Circuit Court are adjudged null and void, and the cause is remanded to the Superior Court of Buncombe County that further proceedings may be had according to law.

The number of Superior Court judges in North Carolina in proportion to population and business is much less than in any other State in the Union. In comparison with some of our sister states, we have possibly not a fourth or even a sixth as many in proportion to wealth and population. Probably it is an opinion of the inadequacy of the judicial force which has induced the General Assembly to create Superior Court judges by legislative enactment, to hold at the legislative pleasure by the device of styling them "circuit" judges. This it cannot do. It is within the legislative discretion to relieve the pressure of the Superior Courts either by conferring a portion of the original jurisdiction of the Superior Courts (either exclusively or concurrently with the Superior Courts), upon criminal or circuit or other inferior courts, with the right of appeal, however, to the Superior Courts, or the more direct process of frankly increasing the number of Superior (659)

Court judges (elected by the people, with fixed terms and rotating), according to what it shall deem the needs of the public business demand.

Judgment quashed, and the cause is remanded to the Superior Court.

Remanded.

FURCHES, J., concurring: I concur in the well-considered opinion of the Court delivered by Justice Clark. But as the case involves an important constitutional question, I deem it not improper that I should briefly give expression to some of the reasons I have for concurring in this judgment:

The Superior Courts are creatures of the Constitution. They cannot be abolished by the Legislature. They are permanent institutions. The Constitution provides and requires the State to be divided into judicial districts. These districts may be increased, but when this is done it adds another or other districts by reducing the territory of one or more of the districts as they then existed. The new district then becomes one of the judicial districts provided for by the Constitution. This new district, when created, becomes a Superior Court district—a part of the system of the Superior Courts of the State. It is then entitled to the same rights and subject to the same laws as the other judicial districts.

While the Constitution authorizes the Legislature to increase the number of Superior Court districts, it does not authorize it to change the mode of electing its judge. This must be by the people, and all the judges must be elected under the same system—all must be elected alike.

If a part are elected by the whole State (and this is the law
(660) now), all must be elected by the whole State. It cannot be that all the judges but one shall be elected by the whole State, and that one elected by a single district. If this were so, the result would be that the electors of this *one* district would have two votes each. They would have the same voice in electing the other twelve judges that the voters of the other eleven had, and then they would have the election of one judge that the others had no right to vote for. There must be uniformity. As the law is now, the whole people of the State must elect. If it be changed to the district system, then the whole people of the district must elect.

The Constitution provides that "every judge of the Superior Court shall reside in the district for which *he* is elected." This is a clear-cut inference that there is to be but *one* Superior Court judge for any one district. And if Judge Ewart is a Superior Court judge, as he resides in the district of another judge, this is a violation of the Constitution.

We all understand what is meant by the term "Superior Court judge," because it indicates his duties and powers. But if a judge be clothed with all the powers and duties of the Superior Court judge, he is a Superior Court judge, although he may be called by some other name. Such legislation is an excrescence upon the Superior Court system of the State.

If more courts are needed, it is easy to provide them, in a constitutional way, by creating more judicial districts and more terms in counties that need them.

Cited: Malloy v. Fayetteville, ante, 482; *Tate v. Comrs., post,* 663; *Pate v. R. R., post,* 879; *S. v. Ray, post,* 1098; *S. v. Hinson,* 123 N. C., 756; *Wilson v. Jordan,* 124 N. C., 690; *McCall v. Webb,* 125 N. C., 247; *Mott v. Comrs.,* 126 N. C., 872, 873, 874, 877, 880, 881, 882; *Bank v. Bank,* 127 N. C., 434; *S. v. Shuford* 128 N. C., 591; *In re Gorham,* 129 N. C., 493; *S. v. Lytle,* 138 N. C., 741; *S. v. Baskerville,* 141 N. C., 814, 816; *S. v. Shine,* 149 N. C., 481; *Ferrall v. Ferrall,* 153 N. C., 179; *Oil Co. v. Grocery Co.,* 169 N. C., 523; *Taylor v. Johnson,* 171 N. C., 85; *Hosiery Mills v. R. R.,* 174 N. C., 453.

(661)

STATE EX REL. J. M. TATE v. COMMISSIONERS OF HAYWOOD COUNTY.

(Decided 22 February, 1898.)

Mandamus—Jurisdiction—Superior Court—Circuit Criminal Court—Constitutional Law.

1. Under the statutes of this State the Superior Court alone has jurisdiction of *mandamus* proceedings.

2. While the General Assembly may, under the provisions of section 12, Article IV of the Constitution, give to any circuit court, or any other court it may erect, original jurisdiction either exclusive or concurrent with the Superior Court of all matters, civil as well as criminal, arising in the county or counties for which such court is established, subject to the right of appeal therefrom to the Superior Court created by the Constitution, provided, as to concurrent matters, such inferior court first acquires jurisdiction, yet it cannot emasculate the Superior Courts by transferring the concurrent jurisdiction of cases, which have originated and are pending in them, downwards to the circuit or other inferior courts.

3. Section 2 of chapter 6, Acts of 1897, providing that the judge of criminal Circuit Court for Buncombe, Madison, Henderson, and Haywood counties, in addition to the existing criminal jurisdiction, "shall have also, as to all civil business originating and pending in said counties or either of

them, concurrent, equal jurisdiction, power, and authority with the judges of the Superior Courts, to be exercised at chambers or elsewhere in said counties, in all respects as the judges of the Superior Courts have such power, jurisdiction, and authority," is unconstitutional for the reason that, instead of being an allotment and distribution of a portion of the jurisdiction of the Superior Courts provided for in section 12 of Article IV of the Constitution, it is, *pro tanto*, an abolition of the Superior Courts.

4. The judge of the criminal circuit court of Buncombe, Madison, Henderson, and Haywood counties has no jurisdiction of a proceeding in *mandamus* under section 2, chapter 6, Acts of 1897, although the case was entitled in, and the summons issued from, the Superior Court, but made rturnable before such criminal circuit judge.

MANDAMUS to compel the defendants, the Board of Commissioners of HAYWOOD, to levy a special tax for working the public roads of said county, authorized by ch. 249, Laws 1897, heard before *Ewart, J.*, of the Criminal Circuit Court of Buncombe, Madison, Henderson,
(662) and Haywood counties, at chambers on 24 August, 1897. The summons was entitled to the Superior Court of HAYWOOD and issued by the clerk thereof. His Honor rendered judgment for the plaintiff and the defendants appealed, assigning error as follows:

"That his Honor held (1) That he had jurisdiction of the cause and the subject matter thereof, and (2) That the Commissioners of Haywood County had no discretion and were compelled to levy the tax."

Geo. H. Smathers for plaintiff.
W. T. Crawford and A. C. Avery for defendants.

CLARK, J. This is an action instituted in the Superior Court of Haywood returnable before the judge of the Circuit Court of Buncombe, Madison, Henderson, and Haywood, in which a *mandamus* is asked against the defendant commissioners. Under our statutes, the Superior Court alone has jurisdiction of this cause of action. The plea to the jurisdiction was overruled upon the terms of sec. 2, ch. 6, Laws 1897, which provides that "The judge of said Circuit Court, in addition to the criminal jurisdiction he now has, shall have also as to all civil actions and special proceedings and all civil business originating and pending in said four counties, or either of them, concurrent equal jurisdiction, power and authority with the judges of the Superior Courts of this State, to be exercised at chambers or elsewhere in said counties, in all respects as the judges of the Superior Courts of this State have such power, jurisdiction, and authority." As pointed out in *Rhyne v.*
(663) *Lipscombe, ante,* 650, this is to create a Superior Court judge without the observance of the constitutional provision that such judge shall be elected by the people, for a term of eight years, and shall rotate

with the other judges. This section gives him the same power, jurisdiction, and authority *in all respects* as a judge of the Superior Court, and of all civil business originating and pending in said four counties, of which the Superior Court has jurisdiction, thus transferring to said Circuit Court jurisdiction even of all matters originating or pending in the Superior Courts of said counties. This is not an allotment and division of jurisdiction as contemplated by section 12, Article IV, but is *pro tanto* an abolition of the Superior Courts. The provision in section 10 that the General Assembly may reduce the number of Superior Court districts is to be construed in connection with sections 21 and 23, fixing the terms of the judges and solicitors. It follows that, in the very improbable case of the reduction in the number of districts, it can only be done at the expiration of the terms of those officers whose districts shall be abolished, their terms being guaranteed by the Constitution.

It is competent for the General Assembly to give to said Circuit Court, or any other court it may erect, original jurisdiction, either exclusive or concurrent with the Superior Court, civil as well as criminal, of all matters which may originate in said counties, subject to the right of appeal therefrom to the Superior Courts created by the Constitution, and provided, as to concurrent matters, the Circuit Court first acquires jurisdiction, but it cannot transfer the concurrent jurisdiction of cases which have originated and are pending in the Superior Courts *downwards* to the Circuit or other inferior courts. The intent expressed in section 12, Article IV (which is an amendment to the Constitu- (664) tion), is not to abolish the Superior Courts, but to authorize inferior courts thereto, with such jurisdiction as the General Assembly may think proper to relieve, to that extent, the pressure upon the Superior Courts, just as the former courts of common pleas and quarter sessions had original jurisdiction of matters below the Superior Court and to some extent concurrent jurisdiction of certain matters with the Superior Courts, but appeals lay from said courts of common pleas and quarter sessions always to the Superior Courts. While the General Assembly could, therefore, confer upon the Circuit Court such original jurisdiction, civil as well as criminal, as it thought proper, either exclusive or concurrent with the Superior Court (subject always to the right of appeal to the Superior Court) that is not the purport and intent of this act.

The General Assembly, with this view of the meaning of the Constitution, may and probably would establish intermediate criminal courts, but it would hardly (though it has power to do so) confer on said courts jurisdiction of the graver offenses as to which appeals would lie, and almost always would be taken, to the Superior Courts, with great in-

crease, instead of a decrease of expense, and for the same reason the civil jurisdiction vested in such courts would probably be very limited, but that apportionment, however, is vested in the discretion of the General Assembly. It is true that in this case the summons, though entitled in the Superior Court, is made returnable before the judge of the Circuit Court, but the very section under which he claims jurisdiction is unconstitutional by substituting him fully and in all respects in the place and stead of the Superior Court. The Court cannot eliminate the unconstitutional provision, which is its very warp and woof,
(665) and reform the section. This can only be done by the General Assembly.

Those who drafted and promoted this act were inadvertent to the position the Superior Court has always occupied in our judicial system, and which it retains under our present Constitution—a position which is in no wise impaired by the constitutional amendment (Article IV, section 12), which empowers the General Assembly to allot and distribute a portion of its powers (exclusively or concurrently) to inferior courts, but without displacing the Superior Court from its legal and historical importance and superiority recognized by so many other provisions in the Constitution. Even as a Superior Court judge, which the act substantially makes him, the act (section 4) is of questionable validity in singling him out and authorizing him to order extra terms, since the Constitution, Art. IV, sec. 12, contemplates a system of regulating the methods of exercising the powers of the courts, under which, as to all other Superior Courts, extra terms are ordered by the Governor.

The Circuit Court never having acquired jurisdiction,

Action dismissed.

Cited: Malloy v. Fayetteville, ante, 482; *Pate v. R. R., post,* 879; *S. v. Hinson,* 123 N. C., 756; *Mott v. Comrs.,* 126 N. C., 876, 877, 881; *S. v. Lytle,* 138 N. C., 741; *S. v. Shine,* 149 N. C., 481.

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(666)

T. M. ANDREWS v. G. T. JONES ET AL.

(Decided 3 May, 1898.)

Trial—Cross-Examination—Unofficial Map.

It was error in the trial of an action to refuse the defendant permission to cross-examine the plaintiff's witness by an unofficial map, not made by an order in the case, which defendant claimed to be a correct diagram of

the *locus in quo*, the map not being offered as substantive evidence but for the purpose of illustrating the evidence of the witness by making his meaning clearer or testing his statements.

ACTION tried before *Timberlake, J.*, and a jury, at July Special Term, 1897, of BUNCOMBE. There was a verdict for the plaintiff and from judgment thereon the defendant appealed.

Tucker & Murphy for defendants.
No counsel contra.

CLARK, J. The defendant offered to cross-examine the plaintiff's witness by a map which the defendant claimed was a diagram of the *locus in quo*. The court declined to permit the defendant's counsel to cross-examine the witness about the map for any purpose, but stated that the party making the map could use it to explain his testimony, if desired. In this there was error. The map was not offered as substantive evidence. It was, as the court ruled, competent for a witness to explain his testimony by an unofficial map, not made by an order in the cause. *Dobson v. Whisenhunt,* 101 N. C., 645; *Burwell v. Sneed,* 104 N. C., 118; *Hampton v. R. R.,* 120 N. C., 534. And if so, an unofficial map was equally competent for the purpose of illustrating the evidence of the witness on cross-examination by making his meaning clearer or testing his statements. It would certainly be as serviceable to cross-examine him by it, as to his different statements, as if it had (667) been introduced by the plaintiff and he had been examined in chief upon it. In neither case would it have been substantive evidence, but only to illustrate his evidence, and a part of it. *Biddle v. Germanton,* 117 N. C., 387. In this view, it would be equally competent to so use the map either in chief or on cross-examination. This is not the case of a paper sought to be introduced as substantive evidence, as a deed or a letter, which the defendant cannot (if objection is made) prove upon cross-examination of plaintiff's witnesses. *Olive v. Olive,* 95 N. C., 485. In *S. v. Whiteacre,* 98 N. C., 753, the Court says: "It is of frequent practice, when necessary to explain evidence and enable the jury to comprehend it fully, to illustrate the position of parties, places, etc., by diagrams, and no notice is required; in fact, they are frequently made by witnesses themselves in the progress of the examination." If the unofficial map had been used to illustrate evidence, whether in the direct examination or on cross-examination, its only value would be as a part of the testimony of the witnesses examined or cross-examined upon it, and as an aid in explaining their testimony. It would have no substantive value of its own, like a survey made by an order in the cause which is presumed to be correct, subject to evidence to the contrary. *Justice v. Luther,* 94 N. C., 793.

In refusing to permit the cross-examination to be illustrated by examination upon a diagram, which the witness might have stated to be correct or incorrect, and thus have checked off his other evidence and made its value perhaps clearer to the jury, there was

Error.

Cited: *Turner v. Comrs.*, 127 N. C., 155; *Weeks v. McPhail,* 128 N. C., 134; *Person v. Roberts,* 159 N. C., 174.

(668)

BATTERY PARK BANK ET AL. v. J. H. LOUGHRAN ET AL.

(Decided 3 May, 1898.)

Action on Note for Purchase Price of Land—Sale of Land—Bond for Title—Power of Sale—Conditions in Note—Liability of Vendee for Purchase Money—Vendor, Ability of to Make Good Title—Statute of Limitations—Pleading.

1. The statute of limitations must be pleaded if a party wishes to rely upon that defense.
2. Where a vendee of land executed notes for the purchase price which recited that they were secured by bond of even date therewith and accepted from the vendor a bond to make title to the vendee upon payment of the notes, such bond containing a power of sale in case the notes should not be paid at their maturity: *Held*, that the vendee was bound by the power though he did not sign the bond.
3. Where a vendor sells land to a vendee and gives bond to make title upon the payment of the purchase money notes, and stipulates in the bond that he shall have power to sell the land upon nonpayment of the notes, he can, after selling the land and applying the proceeds to the credit of the notes, sue for the deficiency, provided that he had a good title to the land when he sold under the power.
4. Where notes for the purchase money of land stipulated that, upon nonpayment of the interest, all the notes should become due, and contemporaneously with said notes the vendor executed and delivered a bond to make title upon the payment of the notes, and reserved to himself the power to make sale of the land upon nonpayment of the notes: *Held*, that the execution of the bond and notes being a part of the same transaction, all the notes became due on the default in payment of interest, and the power to sell land accrued to the vendor.
5. It is not necessary that one who contracts to sell land shall have a good title at the time of the contract, it being sufficient if he perfects his title before he is called upon for the conveyance or before he calls upon the purchaser for the purchase money.

6. In an action for the balance due on notes given for the purchase of land which the vendor had sold under a power authorizing him to sell upon the nonpayment of the notes, the defendant alleged as a defense that the plaintiff did not have title at the date of the contract or at any time thereafter: *Held*, that an issue should have been submitted as to whether the plaintiff could have made the defendant a good and indefeasible title to the land on the day of the sale under the power.

7. The allegation of defective title is a matter of defense and not a counterclaim, and the burden is on the party alleging it.

ACTION tried before *Timberlake, J.*, and a jury, at July, Special (669) Term, 1897, of BUNCOMBE. There was a verdict for the defendant and from the judgment thereon the plaintiff appealed. The facts appear in the opinion.

T. H. Cobb for plaintiff.
W. W. Jones for defendant.

FURCHES, J. On 7 July, 1890, the plaintiff Bostic bargained and sold to the defendant Loughran (and two other persons, not parties to this action) three lots of land in or near the city of Asheville. The purchaser executed to the plaintiff Bostic the six promissory notes mentioned in the complaint and the plaintiff Bostic executed a bond, in the sum of $1,000, conditioned to make the purchasers a title to said land upon the payment of the notes. This bond contains a power of sale authorizing Bostic, upon the non-payment of the notes at maturity, to sell the land mentioned therein, and to apply the proceeds of sale, or a sufficient amount thereof, to pay off and satisfy said notes; and this bond was signed, sealed, and delivered to the defendant by Bostic, and soon thereafter admitted to probate and registered. Each of the notes state that they are secured by a bond on real estate, of even date with said note; and they further state that it is understood and agreed that, if the interest on said notes, which is to be due and paid semi-annually, shall not be promptly paid upon its falling due, then and in that event (670) the whole indebtedness shall become due. Three of these notes are to become due two years after date, and the other three are to become due three years from date.

No part of said notes having been paid, except what the land brought when sold under the power in the bond, the plaintiff Bostic brought suit on said notes in a justice's court, where he recovered judgments, from which the defendant appealed to the Superior Court, where these suits were consolidated, and the case continued until December Term, 1895, when a nonsuit was taken; the plaintiff bank and the plaintiff Merrimon, trustee, having before this become parties plaintiff with Bostic.

The plaintiff Bostic, being indebted to the plaintiff bank, on the ... day of September, 1892, assigned said judgments to said bank as collateral security; and on 27 February he made a general assignment to the plaintiff J. G. Merrimon, trustee, for the benefit of his creditors, in which he again assigned these judgments, subject to the rights of the plaintiff bank. On 14 February, 1896, the plaintiff Bostic, the bank, and Merrimon, trustee, commenced this action. To this action the defendant answers, admitting the purchase of the property, the execution of the notes, and their non-payment, and the execution of the bond for title by the plaintiff Bostic. But he alleges that the plaintiff Bostic did not have the title to said lands at the time he made said contract, or at any time thereafter. And defendant further alleges that, if he ever had title to said lands, since the date of said contract, the plaintiff Bostic had sold and conveyed the same to another party, and that he is now unable to make defendant a title, and should not be allowed unjustly to collect these notes out of defendant. And defendant also pleads the lapse of time and the bar of the statute of limi-
(671) tations.

It is not claimed that plaintiff's action was barred at the commencement of the actions before the justice of the peace, and the record shows, and it is not denied, that this action was commenced within less than one year's time from the date of the judgment of nonsuit. Plaintiffs contend that these facts being shown, and not denied, their cause of action is not barred. Code, sec. 166. And this applies to the new parties (the Bank and Merrimon) as well as to Bostic. *Martin v. Young,* 85 N. C., 156; *Whetstine v. Wilson,* 104 N. C., 385.

Indeed, it seems that the statute of limitations was not pleaded to the three notes last falling due, and this being so, the defendant could have no benefit on account of the lapse of time, as the statute of limitations must be pleaded if the defendant wants the benefit of this defense. *Albertson v. Terry,* 109 N. C., 8.

The general rule, undoubtedly, is as contended by defendant, that the plaintiff must be able to make a good title to land contracted to be conveyed before he will be allowed to collect the purchase money. This was admitted by plaintiff. But it is not necessary that plaintiff shall have such title at the date of the contract of sale. This may be perfected after that time and before he is called upon to make title, or before he calls upon the purchaser for the purchase money. And it seems that he may do this even at the time of trial. *Clanton v. Burgess,* 17 N. C., 13; *Crawley v. Timberlake,* 37 N. C., 460; *Love v. Camp,* 41 N. C., 209; *Hughes v. McNider,* 90 N. C., 248.

But this general rule that plaintiff must have title and be able to convey such to the defendant at the commencement of the action, or

at the time of trial, does not apply in this case, if the plaintiff (672) Bostic had a good title at and before the time of the sale and conveyance complained of by defendant.

The plaintiff Bostic admits that he has sold and conveyed the land named in the bond, and for which the notes in suit were given, to another person. But he alleges that he had a good title to said land; that he so informed the defendant and demanded payment; that defendant neglected and refused to pay, and that he advertised and sold the land under the power contained in the bond for title, and applied the purchase money on the notes of defendant given for the land and now sued on.

The plaintiff had introduced the six notes in evidence, and the defendant for the purpose of making out his defense that the notes were given as the price of land that the plaintiff Bostic had since sold and conveyed, introduced the bond. But he contended that the plaintiff could not avail himself of the condition and power of sale contained in the bond, for the reason that he had not replied to his answer, and also, for the reason that it was a covenant or power contained in the bond of plaintiff Bostic; that defendant had not signed the bond and was not bound by it, and that it conferred no power on Bostic from him to sell said land.

This case is one of first impression, so far as we are informed by our Reports of adjudged cases, of a power of sale to the grantor in a bond for title. And whether it is a practice that ought to be encouraged is not for us to say, but it is our duty to put a construction on the transaction. The bond and notes sued on were all executed at one time, the notes referring to the bond as a security for their payment. . They form a part of the same transaction, and are to be considered together. This may aid us to some extent in arriving at a proper construc- (673) tion. *Howell v. Howell,* 29 N. C., 491; *Moring v. Dickerson,* 85 N. C., 466; *Arthur v. Beckwith,* 13 Am. St., 334. But while the defendant did not sign the bond, he accepted it from the plaintiff Bostic, and offered it in evidence as a part of his defense in showing that Bostic had sold the land for which the notes were given. This being so, he was bound to accept its burdens as well as its benefits. *Maynard v. Moore,* 76 N. C., 158; *Long v. Swindell,* 77 N. C., 176. And if the power contained in the bond authorized Bostic to sell, the defendant is bound by it.

Where a party sells land and gives bond for title when the purchase money is paid, the vendor retains the legal estate in the land while the vendee has an equitable estate in the same. In such case, either party has the right to compel a specific performance of the contract. The parties sustain substantially the same relation to each other as that of mortgagor and mortgagee—the vendor sustaining the relation of mortgagee, and the vendee that of mortgagor. *Ellis v. Hussey,* 66 N. C., 501;

Green v. Wilbar, 72 N. C., 592; *Allen v. Taylor,* 96 N. C., 37. This being so, we see no reason why the same principle that would govern in like cases, between mortgagee and mortgagor, should not govern in this case. And Bostic occupies the position of mortgagee of these lands, as security for the payment of the six notes, with a power to sell from the defendant; the notes not being paid, and Bostic as mortgagee selling under the power and applying the money on the debt as directed in the power; the money arising from the sale not being sufficient to pay the debt secured; can it be contended that the mortgagor, the defend-
(674) ant in this case, would not be liable to a personal judgment for the balance of the debt? We can see no reason why he is not. So, while this case upon the facts stated seems to be new, it is susceptible of solution upon well established principles of law.

The plaintiff Bostic being authorized and empowered by the defendant to sell upon the failure to pay, the defendant is estopped and can take no benefit of the fact that Bostic has disabled himself from making a title to the defendant by this sale. But as the plaintiff Bostic was bound to make the defendant a good title, had he paid for the land, he must have been in a condition to have done so at the time of the sale under the power in the contract. The power of sale did not relieve him from this burden. It will not do to say that he has satisfied his part of the contract by selling a defective title, for which he realized but a pittance and in that way throws the burden of a defective title on the defendant. Therefore, the issue should have been, Was the plaintiff Bostic able to make the defendant a good and indefeasible title to said land on the day he sold the same under the power contained in the bond for title?

The allegation of the defective title is matter of defense and not a counterclaim (Code, sec. 268), and the burden is on the defendant. *Fitzgerald v. Shelton,* 95 N. C., 519; *Hughes v. McNider,* 90 N. C., 248.

The execution of the bond and the six notes all being a part of the same transaction, upon the failure to pay the interest when it fell due all the notes became due according to the stipulations therein contained. *Marling v. Bronson,* 56 N. W., 205.

There were other matters discussed, but the view we take of the matter makes it unnecessary for us to consider them, and we have not
(675) done so. There is error.

New trial.

Cited: S. c., 126 N. C., 815; *King v. Powell,* 127 N. C., 11; *Herring v. Lumber Co.,* 163 N. C., 485.

DOUBLEDAY & LANIER v. THE ASHEVILLE ICE AND COAL COMPANY.

(Decided 3 May, 1898.)

Action for Damages for Breach of Contract—Contract, Construction of —Parol Evidence.

1. Where the whole of a contract is in writing and unambiguous, verbal testimony cannot be allowed to contradict or explain it, and its construction is for the court; but where the contract is partly written and partly verbal and there is room for dispute, parol evidence is admissible, and it is proper for the court to leave to the jury the question of fact as to what the agreement was.
2. A contract to store grapes in defendant's cold-storage room grew out of conversations and correspondence. When the contract was made and the grapes were stored the room was dry and in proper condition, but they were subsequently spoiled by moisture caused by leakage or condensation. Nothing appeared in the correspondence to show whose duty it was to put the room in good condition. *Held*, that the conversations were admissible on that question.

ACTION tried before *Norwood, J.*, and a jury, at August Term, 1897, of BUNCOMBE. The plaintiffs claimed to have been endamaged to the extent of $658 by the negligence of the defendant in not keeping in proper condition a cold-storage room in which plaintiffs stored grapes for hire. There was a verdict for the plaintiffs for $225, and from the judgment thereon the defendant appealed, assigning as error the admission of parol testimony to explain a contract entered into by letter correspondence.

W. W. Jones and Walter B. Gwyn for plaintiff. (676)
Merrimon & Merrimon for defendant.

FAIRCLOTH, C. J. The plaintiffs contracted to store grapes with the defendant company, and it contracted to furnish them with cold storage room for the grapes at an agreed price. They also agreed on the temperature of the room. The grapes were stored and were damaged by leakage from above where the refrigerator and ice were kept, or by condensation produced by the admission of warm air through the door. It seems to be agreed, or at least fully shown, that the room was in good and proper condition when the grapes were deposited. The parties, however, warmly contested the question, Whose duty was it to keep the room in good condition according to the agreement? There was some conversation between the plaintiffs and one of the defendants on the subject, and thereafter several letters passed between the same parties on the subject. The defendant contends that the correspondence contains the whole of the contract, and that the verbal conversation forms no part of it and

was incompetent, because the contract was in writing, and that it was the duty of the court to construe the correspondence and charge the jury accordingly. The plaintiffs insist that the whole evidence was properly submitted to the jury and that it was their province to find out the contract. The court adopted the plaintiff's contention and the defendant excepted. There were numerous prayers for instruction, and exceptions, based on the view of the parties as to the main question above stated.

There is nothing expressly said in the letters as to the duty of
(677) keeping the room dry and in suitable condition for storage purposes. The evidence to show the substance of the verbal conversation, admitted by the court, was conflicting. The plaintiffs testified that they asked Collins (one of the defendants) if he had any suitable place for storing grapes and keeping them until late in the season, and he replied that his company had suitable room, that it was dry, and, after referring to the right temperature, he said it was not necessary to go and see the room, that the room was all right. Plaintiffs said they did not see the room until after the grapes were spoiled. Collins denied this, and several witnesses on each side testified about the matter. In the first letter in evidence by the plaintiffs, 29 June, 1895, he calls attention, by saying: "Have you forgotten about the cold storage I spoke to you about last Saturday?" to which the defendant replied, 1 July, "I had not forgotten about our conversation; . . . let us hear from you as early as you decide what you will do."

There is question of fraud, mistake, or misrepresentation in this case and the jury were so instructed.

It is well settled that where the whole of a contract is in writing and unambiguous, verbal testimony to contradict or explain it is inadmissible. It is then a question of construction for the court, but where the controversy turns upon the meaning of parties to a verbal agreement, or where it is part verbal and part written and there is room for dispute, or if the instrument is ambiguous, parol evidence is admissible, and it is proper for the court to leave to the jury the question of fact, what was the agreement of the parties in relation to such matter. *Islay v. Stewart,* 20 N. C., 160; *Cumming v. Barber,* 99 N. C., 332.

The verbal evidence and the correspondence constituted the evidence
from which the jury's duty was to find the truth of the contention
(678) in this respect. We do not think that the charge of the judge was subject to the criticism that if the jury believed one witness that they should find for the plaintiffs. The charge seems full, explicit, and impartial. As the other prayers and exceptions hinged mainly upon the disposition of the main questions, we see no need to consider them separately. They were in many respects put out of the case by the verdict of the jury.

No error.

CARRIE SIMS, BY HER NEXT FRIEND, v. ROBERT LINDSAY ET AL.

(Decided 3 May, 1898.)

Action for Damages—Master and Servant—Defective Machinery—Negligence—Contributory Negligence—Question for Jury—Sufficiency of Evidence—Trial.

1. The burden of proof on an issue as to contributory negligence rests upon the defendant, and while the court can hold that a party upon whom rests the burden of proof has failed to offer any evidence to sustain it, it cannot adjudge that he has proved his case, for where there is any evidence the jury alone can pass upon its truth.
2. Where, in the trial of an action for damages for an injury sustained by the plaintiff, an operator in a laundry, by reason of a defective machine at which she worked, the plaintiff testified that she thought the machine was more dangerous than a former one she had used, but that nobody had explained the machine to her and she did not know a guard was necessary, and that she had to put her fingers close up to the rollers to get the linen in: *Held*, that such evidence did not necessarily prove the plaintiff to be guilty of contributory negligence.
3. An operative, by not declining to work at a machine lacking some of the safeguards which she has seen on other similar machines, does not thereby waive all claims for damages from the defective machine, unless it be so plainly defective that the employee must be deemed to know of the extra risk.

ACTION for damages for an injury caused the plaintiff by the (679) alleged negligence of defendants and the unsafe and defective condition of a "mangle," at which plaintiff was employed to work, tried before *Timberlake, J.*, and a jury, at July, Special Term, 1897, of BUNCOMBE.

A. S. Barnard for plaintiff. (681)
H. B. Stevens for defendants.

CLARK, J. The plaintiff, who sues by her next friend, was a girl 13 years of age at the time of the injury, whose hand was mashed in the rollers of a mangle in a steam laundry, necessitating the amputation of the fingers of the hand. It was in evidence that the defendant had admitted that the accident was caused by the guard having been taken off, and that he knew it was off that morning when the girl went to work.

At the close of the evidence the defendant demurred under Laws 1897, ch. 109, "on the ground that the plaintiff's testimony showed she had been guilty of contributory negligence in working at the machine for five days, with knowledge of the absence of the guard and of the dangerous condition of the machinery." The court sustained the demurrer, and in this there was error.

The burden of contributory negligence was on the defendant, and while the court can hold that a party, on whom rests the burden of proof, has failed to offer evidence to sustain it, it cannot adjudge that he has proved his case, for when there is evidence the jury alone can pass upon its truth. *Ice Mfg. Co. v. R. R., post,* 881, and several other cases at this term.

(682) Besides, the girl's evidence did not prove her guilty of contributory negligence. She said she thought this machine was more dangerous than a former one she had worked at which had a guard, but that nobody had explained the machine to her, and she did not know that the guard was necessary, nor that this machine ever had a guard, and that she had to put her fingers close up to the rollers to get the linen in. It is not to be held as a matter of law that operatives must decline to work at machines which may be lacking in some of the improvements or safeguards they have seen upon other machines, under penalty of losing all claim for damages from defective machinery. It is the employer, not the employee, who should be fixed with knowledge of defective appliances and held liable for injuries resulting from their use. It is only where a machine is so grossly or clearly defective that the employee must know of the extra risk that he can be deemed to have voluntarily and knowingly assumed the risk. Where the line is to be drawn must depend largely upon the circumstances of each case, but they must be such as to show that the employee had full knowledge of the unusual risk and deliberately assumed it. Such a state of facts was not conclusively shown by the plaintiff's evidence in this case. If such inference could be drawn from it, it was in the province of the jury, not of the court, to draw it.

New trial.

Cited: Lloyd v. Hanes, 126 N. C., 362; *Ausley v. Tobacco Co.,* 130 N. C., 40, 41; *Kiser v. Barytes Co.,* 131 N. C., 614; *Hicks v. Mfg. Co.,* 138 N. C., 327; *Marks v. Cotton Mills, ibid.,* 405; *Pressley v. Yarn Co., ibid.,* 414, 435; *Sibbert v. Cotton Mills,* 145 N. C., 312; *Helms v. Waste Co.,* 151 N. C., 372; *Walters v. Sash Co.,* 154 N. C., 326; *Rogers v. Mfg. Co.,* 157 N. C., 486; *Pigford v. R. R.,* 160 N. C., 97; *Wright v. Thompson,* 171 N. C., 93; *Howard v. Wright,* 173 N. C., 342.

(683)

C. A. WEBB, ADMINISTRATOR OF NATT ATKINSON, v. HARRIET N. ATKINSON.

(Decided 3 May, 1898.)

Action by Administrator to Set Aside Fraudulent Conveyance of Property by Intestate—Appeal — Practice — Nonsuit — Administrator — Fraudulent Conveyance—Husband and Wife—Burden of Proof.

1. Where the defendant files an answer and the court, upon reading the pleadings and before the trial of the case, decides that the plaintiff cannot maintain his action, and the plaintiff takes a nonsuit and appeals, the case will be treated as coming up on demurrer.

2. A creditor cannot sell property, real or personal of a deceased debtor, but must proceed through the administrator who is a necessary party to any proceeding for or against the estate, and, in any proceeding relating to the real estate, the heirs are also necessary parties.

3. Where the assets of a decedent in the hands of his administrator are insufficient to pay the debts, the administrator can maintain an action on equitable grounds, in behalf of the intestate's creditors, against the widow and children of his intestate, to recover money and other property conveyed to them without consideration by the intestate, while he was insolvent, in fraud of his creditors.

4. In an action by an administrator, on behalf of the creditors of the estate, against the widow and children of the intestate, to recover property alleged to have been conveyed to them by the intestate while he was insolvent, and without consideration, the burden of proving the transactions to have been fair and for a full consideration is upon the grantees.

ACTION heard before *Norwood, J.*, at August Term, 1897, of BUNCOMBE. The nature of the action and contentions of the parties are stated in the opinion. Upon hearing the pleadings and argument of counsel, his Honor expressed the opinion that the plaintiff could not maintain his action, and thereupon the plaintiff submitted to a nonsuit and appealed.

J. C. Martin and Moore & Moore for plaintiff. (684)
Merrimon & Merrimon for defendants.

FURCHES, J. The plaintiff Webb is the administrator of Natt Atkinson, and the defendants are the widow and heirs at law of Natt Atkinson. The plaintiff alleges that his intestate's estate is indebted to the amount of $30,000 or more; that a part of said indebtedness had been reduced to judgment in the lifetime of his intestate; that his intestate was insolvent at the time of his death, and that his estate is insolvent.

The plaintiff then alleges that his intestate, being so insolvent and while so insolvent, conveyed a valuable interest he owned in a large body of land, lying in Swain County, to two of his sons, herein made defendants, without consideration, upon a secret trust for his benefit and with the intent to hinder, delay, and defraud his creditors; that this was done with the knowledge, consent, and connivance of these two defendants; that not long after this one of these defendants conveyed to the other, and this one, not long after this transaction between him and his brother, sold and conveyed this Swain County land for a large price, realizing therefrom some $15,000 more than discharged all encumbrances thereon; that this was all a part of the plan and scheme of his intestate to defraud his creditors, and for the benefit of his said intestate, who received the money, the proceeds of sale—$15,000 or more.

That his intestate had bought another tract of land, lying in Buncombe County from one Graham at the price of $4,000, and caused the title therefor to be made to his wife, the defendant Harriet Atkinson; that his intestate and the said Harriet Atkinson mortgaged this land to one Cartwell for money to pay said Graham for said land; that his
(685) intestate took a part of the money he got from the Swain County land and paid off and satisfied the Cartwell debt and mortgage; that this land so bought by his intestate from Graham was conveyed to defendant Harriet by the direction of the said Natt Atkinson, as a part of the scheme, and for the purpose of delaying and defrauding the creditors of said Natt Atkinson; that the residue or the greater part of the residue of the money the said Natt received as the price of the Swain County land, he delivered to his wife, the defendant Harriet, not long before his death, and she has invested several thousand dollars of this money in real estate in and near the city of Asheville, which is described in the plaintiff's complaint, as is the Graham land; and that the defendant Harriet still has and retains the rest and residue of the money received from the Swain County land, not so expended; that these debts, so owing by the intestate at the time of these transactions, which were intended to be delayed and hindered in their collection and their owners defrauded thereby, still exist and are owing by the intestate's estate.

The plaintiff asks for subrogation, and that defendant Harriet be declared a trustee of the Graham land and the other land bought by the intestate and the title made to the defendant Harriet, and also of the real estate bought by the defendant Harriet and paid for out of the money belonging to his intestate's estate since his death, for the benefit of the creditors and for the payment of the debts of his intestate's estate.

Defendants answer and deny all the material allegations of fraud on the part of said Natt Atkinson or any of the defendants, and deny the plaintiff's right to recover.

Upon the case being reached for trial and being discussed by counsel, the court held that plaintiff could not recover, when plaintiff submitted to a judgment of nonsuit and appealed to this court. (686)

It is not stated upon what ground the Court rested its judgment of nonsuit. The defendants did not demur, by which we might see what grounds were assigned by the defendants. Indeed, the defendants answered fully, denying all the material allegations of the complaint. Nor is there any statement of the case on appeal, and defendants complain of this. But it is stated in the record that the complaint, answer and judgment are to constitute the case on appeal. So we see no ground of complaint on that account, if any case on appeal was necessary.

But, as a nonsuit was taken upon the suggestion that the plaintiff could not recover, we must take it that in the opinion of the court the complaint did not state a cause of action, as the court had no right at that stage to consider anything else, and was bound to treat the statements of the complaint as true.

While we must consider that the learned judge treated the case as on demurrer, and we must so treat it, it will be observed that the learned counsel who represented the defendants filed no demurrer, but answered in full.

Taking the facts in the complaint to be true, as we are bound to do in this appeal, we are clearly of the opinion that the plaintiff has made a case entitling him to judgment, as prayed. While it was not conceded on the argument, we do not think it was seriously disputed by defendants but what the complaint contained a cause of action, if it had been brought as a creditor's bill by creditors of the intestate's estate. But it was contended that The Code, sec. 1436 (Laws 1846), did not apply, and *Wiley v. Wiley,* 61 N. C., 131, was cited as authority; and that secs. 1446 and 1447 did not apply, and *Heck v. Williams,* 79 N. C., 437, was cited in support of defendants' contention. While it is (687) probable that these statutes would not of themselves sustain plaintiff's action, it does not entirely depend upon either of these sections, and the cases cited are easily distinguishable from this case. *Wiley v. Wiley* was where there had been sufficient personal property to pay the debts without resorting to real estate. That is not the case here. That case was brought in the county court—a court of law—before the joinder of jurisdictions. And as there had been sufficient personal property to pay the debts of the testator, which had been lost during the administration, the plaintiff's only remedy, if he had one, was in the court of equity. *Heck v. Williams* was where the administrator undertook to sell lands for assets that had been sold by his intestate, without alleging fraud, and of course he failed.

But plaintiff's right to bring and maintain this action rests on higher grounds than the statutes contained in the sections referred to. It is equitable in its nature, and will be maintained on principles of equitable jurisprudence.

If the allegations in the complaint are true, and we are to treat them as true, the plaintiff's intestate has not only attempted to perpetrate a fraud on his creditors, but the defendants are now holding and enjoying the benefits of this fraud, by withholding funds and property from the intestate's creditors that they are justly entitled to. This will not be allowed in a court of equity, and the plaintiff's action must be sustained, unless there is some technical reason why the *plaintiff* should not have brought the suit.

Under our law, since the Code, a creditor cannot sell property, real or personal of a deceased debtor. His estate must be administered by his personal representative. He represents the estate, and so far as (688) reducing the same to assets is concerned he represents the creditors. It is his duty to reduce the estate to assets to pay debts, and if he will not the creditors may compel him to do so. He is a necessary party to all proceedings against the estate, or for the estate, and the heirs are necessary parties to any proceeding to subject any landed interest of the intestate to the payment of debts. These are all parties in this action.

Plaintiff does not claim to follow the lands in Swain County, probably sold for a fair price and to innocent purchasers, but to follow the fund and the property purchased with the money arising from this sale. If the allegations of the complaint are true, and we are so to consider them, the law creates the defendant H. N. Atkinson a trustee of the Graham lands, and the other lands bought with this money arising from the sale of the Swain County lands and conveyed to her. And it would seem that sections 1446 and 1447 might apply. But as we have said, plaintiff's action rests on the higher grounds of equity, and equity jurisprudence. If the allegations of the complaint are true, and the intestate were living, he could have this trust declared unless prevented by the allegation of fraud on the part of defendants. But equity will not allow any suggestion of that kind to defeat the rights of creditors.

The plaintiff alleges in his complaint that this action is brought for the benefit of the creditors of the intestate Atkinson to obtain assets to pay his debts. That under the policy of our law of administration, since the act of 1869, it is in effect almost a creditor's bill in the administration of assets by the personal representative. And we see no reason and find no statute to prevent the plaintiff from maintaining this (689) action. An insolvent man may have such transactions as those

set forth in plaintiff's complaint, with his wife and children, if they are fair, and for a full consideration. But the burden of showing this will be upon them.

There is error and the judgment of nonsuit will be set aside, and the case restored to the docket for trial.

Error.

Cited: S. c., 124 N. C., 448.

T. S. MORRISON & CO. v. R. W. CHAMBERS ET AL.

(Decided 11 May, 1898.)

Action on Note—Vendor and Vendee—Notes—Bond for Title—Assignment.

1. The hypothecation of notes given by the purchaser of land, for the conveyance of title to which the owner has given a bond, does not pass the legal title to the land.
2. The purchaser of a bond for title to land does not thereby become liable for the payment of the notes given for the purchase price.

ACTION tried at July Special Term, 1887, of BUNCOMBE, before *Timberlake, J.* When the case was called for trial and after the jury had been empaneled his Honor, on motion of the plaintiff, rendered judgment on the pleadings and defendants appealed. The facts are stated in the opinion.

W. W. Jones for defendants.
No counsel contra.

DOUGLAS, J. This is an action brought upon a promissory note, the defendants pleading merger and counterclaim. The defendants sold to one Fox (a co-defendant in this action but who has made (690) no defense) a certain piece of land, giving to Fox a bond for title and taking his three notes amounting in the aggregate to the sum of $625, in full payment therefor. Subsequently the defendant Chambers (hereinafter called the defendant) executed to the plaintiffs his promissory note in the sum of $240, to secure the payment of which he endorsed and deposited the three notes of Fox. Some time thereafter Fox assigned to the plaintiffs his entire interest under the bond for title. After this transfer, the plaintiffs brought this suit and asked for judgment on

their note, that it be declared a lien upon the land covered by the bond for title, and that the said land be sold and the proceeds thereof applied to the payment of their debt. The defendant resists a recovery on the ground that the purchase by the plaintiffs of Fox's interest in the bond for title not only vested in them all of Fox's rights thereunder, but also devolved upon them all his liabilities. In other words, the plaintiffs are said to stand in Fox's shoes, and are therefore primarily liable for the payment of the three notes given by Fox to the defendant, and by him hypothecated to the plaintiffs. Upon this theory, while the defendant would owe the note for $240 sued on, the plaintiffs would owe him the difference between that note and the $625 due on the three notes of Fox, with the corresponding difference in interest. For this the defendant, demanded judgment as on counterclaim. Judgment was rendered for the plaintiffs and the defendant appealed.

We see no error in the judgment. The defendant contends that where a bond for title is given to secure the conveyance of the land upon the payment of the purchase money, the relations of vendor and vendee are similar to those of mortgagor and mortgagee. This is true, but (691) it does not help the defendant. The legal title remained in him after the title bond was given, and still remains in him. His further contention that the *legal* title was conveyed to the plaintiffs *pro tanto* by the hypothecation of the notes for the purchase money, cannot be sustained on any authority. The assignment to the plaintiffs of the bond for title simply vested in them the right to demand a conveyance of the land upon the payment of the purchase money. To that extent they had an equitable interest in the land, but they could not be considered the beneficial owners thereof until such payment. There is no allegation that the plaintiffs expressly assumed the payment of the purchase money, and there is no legal implication to that effect. The vendee may assign his bond for title as security for another debt, just as he could execute a second mortgage if he had originally held the legal title. Because a vendee mortgages his land to the vendor to secure the purchase money, or any other debt, and subsequently executes a second mortgage to a third party, the second mortgagee cannot be held liable to the vendor. There is no privity of contract between them. It is true that the first mortgage must be satisfied before any subsequent encumbrance; but a junior mortgagee can sell subject to the prior lien; that is, he can sell the mortgagor's equity of redemption, or he can abandon his own lien. If the first mortgagee sell and the proceeds are not sufficient to pay the debt, he can obtain judgment for the surplus only against the makers or endorsers of the note. This Court has repeatedly held that, "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; *Bobbitt v. Stan-* (692) *ton,* 120 N. C., 253, at page 256. It follows that, after the appropriation has been exhausted, the debtor alone can be pursued. The jurgment is

Affirmed.

SOUTHERN COMMISSION COMPANY v. PORTER.

(Decided 11 May, 1898.)

Partnership—Assignment—Fraudulent Conveyance—Exemptions.

1. An assignment by a surviving partner of an insolvent firm for an indefinite term, the assignee to have the right to employ servants and to replenish the stock, and out of the proceeds to pay firm debts and also the individual debts of the survivor, *pro rata,* is fraudulent as against creditors.
2. A surviving partner, who assigns partnership property of an insolvent firm to pay his own debts *pro rata* with those of the firm, cannot be allowed to testify that he did not thereby intend to defraud the firm creditors.
3. Where a transaction bears such evidences of fraud that it might be properly inferred, it is error to refuse to submit the question to the jury.
4. A surviving partner of an insolvent firm is not entitled to have his personal property exemptions paid out of the partnership assets.
5. Where an assignment was made by a surviving partner of an insolvent firm, and the assignee was empowered to continue the business for an indefinite term, a receiver might be appointed to administer the partnership fund though the deed was not set aside.

ACTION tried before *Timberlake, J.,* and a jury at Special (July) Term, 1897, of BUNCOMBE. The purpose of the action was to have a deed of assignment made by H. C. Davidson, as surviving (693) partner of Davidson & Sherrill, to William Y. Porter, set aside and declared null and void for the reasons hereinafter stated.

George A. Shuford and Thomas & Wells for plaintiffs (ap- (697) *pellants).*

Davidson & Jones for defendants.

FURCHES, J. The defendant, Davidson, and one Sherrill were partners doing business as merchants at Swannanoa, in Buncombe County. The partnership became utterly insolvent. Sherrill died and the defendant Davidson made an assignment of all the partnership effects to the defendant Porter. This assignment was made on 16 October, 1896, in which it is provided that Porter shall, at once, take possession of the goods and partnership effects; that he have the right to employ clerks

and servants, and to buy and replenish the stock of goods, and out of the proceeds to pay the debts of the firm, and also the *individual debts of the defendant Davidson, pro rata* with the firm debts, and no time is fixed when this trust is to be closed.

If this does not amount to fraud in law, upon which it was the duty of the court to so declare and to so instruct the jury, it is so near the line that it is difficult to mark the division. But we see that this assignment is almost a copy of the assignment considered by this Court in *Stoneburner v. Jeffreys,* 116 N. C., 78, except the provision that the *individual* debts of the survivor are to be paid *pro rata* out of the partnership funds, with the partnership debts. This provision does not seem to have been in *Stoneburner v. Jeffreys.* But for this case, we might have been disposed to hold that there were such evidences of fraud—the right to hire clerks and servants, to buy goods and pay for them out of partnership effects, for an indefinite period of time—
(698) that it was a case where the court should hold and declare it fraudulent and void.

There was other evidence of fraud besides those already noticed and contained in *Stoneburner v. Jeffries, supra.* The assignment requires the assignee, Porter, to pay out of the assets of the firm the individual debts of Davidson, as well as those of the firm. This was a fraud on the creditors of the firm. *Strauss v. Frederick,* 91 N. C., 121. And it has been held that the putting one fraudulent claim in the deed of assignment spoiled the whole, and the assignment would be declared void. *Stone v. Marshall,* 52 N. C., 300. This rigid rule has since been relaxed, where it is done without the knowledge and consent of the assignee. *Morris v. Pearson,* 79 N. C., 253. But it has been held since *Morris v. Pearson* that in case of a general assignment (which this seems to be), a *fraudulent intent* on the part of the assignor, whether known to the assignee or not, is such a fraud as will vitiate the deed of assignment. *Woodruff v. Bowles,* 104 N. C., 197. But, of course, the assignee, Porter, knew that the individual debts of Davidson were in this deed of assignment. Davidson testified that he did not intend to commit a fraud upon the creditors of the firm; but he was incompetent to prove this fact. *Booth v. Carstarphen* 107 N. C., 395; *Cowan v. Phillips,* 119 N. C., 26.

If the case was such that the court could not, as a matter of law, declare the fraud, there were so many badges of fraud that this issue should have been left to the jury with proper instructions, as fraud might very well have been found by them when it could not be declared by the court. *Hinshaw v. R. R.,* 118 N. C., 1047; *Mfg. Co. v. R. R., post,* 881.

The court was asked to submit this issue to the jury, but declined to do so, and instructed the jury to find that there was no fraud.
(699) In this there was error.

It was also held by the court that the defendant Davidson was entitled to have his personal property exemption paid him by the assignee out of the partnership assets. In this there was error. *Boyd v. Redd,* 118 N. C., 680.

There are no liens attached to this property that we can see, and it seems to us to be a proper case for the court to appoint a receiver to take charge of this partnership fund and to administer the same among the creditors, whether the deed is set aside or not.

It cannot be allowed to run on indefinitely. After the *individual* creditors of Davidson are eliminated and his claim for the $500 exemption declared illegal, the distribution under the trust would be substantially the same as if the assignment were set aside and the fund administered under the equitable jurisdiction of the court.

Error.

BINGHAM SCHOOL v. P. L. GRAY ET AL.

(Decided 17 May, 1898.)

Injunction—Family or Surnames—Trade Name—Good Will—Incorporation—School.

1. As a rule a trademark cannot be taken in a surname, and any one having the same surname as that under which a business has been long and successfully conducted by another, so as to acquire a reputation therefor, can conduct a like business under the same name, provided there be no intent to injure or fraudulently attract the benefit of the good name and reputation previously acquired by the other.

2. It is beyond the scope of the powers of the General Assembly to establish a monopoly in a family name or to confer a patent right in its use.

3. William Bingham established a school in 1793, which was conducted by him during his life and after his death by successive generations of his lineal descendants, of the same name, under the name of "Bingham School." In the year 1861, while the school was being conducted by two brothers, William and Robert, the latter withdrew for the purpose of entering the Confederate States Volunteer Service. In 1864 the General Assembly incorporated "William Bingham and his associates" under the name of "Bingham School," and, under an agreement with certain associates, William reserved to himself the name and reputation of the school. Robert B. resumed connection with the school in 1865, and in 1879 got control of the school and conducted it under the same name until 1891 when he removed it to Asheville from the *situs* owned by the widow and children of William, where it had been conducted since 1865. William died in 1873, leaving his property to his widow for life with remainder to his children. In 1895, within thirty years from the ratification of the

incorporating act of 1864, the General Assembly incorporated "Robert Bingham and his associates" under the name of "Bingham School," which is the plaintiff herein. The defendant Gray, in right of his wife (a daughter of William Bingham), and of the widow and a son of William, is conducting a school at the old site under the name of "The William Bingham School," and the plaintiff seeks to enjoin defendants from using that name with the legend, "Established in 1793," and from carrying into effect their contemplated purpose of using the name, "The Bingham School." *Held:*

(1) That the defendants have the right not only to use the name, "The William Bingham School," but also if they desire the name "Bingham School," together with the statement, "Established in 1793."

(2) That the incorporating act of 1895 did not have the effect of creating a trademark of the Bingham name and of confining the exclusive right to use it in connection with school purposes upon that corporation.

(3) Nor is it a prohibition upon all others named Bingham, whether of that family or of any other of the same name, against using the name in connection with any school they might establish.

(701) ACTION heard on complaint, answer, and affidavits before *Hoke, J.*, at chambers in Asheville during March Term, 1898, of BUNCOMBE, on a motion to dissolve restraining order theretofore issued was granted.

(704) *Merrimon & Merrimon, John W. Graham, and R. W. Bingham for plaintiff (appellant).*

R. T. Gray, R. O. Burton, and F. S. Blair for defendants.

CLARK, J. The court below found as facts: That Rev. Wm. Bingham established a classical school at Wilmington, N. C., in 1793, which he subsequently removed to Chatham County and thence to Orange County, N. C., where said school was conducted by him up to his death in 1825; it was then continued by his oldest son, Wm. J. Bingham, till 1857, when he associated with him his two sons, William Bing-
(705) ham and Robert Bingham, till 1861, when the latter entered the Confederate army and shared its fortunes until the end came in 1865. In 1864 William J. Bingham, on account of ill health, gave up teaching and his son, William Bingham, procured the school to be incorporated by the Legislature as the "Bingham School." "William Bingham and those who may be associated with him" being named as the incorporators in said charter; in the articles of agreement made between William Bingham and William B. Lynch and Stuart White, whom he "associated with him," under the above charter provision, it is stipulated "nothing herein contained shall prejudice the original and ultimate right of property in the name of said school pertaining to William Bingham as the representative of the name and reputation of the school." In 1865 Stuart

White retired from the school, selling out his interest to William Bingham, and Robert Bingham assumed his place as teacher and member of the corporation; the school was removed to Mebane, N. C., and conducted by the two Binghams and Lynch till 1872, when William Bingham withdrew from the actual participation in the school work and died in 1873; in 1879 Lynch sold out to Robert Bingham, who conducted the school under his sole management, the widow of William Bingham conducting the boarding department, till 1891, when Robert Bingham removed the school to Asheville, N. C., and has conducted it there till the present time; the charter expiring, Robert Bingham had the school again incorporated by act of the Legislature in 1895; on the death of William J. Bingham in 1866 he left his school property to his two sons, and on the death of William Bingham, in 1873, he left all his property to his widow for life and after her death to his children; Robert (706) Bingham qualified as executor under the will of his brother, William Bingham, and settled up the estate, but did not account to the estate or the legatees thereof for any interest they might have in the good will or name of the "Bingham School"; the defendants are the widow and children of William Bingham and are conducting a school at Mebane, N. C., on the site of the old school and under the style of the "William Bingham School," and in their catalogues and advertisements claim that the school was organized in 1793, and they assert that the school is one of the rightful successors of the name and reputation of the school founded and conducted by the Binghams since 1793, and maintain that they have the right to style themselves the "Bingham School," should they so desire.

Upon the above facts the court below properly adjudged that "neither the plaintiff corporation nor Robert Bingham is the sole and exclusive owner of the name and reputation of the school organized by William Bingham in 1793 and conducted by that family continually till 1864; that defendants, acting under the authority of the widow and children of William Bingham, deceased, have a rightful share in the name and reputation of said school and are of right entitled to use the name of William Bingham School of Orange County, N. C., and to claim that their school is one of the successors of the school established in 1793," and dissolved the restraining order which had been previously granted at the instance of the plaintiff.

As the defendants are the widow and children of William Bingham (or those acting under their authority), who are conducting the school on the old site at Mebane, we see no ground upon which the plaintiff can ask that they be prohibited from styling the school, if they wish, the "Bingham School," and most certainly no reason why (707)

the plaintiff should enjoin their using the present style of the "William Bingham School," to which the plaintiff can lay no claim and which is sufficiently distinctive from the plaintiff's title.

That the plaintiff is incorparted as the "Bingham School" does not give it the exclusive right to that name; another corporation might be created by and operated under the same title, when not in the same locality, in the absence of proof of an intent to injure the first named corporation or to avail itself fraudulently of the other's good name and reputation. Where there was a Fulton National Bank in New York and a Fulton National Bank was subsequently opened in Brooklyn, the former could not enjoin the latter. *Farmers L. & T. Co. v. Farmers L. & T. Co.,* 1 N. Y. Supp., 47.

As a rule, a trade-mark cannot be taken in a surname, and any one named Bingham could start a school called the "Bingham School," in the absence of proof of intent to injure or fraudulently attract the benefit of the good name and reputation acquired by a previously existing "Bingham School" (*Brown Chemical Co. v. Meyer,* 139 U. S., 540; 2 Beach Inj., sec. 762), and certainly there could be no confusion between a Bingham School at Asheville and a school even of identically the same name at Mebane, N. C. *Investor Pub. Co. v. Robinson,* 82 Fed., 56.

But in truth the doctrine of "trade mark" can have no application except reasoning by analogy, which is often deceptive. This is a case of the right to "good will." The corporation running the school recognized in 1864 that the "good will" was the individual property of one incorporator, William Bingham. Being a corporation and not a part-
(708) nership, that good will did not pass to the other corporators. The doctrine as to the passing of good will to the remaining partners, on the retirement of one, has no application, as in *Menendez v. Holt,* 128 U. S., 514. On the expiration of the corporation in 1894, this good will was still the property of the widow of William Bingham, to whom all his property went by his will. She could use it by putting it in a new corporation, or by joining in a school without incorporating it. In like manner, in a well known instance of the Blackwell Mfg. Co., the right to the "brand" was the individual property of one of the stockholders. All the realty and buildings used in connection with the Bingham School from its removal to Mebane in 1864, down to the removal of Robert Bingham to Asheville in 1891, were the property of William Bingham till his death and then to his widow and children except about eight acres sold to Robert Bingham by them in 1875, with a covenant in the deed that the land so conveyed should be used solely to erect thereon a residence for himself and academic buildings (the latter to be used by the Bingham School at a reasonable rent), and for no other purposes,

with provision that the grantors should have the refusal should Robert Bingham at any time desire to sell said realty.

The right of Robert Bingham to operate a "Bingham School" is because of his bearing the name, and also because of an act incorporating the school by that name. He has no title to the good will of the former Bingham School, and his claim that the school at Asheville is the sole successor of the Bingham School established in 1793 cannot be sustained. His claim that his school is one of the successors thereof will not be restrained because the defendants have not asked it, and perhaps, even if asked, the courts would not enjoin it, as the (709) damage is intangible, since it could not be shown that its use at that distant locality has perceptibly damaged the "good will" of the school at Mebane, which passed to the defendants. The incorporation of the "Bingham School" at Asheville, N. C., has only the usual effect of a charter, *i. e.*, to confer the corporate rights of perpetual succession, suing and being sued, exemption from personal liability of stockholders and the like. It did not have the effect of creating a trade mark of the Bingham name and of conferring the exclusive right to use it, in connection with school purposes, upon that corporation nor is it a prohibition upon all others named Bingham, whether of that family or of any other of the same name, using it in connection with any school they might establish. Such an idea was foreign to the legislative mind, and it is beyond the scope of the powers of the State Legislature to establish a monopoly in a family name or to confer a patent right in its use.

As to the right to claim to be a successor of the school "established in 1793" it belongs to the defendants, to say the least, fully as much as to the plaintiff. Up to 1864 there had been unbroken succession in the school taught by the Binghams and, in that year, the sole right as successor appears by the agreement among those then teaching to have devolved upon William Bingham, the husband of one of the defendants and father of the other defendants, Robert Bingham having left the school in 1861. This right exclusively in William Bingham in 1864 was recognized by Robert Bingham entering the corporation subject to that agreement; it was not sold by him as executor of William Bingham and is not shown to have passed by sale or otherwise in William Bingham's life to Robert Bingham. The incorporation of 1895, as we have seen, conferred and could confer, no such right (710) of transfer. That act was purely for incorporation—nothing more. If, since 1865, Robert Bingham has continuously taught in the school and since 1872 as its head, he has the benefit of that, but that does not make him the sole heir to the name and reputation acquired from 1793 to 1872. There was a break in his own connection with the school from 1861 to 1865, and there was a decided break in the con-

tinuity of the school by the removal of it to a distant point in 1891, and he fails to show any acquisition by him of the exclusive right held by William Bingham from 1864 to his death. This presumedly went to the widow of William Bingham under his will. The break in the operation of the Bingham School at Mebane, after 1891, was not a forfeiture of the right to revive the school there as a successor of the school founded by the same family in 1793—still less did it transfer the exclusive right to use the name of "Bingham School" upon Robert Bingham (or the corporation) operating a school at Asheville.

There can be a generous rivalry between the two schools, respectively at Asheville and at Mebane, to show, by superior teaching, which is a successor in the truest sense to the celebrated "Bingham" school which has been so long an honor and a service to our State. There is room for good service by both. Neither can restrain the other in the use of the name (2 High Inj., sec 1070), and each may also claim a nominal successorship to the school originally founded in 1793.

No error.

Cited: Tobacco Co. v. Tobacco Co., 144 N. C., 369; *S. c.,* 145 N. C., 375; *Zagier v. Zagier,* 167 N. C., 617.

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(711)

CHARLES A. MOORE v. W. O. WOLFE AND JULIA E. WOLFE, HIS WIFE.

(Decided 11 May, 1898.)

Action on Contract—Feme Covert—Liability of Married Woman on Contract—Plea of Coverture—Jurisdiction of Appeal from Court of Justice of the Peace.

1. The general rule being that a married woman cannot make a contract binding upon her, it is the duty of a plaintiff seeking to enforce a liability under an exception to such general rule to establish the exception.
2. Where there are no written pleadings in a justice's court the summons constitutes the complaint, and if a summons issues from a justice's court against "W. and J., his wife," for a demand due by contract, her coverture sufficiently appears "from the pleadings."
3. A *feme covert* sued on contract should be allowed to plead her coverture.
4. The Superior Court acquires no jurisdiction on appeal from a justice's court of an action on the contract of a *feme covert* which, being enforceable only in equity, could not be maintained in the justice's court.
5. Where a *feme covert* is entitled to the defense of coverture in an action against her, it may be made by the court *ex mero motu.*

6. Where the record shows that the defendant is a *feme covert* the trial should proceed, whether the plea of coverture is interposed or not, and if the proof brings the case within the exceptions to the general rule as to the liability of married women on contracts, the plaintiff should have judgment.

CLARK, J., dissents, *arguendo.*

ACTION, commenced before a justice of the peace and tried before *Timberlake, J.,* and a jury, at July Special Term, 1897, of BUNCOMBE. The facts appear in the opinion. Judgment was rendered for the plaintiff against W. O. Wolfe but refused as to the *feme* defendant, and plaintiff appealed.

Fred Moore and Shepherd & Busbee for plaintiff.
No counsel contra.

FURCHES, J. This action was commenced before a justice of (712) the peace to recover a sum less than $200, alleged to be due the plaintiff for services as an attorney.

The summons was in favor of the plaintiff, and the command therein to the officer was "To summons W. O. Wolfe and *wife,* Julia E. Wolfe, to appear," etc. Defendants denied owing plaintiff anything and pleads counterclaim and set off.

Plaintiff recovered judgment, and defendants appealed to the Superior Court. In that court Julia E. Wolfe asked to be allowed to plead her coverture, but was not allowed to do so. The *feme* defendant then asked the Court to charge the jury that plaintiff could not recover against her, and this prayer was given. Verdict and judgment for plaintiff against W. O. Wolfe, the husband, but verdict and judgment for the *feme* defendant Julia E. Wolfe, and plaintiff appealed.

The error assigned is the instruction to the jury that they could not find a verdict against the *feme* defendant.

Where there are no written pleadings in a justice's court, the summons constitutes the complaint (*Allen v. Jackson,* 86 N. C., 321), and there seems to have been no written pleadings in this case. The summons is "To answer the complaint of the above-named plaintiff for the non-payment of the sum of $200 . . . due by *contract* and demanded by said plaintiff." If plaintiff had recovered against the *feme* defendant, his judgment would have been a personal judgment founded on her *contract* and promise to pay the plaintiff. The general rule is that a married woman cannot make a contract binding upon her. Code, section 1826. It is true that there are exceptions to this general rule, in which she can; but as they are exceptions to this (713)

general rule, the party claiming the benefit of the exception must establish the exception. This was not done here, and it brings the case down to a matter of pleading.

If the *feme* defendant had plead her coverture before the magistrate or had been allowed to do so in the Superior Court, there would be no question as to the correctness of the judgment, and this appeal would not be here.

In *Green v. Ballard,* 116 N. C., 144, it is held that whenever it appears from the pleadings that the defendant is a *feme covert,* no personal judgment can be rendered against her. This opinion seems to be sustained by *Pippen v. Wesson,* 74 N. C., 437, and other cases. *Dougherty v. Sprinkle,* 88 N. C., 300, holds that no personal judgment can be given against a *feme covert* upon her contract; that she has no power to contract, and any contract she may attempt to make is not voidable, but is absolutely void; that where she has separate estate, she may make this liable to the payment of debts. But this is done upon equitable grounds and upon equitable principles, and not upon the obligation of her contract, which in law is void. The case of *Dougherty v. Sprinkle* commenced before a justice of the peace, as this did, in a court that had no equitable jurisdiction; the plaintiff could not recover. This case of *Dougherty v. Sprinkle* is in harmony with the well-considered opinion in *Pippen v. Wesson, supra,* and the authorities there cited, that the *feme* must not only pledge her separate property, but that it must also appear that it was for her *benefit* or the benefit of her estate. And it would seem that as she is not bound by the *legal* obligation of her contract, and that it must be enforced in equity and upon equitable
(714) principles, if enforced at all, it must be *for her benefit,* as it would be inequitable to take her property for the benefit of some one else. Indeed, it would seem difficult to see how this could be done in equity, leaving out of view her personal obligation. It cannot be done upon the ground of fraud, as it can be no fraud for a married woman not to do what the law says she shall not do. This protection of the law was thrown around her for the purpose of protecting her property from liability for the benefit of others. But the doctrine of *Pippen v. Wesson, Dougherty v. Sprinkle,* and that line of cases seems to have been abandoned in *Flaum v. Wallace,* 103 N. C., 296, which has since been regarded and followed as the law. And it may be that it has become too much involved in the business transactions of the State to be reversed now even if it should be considered incorrect upon principle. This doctrine has nothing to do with the enforcement of executed contracts, and only applies to executory contracts.

It appears in the summons in this case, which must be taken as the complaint, that the defendant Julia E. Wolfe was a *feme covert,* and no

personal judgment could be rendered against her under *Green v. Ballard, supra.* The action having been commenced before a justice of the peace, and it appearing that the defendant Julia is a *feme covert,* the justice had no jurisdiction as to her; and the case coming to the Superior Court by appeal from the justice's court, the Superior Court had no jurisdiction the justice did not have. And no judgment could be rendered against the *feme* defendant. *Dougherty v. Sprinkle, supra.*

It appearing to the Court by the summons, which is the complaint in this case, that the defendant Julia was a *feme covert,* she might make this defense by answer or by demurrer, written or *ore* (715) *tenus,* or the Court might make it for her *ex mero motu.* The defendant's asking to be allowed to amend her answer by inserting this defense and then asking the Court to charge the jury that they could not find a verdict against her, was in effect a demurrer *ore tenus.* And the judge's charge that they could not find a verdict against her, whether considered as given *ex mero motu* or in answer to the prayer of the defendant, was correct. *Baker v. Garris,* 108 N. C., 218.

While the judgment of the Court in *Green v. Ballard, supra,* is correct and is based upon the general principle governing cases against married women, it may be, that the unrestricted language used in the opinion is not entirely accurate. And while the general rule is, as laid down in that opinion, that a personal judgment cannot be given against a *feme covert,* there are exceptions to this general rule, as will be found in secs. 1826, 1828, 1831, 1832 and 1836 of The Code, in which *femes covert* may bind themselves by contract upon which personal judgments may be had. So, it is not entirely accurate to say that, where it appears of record that the defendant is a *feme covert,* no personal judgment can be had against her.

But the rule should be that, where it appears from the record that the defendant is a *feme covert,* the trial should be proceeded with as if this defense was pleaded, whether it is actually pleaded or not; and if the plaintiff brings his case within the exceptions, or, in other words, if he show that he is entitled to judgment notwithstanding the coverture of the defendant, then he should have judgment, otherwise he should not.

We see no error, and the judgment appealed from is

Affirmed.

CLARK, J., dissenting. The Code, section 178, provides that a (716) married woman can sue and be sued. This contemplates that a valid judgment can be rendered against her. The Code, section 424(4), provides that judgment may be given against a married woman "in the same manner as against other persons." The Code, section 443, provides

that an execution can issue against a married woman and be levied upon her individual property. This, of course, could not be done unless a valid judgment against her could be obtained. The Constitution, Art. X, sec. 6, provides that the property of a married woman "shall be and remain the sole and separate estate and property of such female." This gives point to the above provisions allowing her to be sued and judgment to be rendered against her as "against other persons" and that execution shall issue against her property.

Pippen v. Wesson, 74 N. C., 437, recognized that the contract of a married woman was binding on her if it was made for her benefit. In the present case the plaintiff testifies that "he was employed by both the defendants to attend to certain legal business for the *feme* defendant; that in pursuance of such employment he did so; that the business transacted in consequence of said employment was for the benefit of the separate estate of the *feme* defendant and that the fees charged for his services were reasonable and just." The *feme* defendant did not plead her coverture before the justice and was refused permission to
(717) plead it on appeal. The Court, however, charged that in no aspect of the evidence could a verdict be rendered against *feme* defendant.

This was, in substance, holding that, since it appeared from the summons that the *feme* defendant was a married woman (her husband being a co-defendant as required), the law from that fact itself rendered her exempt from judgment, even for services rendered for the benefit of her estate and at the request of her husband and herself. If so, why is it expressly provided that she can be sued, that judgment can go against her and that execution can issue against her property? There is not a shred of a statute to sustain such "privilege of sanctuary." That judgments can be rendered against married women and are as binding as against any one *sui juris* has been the ruling of this Court as well as the express letter of the statute law. *Green v. Branton,* 16 N. C., 504; *Vick v. Pope,* 81 N. C., 22; *Grantham v. Kennedy,* 91 N. C., 148; *Neville v. Pope,* 95 N. C., 346. The services rendered the married woman here were as much a "necessary" as that for which the wife was held liable to judgment in *Bazemore v. Mountain,* 121 N. C., 59, and the participation of the husband with the wife in the contract and that it was for the benefit of her estate was shown. The written consent is not required when he is present participating and acting as agent for his wife, for he could not give a written power of attorney to himself.

In practice it will be found to work a serious hardship upon married women if they cannot be held liable for services rendered or money loaned for the benefit of themselves or their separate estate, unless a special charge or privy examination is shown. No statute requires this,

and no decision prior to *Flaum v. Wallace* intimated it. The Code, sec. 1826, requires nothing in any case beyond the "written consent of the husband." As no vested right can accrue under the arti- (718) ficial rule invalidating contracts for the benefit of married women, which has grown up under the last-named decision, it is the better plan to return at once to the plain statute as the law-making power has written it.

Cited: Weathers v. Borders, 124 N. C., 615; *Windley v. Swain,* 150 N. C., 360.

C. H. MILLER ET AL. v. J. M. ALEXANDER.

(Decided 17 May, 1898.)

Private Act of General Assembly—Judicial Powers—Constitutional Law—Invalid Statute.

1. The propriety of ordering sales of lands upon petition of the owners is purely a judicial duty.
2. A private act of the General Assembly (chapter 152, Acts of 1897), in order to "disentangle and unfetter the title" to certain lands which had been devised to "G. for life, remainder to her surviving children and those representing the interest of any that may die leaving children," and which lands this Court had decided (90 N. C., 625) could not be sold until the death of the life-tenant, enacted that the lands should be sold by a commissioner named in the act and the proceeds invested for the purposes of the will: *Held*, that such enactment was void, being an attempted exercise of judicial power by the Legislature and an infringement upon section 8, Article I of the Constitution, which provides that "the legislative, executive, and judicial powers of the Government ought to be forever separate and distinct from each other."

ACTION to enforce the specific performance of a contract for the purchase of land, heard before *Norwood, J.,* at August Term, 1897, of BUNCOMBE, on an agreed statement of facts which sufficiently appear in the opinion. His Honor rendered judgment for the plaintiff, and defendant appealed.

W. R. Whitson for plaintiff.
No counsel for defendant.

FAIRCLOTH, C. J. James M. Smith devised lands to his (719) daughter Elizabeth A., wife of J. H. Gudger, "to her sole and separate use and benefit for and during her natural life, with remainder

to such children as she may leave her surviving and those representing the interest of any that may die leaving children." The plaintiffs are the remaindermen—consisting of the offspring of Gudger's marriage and some others who are minors. These parties filed a petition to sell said land for partition about 1883, and on appeal this Court held that the lands could not be sold during the time of the life estate, as that was the earliest time when those in remainder could be ascertained. *Miller ex parte,* 90 N. C., 625. By Pr. Laws 1897, ch. 152, on petition of plaintiffs, in order "to disentangle and unfetter the condition of the title" the Legislature designated C. H. Miller a commissioner of
(720) the Assembly and authorized him to survey and divide said lands into lots according to his judgment and to sell the same with the approval of the adult petitioners, and make title to the purchaser in conjunction with those of full age. It was also directed that he hold the proceeds as a trust fund to be reinvested as fast as is expedient for the purposes intended by the will. The act requires that Miller report his sale to the clerk, and the only thing the clerk is required to do is to demand a bond from the commissioner to secure the purchase money. The sales made by Miller are not required to be approved by the clerk, the Court or the Legislature. He proceeds on his own judgment.

The real question presented in the case is this: Is the act constitutional? Art. I, sec. 8, is in these words: "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other." In petitions for a judicial sale of lands the Court hears the allegations and requires proof, and passes upon the sufficiency of the proof and determines upon such proof and the surrounding circumstances the propriety of ordering the sale. This is manifestly a judicial duty. The Legislature in the case before us assumed to pass upon and determine these questions on an *ex parte* application, and authorizes a sale upon a state of facts which this Court had held could not be done because of the contingency as to who would be the owners when the life estate determined. In this way the Legislature undertook to exercise judicial power, and in doing so crossed the line between the legislative and judicial branches marked out by the Constitution. In *Robinson v. Barfield,* 6 N. C., 391, a deed was acknowledged by a *feme covert* and ordered to be registered, there being no private examination. An act of Assembly subsequently passed de-
(721) clared that such deeds not executed according to law "shall be held, deemed and taken to be firm and effectual in law." The Court held that the act was *unconstitutional* and in violation of Art. I, sec. 8. *Hoke v. Henderson,* 14 N. C., 1. We hold this, except as to titles acquired subsequent to the validating statute. *Barrett v. Barrett,* 120 N. C., 127.

It has been suggested that a general act of this kind—*i. e.*, not for a special case, would present a stronger case for the petitioners. We express no opinion on that view at present. *Henderson v. Dowd,* 116 N. C., 795, has no bearing on this question.

Reversed.

Cited: Wilson v. Jordan, 124 N. C., 709; *Greene v. Owen,* 125 N. C., 215.

W. W. JONES v. H. E. RHEA.

(Decided 24 May, 1898.)

Action on Note—Contract—Defense—Partial Failure of Consideration—Parol Evidence of Contemporaneous Agreement.

1. Where a contract is not required to be in writing, if the *entire* contract is not reduced to writing, the omitted part may be proved by parol (although no fraud or mistake be alleged), not for the purpose of contradicting or explaining the written part, but to enable the jury to ascertain the entire and true agreement of the parties.

2. In the trial of an action on a note expressed to have been given for legal services rendered by the payee, the maker may show by parol evidence that the agreement was that the payee should attend to all her business in connection with the administration of an estate, and that a large amount of work remained to be done which he refused to do.

ACTION, tried before *Norwood, J.,* and a jury, at August Term, (722) 1897, of BUNCOMBE. The facts appear in the opinion. There was judgment for the plaintiff, and the defendant appealed.

Adams & Carter and Jones & Boykin for plaintiff.
W. J. Peele for defendant.

FAIRCLOTH, C. J. Plaintiff sues to recover the amount due on three promissory notes of defendant. The notes read as follows:

"Twelve months after date, with interest from date, at the rate of 8 per cent per annum, I promise to pay W. W. Jones, or order, the sum of six hundred dollars for services rendered me as attorney in the settlement of the estate of H. K. Rhea, deceased. Witness my hand and seal this 13 November, 1893. H. E. RHEA. [SEAL]."

The defendant admits the execution of these notes, and avers that she gave the notes "with the understanding and agreement that he would

attend to all her business in connection with and growing out of the administration of the estate of H. K. Rhea, deceased, until the administration of the estate was completely wound up; that the estate has not been wound up, that there is a large amount of work yet to be done, and that the plaintiff has withdrawn from her case and refuses any longer to be her counsel and attorney." She also pleads partial failure of consideration, non-performance of agreement by plaintiff and payment for all services rendered.

(723) On the trial the defendant offered to show by parol that part of the agreement was not expressed in the notes, and to support all of her averments by parol. Her offer was not allowed, and objections to her evidence were sustained. Judgment for plaintiff, and appeal by defendant.

The plaintiff contends that the notes, being a higher grade of evidence, are the only competent evidence of the contract. The defendant insists that the notes express only a part of the contract, and that parol evidence is admissible to show the entire contemporaneous agreement. The competency of this evidence is the question presented.

A hasty reference to the decisions on this subject sometimes leads to the conclusion that they are irreconsilable. There may be some conflicts, but a careful application of the correct principles of law will dissipate most of the seeming contradictions. The distinction must be kept in mind in each case. One of those principles is that where the entire contract is in writing, the writing cannot be contradicted by parol, because the latter is a lower grade of evidence, by reason of the fact that the fallibility of human memory weakens the effect of such testimony. Another principle is that where the entire contract is not reduced to writing, evidence of the omitted and contemporaneous part is competent, although not omitted by mistake or fraud, not for the purpose of contradicting or explaining that which is in writing, but for the purpose of enabling the jury to ascertain the entire and true agreement of the parties. The writing stands and the parol proof supplies the omission, and thus the intent of the parties is made manifest.

Another principle is that a total failure of consideration may be given in evidence to defeat the action on a note, but it is otherwise where there is only a partial failure. *Washburn v. Picot,* 14 N. C., 390; *Johnston v. Smith,* 86 N. C., 498.

(724) These principles, we assume, will not be disputed by any lawyer who has a rag of his gown on his back, but the trouble arises in their application to the facts in each case. We must assume the averments of the defendant to be true, for the reason that she offered to prove them and was not allowed to do so, and that is her exception.

In *Daughtry v. Boothe,* 49 N. C., 87, a slave was hired out publicly, and one of the terms of hiring was that the slave was not to be carried out of that county. A note for the hire was executed, reciting the other terms, but omitted the stipulation above mentioned. It was shown that the slave was carried into the swamps of another county, and it was alleged that thereby the health of the slave was greatly impaired. An action was instituted for breach of the hiring contract, and defendant put the note in evidence as the contract. Plaintiff offered parol evidence of the omitted stipulation as a part of the contract. The evidence was admitted, and this Court affirmed the ruling.

In *Johnston v. McRary,* 50 N. C., 369, the terms of a contract, for the sale and purchase of a cotton crop, were all reduced to writing and signed by the buyer, except as to the time of delivery. It was held competent to prove by parol that at the time the written contract was entered into, a day was fixed for the delivery of the cotton. These decisions have been repeatedly approved by this Court. Womack's Digest, 4404, 2083. These cases support the defendant's contention in the present case.

To avoid the appearance of overlooking the plaintiff's authorities, we will examine them:

Moffit v. Maness, 102 N. C., 457—This was to foreclose a mort- (725) gage without any note secured, except as recited in the mortgage. The opinion is a general expression of law, citing a list of cases on divers questions. Referring to the facts and conclusion of the Court, the case seems to decide that a written contract cannot be contradicted by parol proof, which is admitted. The case was peculiar. No note was produced, and the mortgage contained a positive *promise* to pay a *definite* sum. The answer denied the execution of the bond and mortgage, and set up no equitable defense whatever, and the Court said: "We must, therefore, determine the question in its *legal aspects alone.*"

In *Manning v. Jones,* 44 N. C., 368, the Court said the evidence "added no new covenant, nor did it contradict or explain any one that was contained in it" (the deed).

In *Sherrill v. Hagan,* 92 N. C., 345, *Ashe, J.,* said in reference to *Manning's case, supra:* "It was held that the proof was admissible, the deed being an execution of one part of the agreement, the other having been left in parol. So that the proof offered was not to add to, alter or explain the deed." There was no suggestion of fraud or mistake. The defendant on the trial offered to prove that it was agreed that the mortgage should cover whatever should be found to be due upon a settlement. The Superior Court excluded the evidence, and this Court "modified and affirmed the judgment."

Taylor v. Hunt, 118 N. C., 168—This is like *Moffit v. Maness, supra,* in which the Court says: "While it is true that where a contract is not required to be in writing, if the *entire* contract is not reduced to writing, the other part may be proved by parol. *Nissen v. Mining Co.,* 104 N. C., 309."

(726) *Meekins v. Newberry,* 101 N. C., 17—This was an action for damages resulting from breach of contract. Plaintiff put in evidence a receipt, reciting various things agreed to. Defendant offered to show some unwritten part. This Court held the evidence incompetent on the ground that the paperwriting "purports by its terms and the nature of the things agreed to be done to embrace the *whole* agreement of the parties. It implies completeness."

Harris v. Murphy, 119 N. C., 34—This was an action for work and labor done, and the defendant resisted parol evidence and put in a receipt for part payment, which receipt recited the contract. Plaintiff replied that some time *after* the written contract these parties verbally agreed to modify the said agreement and make some changes in the work, and agreed on the price of certain work, resulting from the change, and offered evidence of the modified and *subsequent* agreement. This Court held the evidence competent.

These cases relied on by the plaintiff do not conflict with the principle announced in *Daughtry v. Boothe, supra,* but recognize and are consistent with it.

In an action for specific performance of a contract under seal, parol evidence is admissible to defeat the demand for equitable relief, because a court of equity may grant or withhold such relief in cases where it seems just. *Herren v. Rich,* 95 N. C., 500. Under our present system, the defense may be had in different ways, that is, by counterclaim, by an independent action for the breach of the agreement, or by plea in the nature of recoupment, as in the present case.

As the exclusion of the defendant's evidence was erroneous, she is entitled to a

New trial.

Cited: Audit Co. v. Taylor, 152 N. C., 274; *Palmer v. Lowder,* 167 N. C., 333.

(727)

NANNIE J. ALEXANDER ET AL., HEIRS AT LAW OF A. M. ALEXANDER, DECEASED, EX PARTE.

(Decided 24 May, 1898.)

Judicial Sale of Land—Purchaser of—Notice of Occupant's Equity—Easement.

1. The fact that a railroad was in actual operation over a tract of land at the time of a judicial sale of the land was sufficient notice to the purchaser of the occupant's equity or easement, and made it his duty to inquire for information.

2. On the hearing of a motion on a notice to show cause why judgment should not be rendered against the purchaser of land at a judicial sale for the balance of the purchase money, to which the respondents had answered that a railroad ran through the land and claimed to own 100 feet on either side of its main track, which greatly reduced, as was alleged, the value of the land, was not error to refuse to submit an issue as to the title of the railroad company when there was no evidence of any title except the grant of a privilege to construct a road on so much of the land as the company had a right to condemn under its charter.

ACTION, heard before *Brown, J.*, at March Term, 1897, of BUNCOMBE on a motion (after notice to show cause, etc.) for judgment against J. A. Gwaltney and another, for the balance due on notes given by them for the purchase of land at a judicial sale.

J. M. Gudger, Jr., and Tucker & Murphy for defendant Gwalt- (728) *ney (appellant).*

Davidson & Jones and F. A. Sondley for plaintiffs.

FAIRCLOTH, C. J. The appellant Gwaltney and one Shepard, were the purchasers at a judicial sale of land for division in an *ex parte* proceeding, brought by the heirs of A. M. Alexander. The purchasers paid 10 per cent cash and gave four notes for the balance payable 1, 2, 3, and 4 years after date of sale, which was on 14 February, 1891. The purchasers entered into possession, made some improvements, received the rents and profits and made another payment on the purchase price, and appellant bought the interest of his co-purchaser (729) Shepard. The land sold lies on the west bank of the French Broad River in Buncombe County at Alexander's station. Upon notice to purchasers to show cause why judgment should not be entered against them for balance due on said land notes, they answered on 15 August, 1894 (1) That at the sale it was represented by the commissioner to sell, by petitioner's counsel and the auctioneer, that the railroad had no title, except the actual roadbed covered by the crossties, about 8 feet, and that the purchaser would get a good title, except the space

covered by said roadbed and crossties, and that they bid with that understanding. On the trial it was admitted by the respondents "that there were no false or fraudulent representations made by the commissioner or his attorney to deceive purchasers." This admission takes this defense out of the case.

2. Defense: That the Western N. C. Railroad runs through the most valuable part of said land along the river shore, and said road claims to own 100 feet on either side of the main track, which greatly reduces the value of the land purchased by respondents.

The proofs established these facts: That the railroad was constructed about 1881, and that its charter grants an easement of 100 feet on either side of its track—that by deed dated 16 June, 1869, registered 28 February, 1891, A. M. Alexander, petitioner's father, granted said road the right and privilege to lay out and construct its road at their pleasure on *so much and no more* of his lands, as said company would have the right to condemn for the use of said company, under its charter. At the date of the sale the railroad was in actual operation over the said land, with a depot station thereon, and these facts were well known to the purchasers. The charter of the road and Alexander's deed (730) conveyed only an *easement* in the premises without any title in the soil, and if the road should be discontinued the purchasers would have an absolute title without encumbrance to the possession.

The appellee's counsel filed with us an interesting brief to show that, upon equitable principles and authority, the respondent is entitled to no relief, by reason of his silence, long delay in complaining of any supposed injustice, and continued possession even until payment was demanded, etc. We find it unnecessary to take up those questions. The fact of actual possession by the railroad at the date of the sale and purchase is undisputed, and that is sufficient notice to a purchaser of the occupant's equity and makes it his duty to inquire for information. *Johnson v. Houser,* 88 N. C., 388. In *Edwards v. Thompson,* 71 N. C., 177, this rule prevailed against a nonresident who had no knowledge of any equity in another, except that which was inferred from open possession, which was also unknown to the plaintiff. The Court held, that open possession was a fact of which a purchaser must inform himself, and he is conclusively presumed to do so. Later cases are to the same effect. His Honor properly declined to submit issues as to the title of the railroad company, as there was no evidence of such title except the privilege derived from Alexander's deed, which could not support a plea of title. It only pointed to the right of possession, which was admitted and known to the purchaser.

We discover no error in the trial. Judgment

Affirmed.

Cited: Goodman v. Heilig, 157 N. C., 9.

(731)

JULIA E. WOODCOCK v. J. G. MERRIMON, TRUSTEE, ET AL.

(Decided 24 May, 1898.)

Action to Compel Trustees to Sell Land—Extension of Time for Filing Pleading — Discretion of Court — Trust Deed — Partial Release by Trustee—Deed of Release—Quit Claim—Vendor and Vendee—Contract — Memorandum of Contract — Act of Agent — Ratification — Specific Performance.

1. The courts have discretion, not reviewable, to extend time for filing pleadings.

2. An order extending defendant's time for filing answer and providing that, unless he should file it within the time limited and pay the costs of the action up to the time when the order was made, judgment should be entered for the plaintiff at the said term, was not such a judgment as could be set aside by another judge at the next term, nor was it made conclusive upon the parties by the defendant's consent to the entry of such order.

3. A trustee in a trust deed has no power, under section 1271 of The Code, to release a portion of the premises from an unsatisfied trust.

4. A trustee under a trust deed made an entry upon the margin of the record thereof as follows: "I, J. G. M., trustee, do hereby release and discharge from any and all liability in this deed of trust all of that portion of said land conveyed by E. W. W. and wife to J. R. R. by deed dated 24 November, 1891": *Held*, that such entry was insufficient as a deed of release or quit-claim to R. since there was no *consideration* expressed, no reference to authority from the *grantor* or creditor, and no mention of a *grantee*.

5. While a trustee in a deed of trust is agent for both parties, the agency is confined to the performance of duties imposed by the terms of the deed.

6. An entry upon the margin of the record of a deed of trust which does not show that the person making it was authorized to do so by the creditor, and recites no consideration and names no person as grantee, is not such a memorandum of a contract to convey land as will support a decree for specific performance.

7. A writing by an alleged agent which was insufficient to pass an interest in land, or as a memorandum of a contract of sale thereof, cannot be ratified as a conveyance or memorandum by the conduct and acts of the party sought to be charged therewith.

CLARK, J., dissents, in part.

ACTION, tried before *Timberlake, J.*, and a jury, at July (732) Special Term, 1897, of BUNCOMBE. The facts appear in the opinion. There was a verdict followed by a judgment for the defendants and plaintiff appealed.

W. W. Jones for plaintiff.
Tucker & Murphy for defendants.

MONTGOMERY, J. In August, 1890, J. B. Bostic sold and conveyed to D. D. Suttle a piece of land of about twelve acres in or near Asheville. For a part of the purchase money Suttle executed his note for the amount of $5,500 to Bostic and secured the same by a deed of trust upon the land—J. G. Merrimon being named as the trustee. About 11 September, 1890, Bostic endorsed this note to the plaintiff for value. This action was brought to compel the trustee Merrimon to sell the land conveyed in the deed of trust to pay the debt secured therein. In her complaint the plaintiff alleges that she had requested the trustee to sell the land under the provisions of the trust and that he refused to sell the *whole* of the land alleging as a reason for his refusal that he had released five acres thereof upon the margin of the registry where the deed was registered, by a writing as follows: "I, J. G. Merrimon, trustee, do hereby release and discharge from any and all liability in this deed of trust all of that portion of said land conveyed by E. H. Wright and wife to J. R. Rich by deed dated 24 November, 1891.

Witness my hand and seal this 25 November, 1891.

Witness: J. G. MERRIMON. [SEAL]

J. J. MACKEY."

(733) The plaintiff further alleged that the whole of the land would not be sufficient to pay the debt, and that, if Merrimon executed the writing upon the margin of the registry, he did so without consideration moving to her, without authority from her, and that such writing was not authorized in the deed of trust and is void. The defendant Merrimon, in his answer, admitted that the plaintiff through her attorney had requested him to sell the whole of the land and that he had refused to sell five acres thereof, because, as he averred, he had as trustee made and signed, upon the margin of the registry of the deed of trust, the entry set forth in the complaint and that he was duly authorized by the agent and the attorney of the plaintiff to make the entry. The defendant Merrimon further averred that the consideration which induced the plaintiff to agree to and authorize the release of the lien of the trust deed upon the five acres described in the entry on the registry, was a certain obligation and contract entered into on 6 February, 1892, between J. M. Ray and J. B. Bostic, in which contract, for the consideration therein named, Ray agreed to assume and pay the note of Suttle to Bostic in the hands of the plaintiff, and that this contract and agreement was delivered to the plaintiff. The defendant Rich in his answer sets up his purchase of the five acre tract and avers that the plaintiff for a valuable consideration authorized the trustee Merrimon to make the entry on the registry.

At the March Term, 1897, after trial, verdict, and judgment, an order was made in the following words: "It is ordered that defendant Rich have leave to file an amended answer as he may be advised, said amended answer to be filed within 60 days from date hereof. As a condition of granting this amendment said Rich is ordered to pay all costs of this action up to and including the term, which costs shall never be taxed against plaintiff, whatever may be the final result. If said (734) costs are not fully paid within sixty days from this date, then all the said answers of defendants are to be stricken out entirely and judgment rendered at next term for plaintiff. To this order the defendants consent in open court. The findings and judgment and orders of the Court herein at this term are set aside."

At the succeeding term of the Court, the plaintiff made a motion before *Timberlake, J.*, for judgment in accordance with the order made at the preceding term, and at the same time a counter motion was made by the defendant Rich to be allowed to file an amended answer as of date subsequent to the time limited in the order of March Term, 1897. *Judge Timberlake* denied the plaintiff's motion, set aside so much of the order made at March Term, 1897, as limited the time allowed to the defendant Rich to file his answer and pay the costs, and permitted him to file his amended answer as of the time allowed in the order of March Term, 1897. The plaintiff excepted to this ruling of his Honor and insisted that it was not lawful for one Superior Court Judge to vacate the judgment and order made by another judge in the same cause, and cites *Henry v. Hilliard,* 120 N. C., 479, to sustain his position.

We are of the opinion, however, that the case before us and that of *Henry v. Hilliard* bear no resemblance to each other. In *Henry v. Hilliard* there was a final judgment affecting the merits and the vital interests of the case and was conclusive of the litigation. The order made at March Term, 1897, in this case cannot be considered as a judgment of the Court, in the sense of affecting the rights and interests involved in the litigation. It is only an order made in reference to pleading and practice. It was out of his Honor's power to order what kind of a judgment should in the future be entered up by another judge. (735) The future judgment was a matter to be entirely left to the judge who might then preside under the conditions that might then appear. The fact that the defendants in the case consented to the order of March Term, 1897, did not make the order a judgment conclusive of their rights, but at most was a contract which the judge, who followed, for reasons satisfactory to him, did not enforce. The courts have discretion, not reviewable, to extend the time for filing pleadings. *Gwinn v. Parker,* 119 N. C., 19; *Bailey v. Commissioners,* 120 N. C., 388. The Code, sec. 274, provides that "The judge may likewise, in his discretion and upon

such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited, or by an order to enlarge such time." In *Gilchrist v. Kitchen,* 86 N. C., 20, the Court says: "But, independent of The Code, we hold that the right to amend pleadings in the cause and allow answers or other pleadings to be filed at any time, is an inherent power of the Superior Courts which they may exercise at their discretion. The judge presiding is best presumed to know what orders and what indulgence as to filing of pleadings will promote the ends of justice as they arise in each particular case, and with the exercise of this discretion this Court cannot interfere because it is not the subject of appeal." *Austin v. Clark,* 70 N. C., 458.

Under the order of *Judge Timberlake,* the defendant Rich filed an amended answer, which presented a different case entirely from that which appeared in the original pleadings. He averred that the entry made by the trustee Merrimon, on the registry, was not only a
(736) deed of release to himself made with the consent and approval and knowledge of the plaintiff for a valuable consideration, but that it was a memorandum or note in writing of an agreement or contract to sell and release and convey the land therein described and conveyed to the defendant Rich, signed and executed by the defendant Merrimon, trustee, by the authority and consent of, and as the agent and trustee of the plaintiff. The defendant Rich sets up another defense, and that was that the plaintiff afterwards ratified and affirmed the action of the trustee in making the entry on the registry.

Two issues were submitted to the jury: (1) "Did T. H. Cobb as the agent and attorney of the plaintiff, and with her authority and consent, authorize and direct J. G. Merrimon, trustee, to release the land in controversy?" (2) "After the execution of the release mentioned in the complaint by J. G. Merrimon, trustee, did the plaintiff ratify and confirm this act?" The jury answered both issues in the affirmative and the Court rendered judgment for the defendant.

The entry made by the trustee claimed to be a release was not authorized by section 1271 of The Code. That section only empowers the trustee to "acknowledge satisfaction of the provisions of such trust, etc.", the entry operating as a reconveyance. As was said in *Browne v. Davis,* 109 N. C., 23: "It was never contemplated that the trustee could by this means release from an unsatisfied trust specified parts of the land." We do not mean to say however that the creditor might not be estopped, under certain circumstances, from enforcing his claim against that part of the land undertaken to be released by the trustee if done with the creditor's consent and authority properly shown. The entry made by the trustee is not a deed of release and quit claim on its
(737) face. It lacks the recital of consideration; it discloses no au-

thority from Suttle, Bostic or the plaintiff, nor is it made to *the defendant Rich.* To get around this difficulty the amended answer was filed, in which the defendant Rich averred that the entry made by the trustee was a memorandum in writing of a contract to convey made by Merrimon as the agent of the plaintiff, and that in equity the plaintiff ought to be required to release and convey to him the five acres undertaken to be released by Merrimon.

Again, the testimony introduced by the defendant, to show the nature of the transaction between Merrimon and the plaintiff, did not tend to show that any agency was conferred on the defendant Merrimon by the plaintiff to do any act for her. At most, she authorized him as trustee under the deed to release the five acres under certain conditions which were not performed. Merrimon himself testified that he supposed he had the right, as trustee, to release the five acres and that he executed the writing—the entry on the registry as *trustee.* To use his own language, he said, "I acted simply as trustee and tried to carry out the contract as trustee."

We were told by the counsel of defendants that the trustee in a deed of trust was by virtue of the law the agent of both creditor and debtor; and that is true, but the agency is confined to the duties imposed by the terms of the deed of trust. In making sale under the deed, in preserving the property, in disbursing the proceeds of sale, and in other such matters required of him in the deed, trustee acts as agent of both parties; and in this sense are the authorities to which he cites us (*Johnston v. Eason,* 38 N. C., 330, and *Hinton v. Pritchard,* 120 N. C., 1) to be understood. (738)

Is the entry made by Merrimon, trustee, on the registry, treated as a memorandum in writing of a contract to convey land, sufficient in form and substance to enable the Court to decree specific performance thereof? We are of the opinion that it is not. It does not recite that Merrimon was the agent of the plaintiff. It does not recite any kind of consideration, and no particular person is named as the grantee.

The real question, then, involved in the matter was not whether Mr. Cobb, as agent and attorney for the plaintiff, and with her knowledge and consent, authorized and directed J. G. Merrimon, trustee, to release the land (5 acres), but whether the entry on the registry was in law such release—the proper execution of the power. We have seen that it was in law neither a release deed nor a memorandum in writing of a contract to convey and release the land under which the Court could decree specific performance.

His Honor's charge, therefore, on the second issue—"After the execution of the release mentioned in the complaint by J. G. Merrimon, trustee, did the plaintiff ratify and confirm the act?"—was erroneous.

The instruction was in these words: "In regard to the second issue it was stated by the plaintiff in her examination that she received the Ray contract, marked 'A,' that she received the payment of interest from said Ray, and recognized him as her debtor, and afterwards brought suit upon the Ray contract, and these acts the Court charges you amount to a ratification, provided she accepted and retained said contract with full knowledge of all material facts." There was nothing to ratify. The entry on the registry by the trustee, claimed to be a release deed to the defendant, Rich, was not in law a deed of release; neither was it (739) such a sufficient memorandum in writing of a contract to convey and release the five acres made as averred in Rich's amended answer as would enable the defendant, Rich, to have specific performance decreed.

Whether or not the plaintiff ought to be estopped from subjecting the five acres of land to the satisfaction of her debt, is a question which was not passed upon on the trial. It was set up in the answer of Rich, but no issue on the question was submitted.

In passing, it may be said that the first issue was not submitted in a form that is satisfactory to this Court. The act of the plaintiff was the matter to be inquired into, and the introduction of the part taken by Cobb, the alleged agent of the plaintiff, might have given the defendants an advantage before the jury to which they were not entitled.

There was error in the instructions of his Honor, and there must be a New trial.

CLARK, J., dissenting in part: The trustee signed the following, which was duly recorded on the margin of the registry of the deed of trust :

"I, J. G. Merrimon, trustee, do hereby release and discharge from any and all liability in this deed of trust all of that portion of said land conveyed by E. H. Wright and wife to J. R. Rich by deed dated 24 November, 1891.

Witness my hand and seal this 25 November, 1894.

"Witness: J. G. MERRIMON. [SEAL]"

J. J. MACKEY.

Concede, that, technically, this was not authorized to be recorded as a release by The Code, section 1271, still it was a memorandum in (740) writing of a contract to convey made by Merrimon, as agent of the plaintiff, and the jury, on an issue submitted, find that Cobb, as the plaintiff's agent and attorney, and with her authority, authorized and directed J. G. Merrimon to make the release. The release refers to the trust deed, on the margin of whose registration it was recorded,

and to the deed of Wright and wife to J. R. Rich, dated 24 November, 1894, and is sufficient in form and substance to enable the Court to decree specific performance, for there can be no sort of ambiguity as to the land embraced. But concede, even, that this authority from the plaintiff to Cobb was not sufficiently proved, the second issue was, "After the execution of the release mentioned in the complaint by J. G. Merrimon, trustee, did the plaintiff ratify and confirm the act?" On this his Honor charged the jury upon her own testimony: "The plaintiff stated in her examination that she received the Ray contract, marked 'A,' that she received the payment of interest from said Ray, and recognized him as her debtor and afterwards brought suit upon the Ray contract, and these acts the Court charges you amount to a ratification, provided she accepted and retained said contract with full knowledge of all material facts." These acts certainly would prove ratification, and the jury found that these were the facts. If there was not sufficient authority to Cobb shown to authorize Merrimon to make the release, this ratification supplied the defect. Rich bought in good faith upon a belief that Cobb had the authority as plaintiff's agent, and her conduct thereafter fully ratified his authority, if defective. It would be against good conscience for him to suffer loss thereby, after such conduct on the part of the plaintiff.

Cited: Christian v. Yarborough, 124 N. C., 77; *Best v. Mortgage Co.,* 131 N. C., 71; *Church v. Church,* 158 N. C., 565; *Wynn v. Grant,* 166 N. C., 46; *Lloyd v. Lumber Co.,* 167 N. C., 97.

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(741)

O. E. EDWARDS, JR., ET AL. v. A. H. LYMAN.

(Decided 24 May, 1898.)

Action to Remove Cloud on Title—Tax Deed—Description—Trial.

1. In the trial of an action to remove a cloud upon title cast by a tax deed inadvertently given for a tract different from the one advertised and sold for taxes, it is not necessary for the person whose land has been so inadvertently conveyed to do more than to show a deed or a will to the property antedating the sale or such adverse possession as would give title in fee.

2. A notice of tax sale described the land as situated on a river, adjoining the lands of F. on the north and R. on the east. The land conveyed by the sheriff was, in fact, a mile and a quarter from the river and adjoined

the lands of R. on the north and did not touch the lands of F. at all. *Held*, that the deed was inoperative, the description not being such as might be cured under the statute relating to tax deeds but a description which did not fit the land that was advertised and sold by the sheriff.

ACTION, tried at August Term, 1897, of BUNCOMBE, before *Norwood, J.*, and a jury. The action was brought by the plaintiff (under ch. 6, Laws 1893) as the owner, by purchase under foreclosure of a mortgage, of certain lands for which the defendant held a deed from the tax collector. The facts sufficiently appear in the opinion. There was a verdict for the plaintiff on the issues submitted and from the judgment thereon the defendant appealed.

W. B. Gwyn and Merrimon & Merrimon for plaintiffs.
F. A. Sondley and R. O. Burton for defendant.

MONTGOMERY, J. This action was brought by the plaintiff, who is in possession of the tract of land described in the complaint, under (742) ch. 6, Laws 1893—to have an adverse claim of defendant to the land determined. The defendant in his answer set up a deed made to him, by a tax collector, to the land and prays to be put in possession of the same. The defendant contends that, under sub-section 3, section 66, ch. 297, Laws 1893, under the head of "conclusive evidence of facts," the plaintiff, as a matter preliminary, must first show that he or the person under whom he claims title had title to the land at the time of the sale, and that all taxes due upon the land have been paid by the plaintiff or the person under whom he claims title, and the defendant further insists that the decision of this Court in the case of *Moore v. Byrd,* 118 N. C., 688, changes the burden of proof even where the purchaser at the tax sale brings the suit to recover the land and makes the tax deed *prima facie* title. We are of opinion that, in this action, the plaintiff had complied with the requirements of the statute and with the spirit of the decision in the case of *Moore v. Byrd, supra,* as to proof of title in the person from whom he claims. We think that it is not necessary, in suits involving title to land claimed by one of the parties through a tax title, for the person whose land has been sold for taxes to do more than to show a deed or a will to the property antedating the day of sale, or such adverse possession as would give title in fee. The ordinary rules of proving titles in actions between parties for the possession of land ought not to prevail in suits of this nature where the sheriff's deed for taxes is the chain through which both of the parties claim. Without any additions on either side the title to the land is out of the State because, by a sale of the land for taxes, the State by authority of the sale admits title out of itself and to be in the person

whose land is sold for taxes at the time of sale. And, besides, (743) both the claimant under the tax sale and the former owner are claiming under the same title. The plaintiff, having met this difficulty as we think, according to the proper construction of the statute, insists that there has been an entire omission to sell the property and that such omission is fatal to the defendant's deed; that the law would only raise from the deed, if it conveyed the land at all, a presumption that the land was sold for the taxes, and that the testimony shows that the tract of land claimed by the plaintiff was not in point of fact sold by the collector. And we are of the opinion that the view of the law taken by the plaintiff is the correct one; and that the testimony, if believed by the jury (and they did believe it, from their verdict) was such as to render inoperative the deed under which the defendant claims because of its utter failure to convey the land which was actually sold by the collector, and that his Honor was right in instructing the jury to answer the first issue "Yes" if they believed the testimony. The publication of the notice and the report of sale by the tax collector showed that the land which was conveyed in his deed to the defendant was not the land which he sold for taxes. The description of the land in that deed was not a defective description which might be cured under the statute, but it was a description which did not fit the land which was advertised and sold by the collector. That deed did not describe the land which was sold by the collector in any respect but did, with some degree of certainty, describe another tract. The description in the advertisement was "Beaver Dam—Vance, R. B. and Z. F., two-third interest in 156 acres of land on east margin French Broad River, adjoining lands of W. T. Reynold on east and M. J. Fagg on the north," and the description in the sale book is east margin French Broad River adjoining lands of W. T. Reynolds on the east and M. J. Fagg on the north. The testimony showed (the defendant introduced no testimony) that the (744) tract of land described in the complaint did not adjoin the lands of Fagg at all, and only adjoined slightly on the *north* the lands of Reynolds, and was at its nearest point to the French Broad River from one-quarter to three-eighths of a mile away. That part of the description in the defendant's deed from the collector, which is definite and by metes and bounds, is precisely the description given to the land, in which the plaintiffs claim, and the description is that of an entirely different tract of land from the land which the collector sold for taxes. The recent decisions of this Court in the matter of contests over title to land sold for taxes show that the Court is maintaining the act of the Legislature on that subject almost to the letter and in its integrity, but we cannot go to the extent insisted on by the counsel of the defendant in this case.

It has been shown by the evidence undisputed that the tract of land which was advertised and sold by the sheriff was not the tract of land conveyed in his deed to the defendant.

Affirmed.

CLARK, J., concurring: The statute provides that "no person shall be permitted to question the title acquired by the sheriff's deed (under a tax sale) without first showing that he or the person under whom he claims title had title to the property at the time of the sale and that all taxes due upon the property had been paid by such persons or the persons under whom he claims title as aforesaid." This was quoted *verbatim* in *Moore v. Byrd,* 118 N. C., 668, and the legislative power to enact
(745) it has been sustained in that and other cases. As the law has always required a plaintiff in ejectment to prove title out of the State, it would be very singular if the law-making power could not provide that a conveyance made by virtue of a sale under its statutory and preferred lien for public dues should be a *prima facie* title and not to be questioned save by one who shows that "all taxes due upon the property have been paid by such persons or the persons under whom he claims title as aforesaid." The opinion in the present case expressly sustains the statute, but I apprehend the true ground of distinction between this case and *Moore v. Byrd, supra,* is that in the present case the land covered by the deed is not the land which was sold for taxes; besides, the plaintiff here is in possession and seeks not to recover possession by virtue of a tax deed, but to remove a cloud upon title cast by a tax deed inadvertently given for a tract different from the one sold, and the taxes have been duly tendered by the plaintiff.

One who intentionally shirks payment of his taxes throws the payment of them upon better men and is entitled to no more consideration than the coward who leaves the fight and casts an increased peril upon his braver comrades. If one who owes taxes inadvertently fails to pay he is given the benefit of an advertisement for sale and a personal notice 30 days before the sale, the publicity of a sale and 12 months thereafter in which to redeem, to which, besides other safeguards, the Legislature has re-enacted, in compliance with the suggestion of this Court in *Sanders v. Earp,* 118 N. C., 275, the provision of the act of 1887, which for some cause had been dropped, that (Laws 1897, ch. 169, sec. 64) the purchaser shall serve a specific notice, with description of the property, upon the person in possession and upon them
(746) in whose name the land was assessed for taxes, at least three months before the expiration of the time allowed for redemption before such purchaser shall be entitled to a deed. And even one who purposely fails to pay his taxes has the same indulgences.

The purchasers of land for taxes may in some cases be liable to moral censure for getting property at an under price, but the courts cannot discountenance them, since, without purchasers, whom the law invites, the public dues upon the property of those who shirk payment of taxes could not be had. Purchasers of land sold for taxes are far more deserving of consideration than tax skulkers. Under the former tax laws the sale of property for taxes was so environed with technicalities that purchasers for taxes very rarely got a good title with the result that the evasions of taxes increased at a great rate with a crushing effect upon good citizens who were thus saddled with the entire expenses of government. To remedy this, the United States government, and most of the States, enacted a reform in tax sales, similar to that enacted in North Carolina in 1887 (ch. 137) which has been everywhere sustained by the courts. *De Treville v. Smalls,* 98 U. S., 517; *Varnum v. Shuler,* 69 Iowa, 92; Black on Tax Titles, sec. 418, and many others besides and in this State: *Stanley v. Baird,* 118 N. C., 75; *Peebles v. Taylor, ib.,* 165; *Sanders v. Earp, ib.,* 275; *Moore v. Byrd, ib.,* 688; *Powell v. Sikes,* 119 N. C., 231. The letter of the statute and every consideration impel us to adhere to what has been laid down in these cases.

Cited: Mfg. Co. v. Rosey, 144 N. C., 371.

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(747)

SAMANTHA C. WILSON v. CLARA M. FEATHERSTON, INDIVIDUALLY AND AS ADMINISTRATRIX OF J. W. WILSON, ET AL.

(Decided 24 May, 1898.)

Trial—Witness, Competency of—Transaction with Deceased Person—Gift—Delivery Essential to Gift.

1. In an action by a widow against her daughter individually and as administratrix of the latter's father to compel payment of the plaintiff's share in the estate, the testimony of such defendant is incompetent under section 590 of The Code to prove a conversation between the decedent and a third person. The testimony of such third person, who was a bailee of property in controversy at the time of the conversation, and a party defendant to the action, as surety on the administration bond, is also incompetent under section 590.

2. Actual delivery and transfer of possession are essential to a gift of personal property, except where actual delivery is impossible or impracticable, in which case constructive delivery is allowable.

3. The delivery of a deposit book by a father to his daughter, with the expressed intention, at the time, of giving her the money and bonds which were referred to by memoranda in the book, is not a delivery of the money and bonds.

ACTION, tried before *Norwood, J.*, and a jury, on exceptions to the report of referee, at August Term, 1897, of BUNCOMBE. The facts appear in the opinion. From a judgment for the plaintiff the defendants appealed.

Merrimon & Merrimon for plaintiff.
A. S. Barnard for defendant.

FAIRCLOTH, C. J. John W. Wilson died 28 August, 1893, leaving the plaintiff, his widow, and the defendant, Clara M. Featherston, his only child and heir at law. On 6 September, 1893, the defendant, Clara M., administered on her father's estate, and the defendants, J. E. Rankin and A. A. Featherston, were her bondsmen.

(748) Plaintiff sues and demands her yearly allowance and her distributive share of the estate. Defendant says her father gave her all his estate, and that there is nothing to distribute or to pay the yearly allowance which had previously been reduced to judgment in the sum of $300. The estate consisted of money and bonds which John W. Wilson had placed in the hands of defendant, Rankin, for safe keeping, for several years before, with occasional deposits of rents, etc., and the account was kept in a "deposit book." Rankin testified that defendant, Clara, presented this book and got money *before* her father's death, and that he paid over all in his hands to defendant, Clara, after her father's death; that in July, 1893, Wilson and his daughter, Clara, were in his office, and defendant offered to prove by Rankin a conversation between himself and Wilson concerning his disposition of the funds in Rankin's hands. On objection, this evidence was properly excluded. Code, section 590.

Defendant, Clara, testifying, was asked by her counsel, "State whether or not you heard a conversation between your father and J. E. Rankin at the Battery Park Bank in July, 1893, in regard to his bank deposits, and what disposition he had made of it?" This question was excluded on objection, and presents an important exception under section 590 of The Code. We see no error, and the exception is overruled.

One purpose of section 590 was to disqualify an interested party to testify to a conversation or transaction between a deceased and the witness, because there is no one to contradict the witness, and we think a true construction of that much-construed section excludes the evidence of a third party to such conversation, if the third party

(749) is interested in the result of the action, and there is no one to

contradict the statement of the witness. Here, Wilson is dead, Rankin is a party and incompetent, and the witness, Clara, is a defendant and claims the property through a gift of her deceased father. So, she is interested, and there is no one else who can speak of the transaction or contradict the witness. In *Halliburton v. Dobson,* 65 N. C., 88, this Court recognized the gravity of the question, but left it for "future consideration."

In a later case the plaintiff's testator was a trustee of the slave in question for one Lloyd. In the course of the trial Lloyd was offered to prove a conversation between the plaintiff's testator (trustee of the witness) and the defendant's intestate. The Court excluded Lloyd's evidence, as he was practically the plaintiff in the action. *Barlow v. Norfleet,* 72 N. C., 535.

She said, "I got possession of the book on 13 July, 1893." Dr. Burroughs testified, "I was Wilson's physician," and he said he wanted more attention; that "Hun (his daughter) would pay me." He lived with his daughter, and she, Mrs. Featherston, always paid me his bills; she paid them for him. Amanda Moore, a cook of defendant, testified, "I knew John W. Wilson; I stayed with him a few months before he died; I was up stairs with Clara Featherston and deceased; Wilson came up and said, 'Hun, here is my bank book and all my money, and all I ask of you is to take care of me as long as I live.' He gave her a book at that time. It looked like the one identified by Rankin. Clara put the book in her trunk and locked it up in her room."

His Honor instructed the jury that there was no evidence from which they could find that there was a gift of the money in Rankin's hands to the defendant, Clara Featherston, by her intestate, John (750) W. Wilson, and directed the jury to answer each issue "No," and defendants excepted.

The main question is whether there was a delivery in law, upon the proofs in the case. Delivery is essential to a gift, whether it be *inter vivos* or *causa mortis.* It means passing over the property and possession, and the burden of showing this is upon the donee. An intent to give or a promise to give will not be sufficient unless the subject matter passes under the control of the donee free from any control of the donor. *Causa mortis* and *inter vivos* are unlike in several respects, but there is no difference as to the need of delivery. This must take place in either case. The former may be defeated by a recall or recovery from the dying condition. But in the latter the title passes and cannot be recovered. It seems to be a wise provision that delivery must be considered essential, because it strengthens the evidence of the gift. The evidence should be clear and convincing in such cases, because *pro tanto,* they are a revocation of written wills, and much like nuncupative wills

they are of a dangerous nature. These forms of gift rest in parol, and the fallible memory of witnesses impairs confidence in the evidence. Actual delivery and transfer of possession are simple and easily understood. Constructive delivery is also satisfactory when it applies, such as cases where actual delivery is impossible or impracticable. For instance, a bond for the payment of money, if the promisee actually delivers the bond, the decisions are that the right to the money promised passes by construction. The bond is an obligation, and it is property. Now applying these rules to the case before us: The intention of the father
(751) to make a gift to his daughter is apparent. The possession of the money is not transferred, and nothing of value is delivered. The "deposit book" is no more than a memorandum, binding no one, containing no obligation, and could only be used to refresh the memories of the depositor and depositee as to dates and amounts of their dealings. It does not appear that there were any changes in the entries during the life of Wilson. There is no pretence that the money was turned over or actually delivered.

Our opinion is that the delivery of the "deposit book" was not a constructive delivery of the money or county bonds. The danger of permitting large estates to pass from one to another by the evidence of servants or illiterate employees is sufficient to require convincing proof, such as actual delivery, or written instruments. We had to consider a question of *causa mortis* in *Newman v. Bost, ante* 524, and it was distinctly announced that symbolical deliveries do not prevail now in this State, and that the proof of actual or constructive delivery must be clearly established. In our own reports, *Adams v. Hayes,* 24 N. C., 361, decided a case clearly illustrating the position we now occupy on this subject. To the legal student, see *Ward v. Turner,* 2 Ves., 431, and reproduced in White & Tudor's Leading Cases in Equity, Vol. 1, Part 2, marginal page 905, with copious notes of English and American decisions. As this decision will be decisive on the principal question between the parties, we will not examine other questions raised before the referee and his Honor.

Affirmed.

Cited: Featherston v. Wilson, 123 N. C., 625; *Duckworth v. Orr,* 126 N. C., 676; *Harrell v. Hagan,* 150 N. C., 244; *Patterson v. Trust Co.,* 157 N. C., 14; *Grissom v. Grissom,* 170 N. C., 99; *Brown v. Adams,* 174 N. C., 502; *Askew v. Matthews,* 175 N. C., 189.

(752)

FIRST NATIONAL BANK OF SPRINGFIELD ET AL. v. ASHEVILLE FURNITURE AND LUMBER COMPANY.

(Opinion filed 26 May, 1898.)

(For syllabus see 116 N. C., 827 and 120 N. C., 475).

PETITION by intervenors to rehear the case decided at February Term, 1897, 120 N. C., 475. A former appeal in same case 116 N. C., 827.

Shepherd & Busbee and Merrimon & Merrimon for petitioners.
Moore & Moore and F. A. Sondley, contra.

FURCHES, J. This case is before us for the third time. The first time it was here a new trial was granted. 116 N. C., 827. The next time it was here we affirmed the judgment of the Court below. 120 N. C., 475. And this is a petition to rehear. We have carefully re-examined the case upon the errors assigned in the petition and find no error. Every matter set forth in the petition, as assignment of error, was fully and carefully considered by the Court in the opinion we are now asked to review, except that part of the petition that refers to his Honor's charge. This point was also considered by the Court but not specially discussed in the opinion, for the reason that we did not think then that it demanded special treatment. It is but a paragraph in the testimony of Hollinger, a witness of the interpleaders, the petitioners. He was examined at great length as to the value of the property, his evidence on this subject covering 20 pages or more of printed matter. It is not denied but what he made the statement, in his evidence, that his Honor quoted to the jury in his charge. Its competency is not attacked. The judge only gave it to the jury along with the other evidence, and told (753) the jury that they should consider it with the other evidence. What do the petitioners think he should have told the jury? that they should not consider this evidence? We do not see the error complained of. But if we could see it was error, as the petitioners do, we do not see that it did or could have prejudiced the petitioners' cause before the jury.

Petition dismissed.

CLARK, J., dissents.

Cited: Glass Plate Co. v. Furniture Co., 126 N. C., 889.

RICHARD LEDBETTER v. C. E. GRAHAM.

(Decided 23 April, 1898.)

Action on Note—Trial—Witness—Competency of—Transaction with a Deceased Person.

1. A party to an action is a competent witness as to a transaction between himself and a person deceased at the time of such examination when the representative of such deceased person is not a party to the action.
2. The interest disqualifying a person as a witness under sec. 590 of the Code is an interest in the event of the action.

ACTION, tried before *Norwood, J.*, and a jury, at August Term, 1897, of BUNCOMBE. The action was against the defendant Graham, the only defendant in the case, who was a surety of M. E. Carter who was dead at the time. The action was commenced upon a note for $700 made (754) to the plaintiff. The defendant admitted he made the note as alleged in the complaint and plead the statute of limitations. The note was barred by the statute unless Carter, the principal obligor, had made certain partial payments alleged in the complaint. On the trial the plaintiff and his son, who had acted as plaintiff's agent, was allowed to testify concerning payments made by Carter on the note. The defendant objected to the admission of the testimony and appealed from the judgment rendered.

Moore & Moore for plaintiff.
Merrimon & Merrimon for defendant (appellant).

PER CURIAM: Affirmed. See *Shields v. Smith,* 79 N. C., 517, and *Bunn v. Todd,* 107 N. C., 266.

Cited: McGowan v. Davenport, 134 N. C., 531, 535.

D. W. ALLEN v. F. M. HAMMOND.

(Decided 3 May, 1898.)

Appeal—Practice—Incomplete Record.

Where the consideration of the complaint is essential to the determination of the questions involved on appeal and the complaint is not in the record on appeal, and appellant makes no motion for a *certiorari* to perfect the record, the appeal will be dismissed.

ACTION, tried at Fall Term, 1897, of MADISON, before *Norwood, J.* From a judgment for the defendant the plaintiff appealed. The record on appeal does not contain the complaint. In this Court the defendant (appellee) moved to dismiss.

J. M. Gudger, Jr., for defendant. (755)
No counsel contra.

PER CURIAM. There is no complaint, answer or summons sent up, only the case on appeal; and the complaint is essential to be considered in passing on this controversy. Defects in the transcript are often remedied by *certiorari* when there is no laches on the part of the appellant, and sometime by the Court's sending down a *certiorari ex mero motu* to supply merely formal parts of the transcript. *S. v. Preston,* 104 N. C., 733; *S. v. Beal,* 119 N. C., 809; *S. v. Daniel,* 121 N. C., 574. But here the defect is in a material respect and no motion for *certiorari* has been made by the appellant. He has not perfected his record on appeal and not having paid due attention to it, let the motion to dismiss be entered.

Appeal dismissed.

Cited: Finch v. Strickland, 130 N. C., 46.

ROXANNA NORTON v. JAMES M. McDEVIT.

(Decided 3 May, 1898).

Action to Declare a Trust and to Recover Land—Pleading—Implied Trust—Evidence—Statute of Limitations—Tenant by Curtesy.

1. While the technical exactness observed under the old system of pleading is not required under the Code system, substantial accuracy is required in the statement of the plaintiff's cause of action and of the defendant's ground of defense.

2. In the trial of an action against plaintiff's step-father to have a trust declared in land and for possession of the land, evidence of a declaration by plaintiff's mother (under whom defendant claimed and who died before the trial), made while she was in possession, to the effect that she was holding the land for her children, was competent to show the nature of the mother's holding.

3. When the fact is found, without explanation or evidence of a different intention, that land was bought and paid for with the money of one and title taken to another, the law creates the latter a trustee for the former.

4. Where a trust is created by the purchase of land with the money of one person and its conveyance to another, it is a trust created by implication of law, and the statute may begin to run before the trust is broken; otherwise, is the case of an "express trust."

5. The statute of limitations does not run against a *cestui que trust* in possession.

6. The seven years statute of limitations (sec. 153 of The Code) does not apply to an action brought to obtain possession of land bought for plaintiff's mother with plaintiff's money but conveyed to the former, the action being brought against the husband of the grantee after her death.

7. A husband is not entitled as tenant by the curtesy to hold land held by his wife as trustee for her children by a former marriage.

(756) ACTION, tried before *Norwood, J.*, and a jury, at Fall Term, 1897, of MADISON. The facts appear in the opinion. There was a verdict for the defendant and from the judgment thereon the plaintiff appealed.

W. W. Zachary for plaintiff.
J. M. Gudger, Jr., for defendant.

FURCHES, J. This is an action to declare a trust and for possession of land. The complaint, as it is drawn, does not very distinctly state the plaintiff's cause of action. It is a mistake to suppose that The Code pleading does away with the necessity of a correct statement of plaintiff's cause of action, or relieves the defendant from making a correct statement of his grounds of defense. While it is not necessary that this should be done with the technical exactness required under the old style of pleading, it should be done with substantial accuracy. But the great object in pleading is to put matters in litigation upon their merits, and when it appears to the Court that this can be done, to prevent
(757) a failure of justice, the Court will proceed with the trial, as where it appears to be a defective statement of a good cause of action, but will not do so when it appears to be a statement of a defective cause of action.

We gather from the allegations of the complaint that in 1877 the plaintiff and her sister, Ardelia, were the minor children of Mary A. Norton, then a widow; that they were the owners of $400 in currency and a horse—the plaintiff then being 15 years old and her sister 14; that at the request of the plaintiff and her sister, and their mother Mary A. Norton, this money and horse were put in the hands of one Chandler, the grandfather, to buy the lands described in the complaint for the plaintiff and her sister Ardelia; that said Chandler bought the lands and paid for them with this money and horse, but through mistake, or

from some other cause, the deed was made to the mother; that the mother, the said Mary, afterwards intermarried with the defendant, McDevit, by whom she had one child which lived to be about one year old when it died, and the mother died on 17 April, 1893, and this action was commenced on 15 June, 1896 that the said Mary, and the plaintiff, and the defendant, after he married the mother Mary, continued to live on said land until the death of Mary, and the plaintiff and defendant continue to live on the land until now—the mother and the defendant controlling a part of it, and the plaintiff working and controlling a part of it.

The defendant denied that the land was bought with the money and means of plaintiff and her sister, and denied that there was any mistake or error in making the deed to his wife Mary; and alleges that it has been more than seven years since said deed was made and since plaintiff reached her majority of 21 years, and insists that (758) plaintiff's right of action was barred by the statute of limitations, if she ever had any right. The plaintiff admitted that she was 37 years old and unmarried at the trial.

On the trial the plaintiff proposed to prove by one Tredway that he heard Mary, the mother of plaintiff, say that she was holding the land for her children. This was objected to by defendant and excluded by the Court. We do not see why this evidence was not competent, being a declaration while in possession, explaining the manner in which she was holding the land—she being the party under whom defendant is claiming.

On the trial the following issues were submitted:

1. Was the money of plaintiff used in the purchase of the land, and if so how much? Ans.: "Yes, $200."

2. Was the mare or any interest in the mare, given for the land, the property of plaintiff, and if so, what was the plaintiff's interest in the mare? Ans.: "Yes, $50."

3. Did plaintiff's cause of action accrue more than seven years before this action commenced? Ans.: "Yes."

It is found by the first and second issues that the land in controversy was bought and paid for with the money and mare of plaintiff and her sister Ardelia. This fact being found by the jury, without any further evidence or explanation, the law created a trust in favor of plaintiff and her sister. *King v. Weeks,* 70 N. C., 372. This is upon the idea of mistake or bad faith in not taking the deed to the party paying for the land. *Lassiter v. Stainback,* 119 N. C., 103.

This is not what is known as an express trust, against which the statute will not run until the trust is broken. *Hodges v. Council,* 86 N. C., 181; *Hamlin v. Mebane,* 54 N. C., 218; 2 Pomeroy Eq. Juris., secs. 988,

989, 991; Lewin on Trusts, sec. 886; *Wright v. Cain,* 93 N. C.,
(759) 296. But is a trust created by implication of law against which the statute may run. 2 Lewin, *supra.* 864; 1 Lewin, *supra,* 180; 1 Pomeroy, *supra,* section 155.

But the plaintiff alleges that she has been in possession of this land or some part of the same all the time, since the date of the purchase and deed to her mother. If this is true, no statute has run against her, as the statute does not run against a *cestui que trust* in possession. *Stith v. McKee,* 87 N. C., 389; *Mask v. Tiller,* 89 N. C., 423. But if the statute had run, the plaintiff would not be barred in seven years. Section 153 of The Code does not apply to this case, but section 158, if any statute does. *Ross v. Henderson,* 77 N. C., 170.

The Court charged the jury that if they believed the evidence the plaintiff's cause of action accrued more than seven years before the commencement of the action, that the same was barred by the statute, and they should find the third issue "Yes." To this charge the plaintiff excepted. This was error.

The deed from Ramsey to Mary Norton, mother of plaintiff, conveyed at least the legal estate in the land to her. And the defendant McDevit having married her and a child having been born alive by this marriage, the defendant is a tenant by the curtesy of the legal estate, at least. But if it turns out that his wife only held the land as the trustee of plaintiff and her sister, this will destroy his tenancy by the curtesy.

The plaintiff and her sister being the only lawful heirs of their mother Mary (Rules 1 and 9, section 1281 of The Code), upon her death the estate in the land descended to them, subject to the curtesy of the defendant if there was no trust. But if the mother Mary held
(760) the land in trust for the plaintiff and her sister, as plaintiff alleges she did (and as we hold she did if the land was bought and paid for with their money), upon her death the legal and equitable estate united in the plaintiff and her sister, and destroyed the defendant's claim to curtesy. And plaintiff, being a tenant in common, is entitled to be let into possession of one-half of the land.

But as the defendant claims to have bought a part of the interest of Ardelia (she says one-fourth) it seems to us it would be proper for her to make herself a party to this action, in order that the whole matter may be settled. But we do not consider her a necessary party, and it must be left to her whether she will make herself a party or not.

There were other matters discussed, not material to the determination of the appeal, and we do not consider them. There is error as pointed out and a new trial is ordered.

New trial.

Cited: Flanner v. Butler, 131 N. C., 157; *Woodlief v. Wester,* 136 N. C., 168; *Norcum v. Savage,* 140 N. C., 474; *Blackmore v. Winders,* 144 N. C., 216; *Phillips v. Lumber Co.,* 151 N. C., 521; *Bank v. Duffy,* 156 N. C., 87; *Lynch v. Johnson,* 171 N. C., 615.

RACHEL FRISBEE v. THE TOWN OF MARSHALL.

(Decided 3 May, 1898.)

Action for Trespass—Trespass on Possession—Evidence—Damages.

1. Where, in the trial of an action for trespass on land to which plaintiff's deceased husband had title but in which dower had not been allotted or sued for, the plaintiff offered to show that she had been in possession, cultivating and paying taxes on the land. *Held,* that it was error to exclude the evidence.
2. An action of trespess against a wrongdoer is a possessory remedy founded merely on the possession and it is not necessary that the title to the land should come into question; hence, it was error, in the trial of an action for trespass by a widow, to whom dower had not been allotted in her husband's land, to instruct the jury that the burden was on her to show that she was owner of the land.
3. Damages in an action for trespass on land in possession of plaintiff must be limited to such injuries to the possession as diminish its profits and uses, considering the damages after the action commenced so far as they resulted from the original trespass.

MONTGOMERY, J., dissents.

ACTION, tried before *Brown, J.,* and a jury, at Spring Term, (761) 1897, of MADISON. The facts appear in the opinion. There was a verdict for the defendant and from the judgment thereon the plaintiff appealed.

W. W. Zachary for plaintiff.
J. M. Gudger, Jr., for defendant.

FAIRCLOTH, C. J. From the confused record in this case we have had some difficulty in ascertaining the facts. As we understand them they are as follows: (1) No summons is found in the transcript, but we assume that it issued before November Term, 1892, when the original complaint was filed, alleging that defendant, before and after 1 May, 1890, appropriated plaintiff's land for township purposes, and pulled down plaintiff's fence, trees, etc. Answer filed at August Term, 1894, denies the allegations.

Amended complaint filed at Spring Term, 1897, alleges that, between 1 May, 1890, and the bringing of this action, defendant pulled down a rock wall on plaintiff's land, which protected a house and store from the overflow of Frisbee Branch, and that by such removal of wall, and by negligent obstruction of said branch at the time mentioned, the water was turned out of its natural course on to plaintiff's land and damaged the plaintiff's premises, all of which was denied in the second
(762) answer.

(2) That Frisbee Branch separated two tracts of land; that plaintiff's husband had a record deed for the tract on the north side, and that plaintiff resides on the tract on the south side of the branch which is not covered by said deed.

The Court submitted the issues:

1. Did the defendant's agents wrongfully trespass upon and damage a certain tract of land on the northwest side of Frisbee Branch, the property of the plaintiffs?" Ans.: "No."

3. Did the defendants wrongfully trespass upon and damage a certain tract of land on *southeast* side of Frisbee Branch, the property of the plaintiff? Ans.: "No."

It was admitted that title was out of the State. There was no plea of *liberum tenementum,* sole seized, nor any plea of title or possession in the defendant.

Upon the first issue plaintiff offered evidence tending to prove: That she was married to Elza Frisbee, who died in 1865, leaving three children—Malinda, Lafayette and John Frisbee. Lafayette died without heirs; Malinda and John resided with their mother upon the land referred to in 3d issue, which is contiguous to the land referred to in 1st issue, being divided by Frisbee's branch. That as to land on north side of said branch referred to in 1st issue plaintiff testified that during her husband's life she gave one McNew the money to pay for same, and he brought back to her the following deed, to wit: a deed in fee simple from I. B. Sawyer, Clerk and Master in Equity, Buncombe County, to Elza Frisbee, dated 1862. The said deed covers the land referred to in issue number 1, and has long since been duly recorded; that said money was her own property; that after her husband's death she removed to
(763) the land on southeast side of said branch referred to in issue 3, and resided there from 1865 to this date; that she took possession of the tract referred to in issue number 1, and had cultivated and paid taxes on it and been in possession of it ever since; that her daughter, Malinda, has lived with her "off and on" all the time; that the plaintiff had never had any dower set apart to her and had never brought suit for dower, nor had she sued her children to have them declared trustees to her use for said land.

Malinda Frisbee testified: That she had never had anything to do with the land; that she supposed it was her father's land, but that her mother had full control of it, and she had not set up any claim so far as she was concerned.

Under the 4th issue relating to damage to the land on southeast side of the branch the plaintiff offered to prove that about a year before suit was brought and complaint filed in this cause a small store-house was washed away by a freshet in Frisbee Branch, and that such damage was occasioned by a removal of certain rocks off the land of plaintiff by defendant's agents.

Objected to on ground that such damage had not occurred at commencement of this action. Sustained and evidence excluded. Plaintiff excepted.

His Honor told the jury they might consider each tract separately; that it is admitted that the deed to Elza Frisbee, husband of plaintiff, covered the tract on the north side of the branch and does not cover the tract on the south side.

The Court instructed the jury that the burden of proof was on the plaintiff to show that she is the owner of the tract referred to in first issue, before she can recover damages for any trespass thereon; that the question of a resulting trust could not be determined in (764) this action; that when no dower has been set apart the possession of the widow is the possession of the heir at law; that the legal title is in the heirs in this case who are not parties to this action, and directed the jury to answer the first issue "No." We think this instruction and the rejection of plaintiff's evidence was error. The evidence was intended and tended to show that the plaintiff was in possession of both tracts with her children and that she exercised control over each tract. We think that his Honor correctly held that the question of a resulting trust could not be disposed of in the present state of this case. This is an action of trespass. The error was in holding that plaintiff could not recover because, upon the facts, the title was in the heirs of the deceased husband and of course not in the plaintiff. In an action of ejectment the plaintiff must show title. In trespass *q. c. f.* the plaintiff need only show possession against a stranger to the title or possession. He is a *tort-feasor*. What constitutes possession? "When one settles upon land by himself or tenants and continues that possession, builds a house, *or* clears the land and cultivates it, his claim then becomes notorious and gives fair notice to the adverse claimant to look to his title." *Andrews v. Mulford*, 2 N. C., 311. "Possession of land is denoted by the exercise of acts of dominion over it in making the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of

owner, and not of an occasional trespasser." *Williams v. Buchanan,* 23 N. C., 535. "Every unwarrantable entry upon a peaceable possession is a trespass." *Wells v. Howell,* 19 Johns, 385. "If lands are occupied by a tenant, he and not the lessor must bring trespass against a stranger for unlawful disturbance of the possession." *Campbell v. Ar-*
(765) *nold,* 1 Johns, 511. "Whoever is in possession may maintain an action of trespass against a wrong doer to his possession, because it is a possessory remedy founded merely on the possession and it is not necessary that the right should come in question." *Taylor, C. J.:* "Possession alone is sufficient to maintain trespass against a wrongdoer. And it is consistent with first principles, and in fact would be strange if it were not so; for wretched would be the policy which required the title to be shown in every instance where the peaceable possession was disturbed by an intruder who had no right. It would tend to broils and quarrels and the possessor would resort to force to defend his possession if the law afforded him no redress." (*Henderson, J.*). *Myrick v. Bishop,* 8 N. C., 485.

The above principle has been uniformly followed by this Court. The evidence offered tended to show that the plaintiff has for a long time been in control, and exercising ownership over each tract, by notorious acts, in the presence of the heirs of her husband. We think it improper to enlarge on the question of damages until the evidence has been heard, except to say that they must be limited to such injury to the possession as diminishes her profit and uses, and not extended to any injury to the freehold. The damages occurring after the action commenced must be taken into account, so far as they were the result of the original trespass. They were the consequence of the original wrongful act. If the heirs are advised to become parties to his action they can do so by permission of the Superior Court.

Error.

MONTGOMERY, J., dissenting. I do not concur in the conclusion of the Court. The complaint was for damages to the freehold and
(766) not to the plaintiff's right of possession.

Cited: Daniels v. R. R., 158 N. C., 425; *Wheeler v. Telephone Co.,* 172 N. C., 11.

LINUS NORTH ET AL. v. ALBERT BUNN ET AL.

(Decided 12 April, 1898.)

Action for Recovery of Land—Specific Performance—Statute of Frauds—Parol Contract.

1. A parol contract for the conveyance of land being void under the statute of frauds, no evidence relating to it, if denied, is admissible.
2. Where the plaintiff in an action for the recovery of land shows title, and the defense is admissible, he is entitled to judgment.
3. Where, in an action for the recovery of land, the defendant seeks the enforcement of a parol contract by which plaintiff was to convey the land (on which defendant had made improvements) in consideration of the defendant's obtaining the conveyance to plaintiff of another tract of land, which defendant had done, the Court should allow such amendments of the pleadings as to admit all proper evidence concerning the agreement, to the end that the mutual equities may be enforced.
4. The rule that one who contracts to sell land, and receives the consideration and refuses to convey for any reason, cannot keep both the land and the money, applies to *feme coverts;* and while a Court cannot compel a married woman to execute and acknowledge a deed as of her own free will, it can declare the price paid to be an equitable lien on the land in favor of the other party, so that if she keeps the land she must pay the amount of the lien.

ACTION, tried at Fall Term, 1897, of TRANSYLVANIA, before *Norwood, J.,* and a jury. There was a verdict for the plaintiffs and from the judgment thereon the defendants appealed. The facts appear in the opinion.

Geo. A. Shuford for plaintiffs. (767)
Gash & Pless for defendants.

FAIRCLOTH, C. J. This is an action for possession of land and damages, etc. The case is stated as follows: "The plaintiffs introduced in evidence a regular chain of title from the State to the *feme* plaintiff, Sophie E. North, and showed the defendants to be in possession of that part of the land laid down on the map as forming a triangle and represented by the figures "1," "2" and "3," and offered evidence as to the value of the rents and profits, and here closed their case.

"The defendants thereupon offered to prove by the defendant, Kitty Bunn, that she went into possession of the land in controversy under a parol agreement with plaintiffs, and offered parol evidence to prove the contents of a letter from the *feme* plaintiff, Sophie North, to the *feme* defendant, Kitty Bunn, now lost, in which said letter the plaintiff,

Sophie North, offered, as defendants allege, to the *feme* defendant, to convey to her the land in dispute, if said defendant would buy from one Samuel King another strip of land and have the same conveyed to the *feme* plaintiff; and that said offer was accepted, and to comply therewith the said *feme* defendant paid the said King for the said strip of land and had the said King to make and deliver to the *feme* plaintiff a good and sufficient deed for the said strip of land described by the said plaintiff; that by reason of the said agreement the plaintiffs allowed the said defendant to improve and occupy the land in dispute for about five years; that said land was greatly improved and enhanced in value by the defendants, over and above any rents and profits due the plaintiffs. (To the introduction of this evidence the plaintiffs objected, and the objection was sustained by the Court, and the defendants (768) excepted.)

"The defendants also offered to prove by Linus North, who was offered as a witness by the plaintiffs, on the cross-examination of said witness, to prove that there was a parol contract by which plaintiffs agreed to convey the land in dispute to the *feme* defendant, if the defendants would purchase and convey to the *feme* plaintiff the land embraced in the figures "4," "5" and "6," represented on the plat, and that the defendants did purchase and caused to be conveyed to the said plaintiff the said land, and that the plaintiffs are now in possession of the same. (This evidence was objected to by the plaintiffs, and the objection sustained by the Court, and the defendants excepted.)

"No other or further evidence was offered by the defendants, and the Court thereupon submitted the following issues to the jury, to wit:

1. 'Is the plaintiff, Sophie E. North, the owner of the land described in the complaint?

2. 'Are the defendants in the unlawful possession of the land or any part thereof?

3. 'What damage has the plaintiff sustained by reason of the unlawful possession of said land by the defendants?'

"The jury answered the first and second issues in the affirmative, and assessed the plaintiff's damage at $..., and the Court thereupon rendered judgment for the plaintiffs, as appears in the record, and the defendants excepted and appealed from the same to the Supreme Court."

The contract for the conveyance of the land in dispute, being in parol, and denied, cannot be enforced by reason of the statute of frauds. When the contract is denied the Court cannot hear proof of a void contract. *Dunn v. Moore,* 38 N. C., 364. The evidence of such con- (769) tract was, therefore, properly excluded. Plaintiff having shown title, was entitled to a verdict and judgment for possession. This would ordinarily terminate the action, but the defendant has averred

facts in her answer which, if true, would give her relief in a court of equity, and we think it can as well be administered in this action as another. When the case goes down for trial the Court has power, and it would be proper to allow the parties to so amend the pleadings as to admit all proper evidence as to the agreements, the rents, improvements, etc., to the end that the mutual equities may be enforced. This relief is not founded upon the existence of any contract sought to be executed, or for the breach of which compensation or damages were asked for. It is an appeal to the Court to prevent *fraud.* The real parties, plaintiff and defendant, are married women. It is a rule in our law that one who contracts to sell land and receives the consideration, and refuses to convey for any reason, cannot keep the land and the money also, and this rule applies equally to *feme coverts.* The Court cannot compel a married woman to execute a deed and acknowledge its execution as of her own free will, but it can declare the price paid to be an equitable lien in favor of the other party, so that, if she keeps the property, she must pay the amount of the lien. *Burns v. McGregor,* 90 N. C., 222.

If the defendant's averments, in part or in whole, are sustained on the inquiry, then the full equitable rights of both parties must be administered, as to both tracts of land. *Vann v. Newsom,* 110 N. C., 122.

If it is true that defendant paid the whole purchase price for the land conveyed by King to the plaintiff in pursuance of the alleged agreement, then that land is her property, subject to any equity (770) found in the further investigation in favor of plaintiff, and she would be entitled to such conveyance as the Court shall direct. Code, section 426.

The plaintiff's judgment must be modified according to the principles herein indicated, and with that modification it is affirmed.

Modified and affirmed.

Cited: Vick v. Vick, 126 N. C., 126; *Luton v. Badham,* 127 N. C., 103, 107.

S. C. AND E. D. OWEN, ADMINISTRATORS OF JESSIE OWEN, v. A. F. AND J. H. PAXTON.

(Decided 24 May, 1898.)

Costs—Taxation of—Judgment.

Where, as a condition of a continuance, the plaintiff in an action was required to pay the accrued costs and they were taxed, docketed and paid, and a judgment was subsequently entered in the action directing the repayment of such costs by the defendant. *Held*, that such costs became a part of the judgment, not as costs, as such, but as a part of the judgment already ascertained by reference to the docket as for so much money paid by plaintiff for defendant's benefit, and hence, there was no necessity for a retaxation of the costs.

MOTION by the defendants in an action pending in TRANSYLVANIA, for an injunction restraining the plaintiffs from collecting certain costs which the plaintiffs claimed they had a right to collect under a former judgment rendered in this cause, and a counter motion on the part of the plaintiffs to dissolve a restraining order which had been previously granted on the defendant's motion. The cause was continued
(771) from time to time by consent of parties, and came on for hearing before *Brown, J.*, at chambers in Brevard, on Thursday, April 1, 1897, when he rendered judgment, vacating the restraining order previously issued and refusing the defendants' motion for an injunction, and taxing the defendants with the costs of the motion. From this judgment the defendants appealed. The grounds of the motion appear in the opinion.

Geo. A. Shuford and Davidson & Jones for defendants.
No counsel contra.

CLARK, J. At Fall Term, 1887, the plaintiff was adjudged to pay the costs of the term as the condition of continuance. The costs of that term ($114.99) were accordingly taxed against him, docketed and paid. At Fall Term, 1892, a consent judgment was entered in favor of the plaintiff, reciting as a part of the recovery from the defendants the costs of Fall Term, 1887, which had been paid by the plaintiff. In August, 1893, the defendant moved before the clerk to correct the judgment by striking out the costs of Fall Term, 1887, paid as aforesaid by the plaintiff. The Clerk's judgment refusing the motion was affirmed on appeal by the judge, who taxed the defendant with the costs of the motion. This is a restraining order asked by the defendant upon the ground that the clerk, in taxing the costs under the judgment of 1892, failed to tax against the defendant the costs of the Fall Term, 1887,

theretofore paid by plaintiff, and that a year having elapsed since the rendition of the judgment of 1892, it is now too late (under The Code, sections 748 and 3760) to retax the same, and further, that the judgment having been paid the said costs could not be taxed against the defendant except after due notice. (772)

But this is not a question of the retaxation of costs. The costs of Fall Term, 1887, were duly taxed up amounting to $114.99 and were paid by the plaintiff. The judgment by consent at Fall Term, 1892, directed the repayment of those costs by the defendant. Their recovery therefore is adjudged against the defendant, not as a part of the costs, *qua* costs to be ascertained and taxed up by the clerk, but rather as a part of the judgment already ascertained by reference to the docket, as for so much money paid by plaintiff for defendant's benefit.

Being part of the judgment, there is no bar except from the lapse of ten years, Code section 152 (1), and the defendant's realty is subject to lien of the same and also for the costs incurred on the motion to correct the judgment, it being incident to said judgment.

No error.

D. S. RUSSELL v. HILL & NELSON.

(Decided 3 May, 1898.)

Appeal—Record on Appeal—Conflict in Record.

While a mere clerical error in copying the record on appeal could be corrected in this court by amendment or *certiorari*, an acknowledged conflict existing in the record below between the recitals in the judgment and the response to the issues can only be corrected by a new trial.

ACTION for conversion of personal property, tried before *Robinson, J.*, and a jury, at August Special Term, 1897, of SWAIN. From a judgment for the plaintiff the defendants appealed. The record on appeal, as well as that below, shows that the jury answered the second issue "No," while the judgment recited that the second issue was answered "Yes." (773)

G. S. Ferguson for plaintiff.

R. L. Leatherwood for defendants.

PER CURIAM. When there is a conflict between the "case on appeal" stated by the judge and the record proper, the latter governs. Cases cited in Clark's Code (2 Ed.), p. 579. But here the conflict is in the

record itself. Upon the issues sent up in the record the second issue is answered "No," while in the judgment it is recited that it had been answered "Yes." If this were a mere clerical error in copying it could be cured by a *certiorari* or by amendment here, *S. v. Beal,* 119 N. C., 809; *S. v. Preston,* 104 N. C., 733; but counsel concur that the conflict is in the original record below. Such being the case, the only remedy is by a new trial.

New trial.

A. M. FRY v. C. E. GRAHAM ET AL.

(Decided 24 May, 1898.)

Trustee—Advertisement of Sale Under Trust Deed—Payment of Debt Secured Before Sale—Commissions.

1. Where a trustee, under a deed in trust with power of sale, advertised the land for sale, and the sale was postponed, and before the day of the adjourned sale the debt was paid in full and the deed cancelled, the trustee cannot recover commissions on the amount of the debt, but is entitled to a just allowance for time, labor, services and expenses in and about the matter.

2. In such case, an action brought by the trustee to recover commissions should have not been dismissed and, on appeal, will be sent back for a new trial as to the proper compensation of the trustee for his time, labor, expenses, etc.

(774) ACTION, tried before *Norwood, J.,* at Fall Term, 1897, of SWAIN. The facts appear in the opinion. The defendants demurred *ore tenus* and his Honor sustained the demurrer and dismissed the action. Plaintiff appealed.

W. W. Jones for plaintiff.
R. L. Leatherwood for defendants.

FAIRCLOTH, C. J. The plaintiff was trustee of the defendant, to secure a debt of the latter, with a power of sale in the trust deed upon default of payment. After default occurred the plaintiff advertised to sell the land, but before the sale day it was agreed to postpone the sale. About a year later the plaintiff advertised to sell again at the request of the credtor, and soon thereafter a restraining order was granted, which we understand to have been finally dissolved. Before the second sale day the debtor paid in full the debt and interest and discharged the other stipulations in the deed, and the creditor cancelled and marked the trust deed satisfied, so that no sale was made.

The plaintiff institutes this action to recover five per cent commissions on the amount of the debt, $26,000, and his expenses incurred in advertising, etc. Defendant demurred *ore tenus* and his Honor dismissed the action. There was no agreement between the parties as to the commissions.

We lately had a similar case and it was held that the plaintiff was not entitled to commissions. *Pass v. Brooks,* 118 N. C., 397.

In that case we approved an early decision that "a just allowance for time, labor, services and expenses, under all the circumstances that may be shown before a master," may be made when the (775) Court sees fit to do so. *Boyd v. Hawkins,* 17 N. C., 336. The rule and reasoning will be found in those two cases and need not be repeated here. We therefore think his Honor properly held that plaintiff is not entitled to commissions, but we think he erred in dismissing the action. Whether the plaintiff is entitled to charge for advertising, expenses, labor or services, are matters to be inquired into upon the proofs and the finding of the jury under instructions from the Court. The case will be sent back for trial as to such matters.

Error.

Cited: Whitaker v. Guano Co., 123 N. C., 370; *Turner v. Boger,* 126 N. C., 303.

C. B. ROUSS v. J. H. DITMORE.

(Decided 24 May, 1898.)

Action for Goods Sold and Delivered—Statute of Limitations—Fraud—Remedy.

1. After an action for goods sold and delivered has been barred by the statute of limitations, the discovery by the plaintiff that the vendee used fraud in the purchase of the goods will not revive the cause of action.
2. The remedy by the vendor of goods obtained by the fraud of the purchaser, first discovered after the action on the contract has been barred, is by an action for damages under sec. 155 (9) of The Code as amended by chap. 269, Laws 1889.

ACTION, tried before *Robinson, J.,* and a jury at August Special Term, 1897, of SWAIN.

The action was brought in May, 1895, and was for the recovery of the sum of $1,006.95, due as a balance for goods and merchandise purchased by the defendant from the plaintiff in 1889. The (776)

plaintiff alleged in his complaint that at the time of the sale and delivery of said goods and merchandise the defendant executed to the plaintiff two mortgage deeds for the said balance, conveying lands in Swain County to the plaintiff as security for said goods and merchandise, and which amount was payable three months from the date of said sale and delivery of the said goods. The plaintiff alleged that the defendant, in order to obtain said goods and merchandise, falsely and fraudulently represented the lands conveyed in the said two mortgages to be worth $1,500 in cash; and that the defendant well knew at the time of the alleged fraudulent representation that the lands so mortgaged were not worth exceeding the sum of $50, and that the said false and fraudulent representations were made with the intention of cheating and defrauding the plaintiff out of his goods and merchandise; that the plaintiff relying on the representations so made by the defendant, and believing the same to be true, sold said goods and merchandise to the defendant; that the said sale was made by the plaintiff on 21 March and 18 July, 1889, and the mortgage deeds were executed on 18 May, 1889, and on 31 May, 1889, all the goods and merchandise were delivered to the defendant except $100 worth, which were delivered on 18 July, 1889. The defendant plead payment and the statute of limitations.

Upon the reading of the pleadings the defendant moved to dismiss the action on the ground that the sale was alleged to have been made in 1889 and the suit was not brought until 1895.

(777) It was alleged in the complaint that the plaintiff did not discover the representations made by the defendant in order to obtain credit, which were false and fraudulent, and made with the intent to cheat and defraud plaintiff, until the Spring of 1895, at which time plaintiff brought suit for the recovery of the amount due him.

The Court intimated an opinion that the plaintiff's action was barred by statute of limitations, notwithstanding the representations made by the defendant to the plaintiff in order to obtain the goods and merchandise so purchased, and notwithstanding the plaintiff did not discover that the representations were false and fraududent until 1895.

The plaintiff offered to introduce the said mortgage deeds, both under seal, and also to introduce evidence showing that the property mortgaged was not worth over $50, and that the defendant had represented the property to be fine property (one acre in the centre of the town of Bryson City, and on a main street and suitable for either residence or business property), and that all these representations were false and fraudulent and made by the defendant with intent to defraud the plaintiff.

The plaintiff offered to prove all the allegations contained in his complaint, but the Court held that on the pleadings the action was

barred and would not allow any proof whatever to be offered by the plaintiff, holding that under no circumstances could the plaintiff recover. Thereupon, the plaintiff submitted to a nonsuit and appealed.

R. L. Leatherwood and W. W. Jones for plaintiff.
No counsel contra.

FAIRCLOTH, C. J. This action was commenced in 1895 for (778) balance due on an account for goods sold and delivered in 1889. Defendant gave a mortgage to secure the account on real estate. He plead payment and statute of limitations. Plaintiff alleges in his amended complaint that defendant, with a fraudulent intent, represented that the real estate mortgage was worth $1,500, whereas, in fact, it was not worth more than $50. Upon these facts his Honor held that the action was barred and proceeded no further. Nonsuit and appeal. Laws 1889, ch. 269, amends The Code, section 155(9), and subjects all actions to the same rule whether heretofore cognizable solely in a court of equity or not. *Alpha Mills v. Engine Co.*, 116 N. C., 797. That action was for damages on a false warranty. The present action is not for damages for any fraudulent conduct on the part of the defendant, but is for the balance due on account for goods sold. The amended complaint is only a reply to an effective defense pleaded, and is not the cause of action alleged in the original declaration. At common law there was no time limited to bring an action. In the course of events, the courts of equity, being impressed with the inconvenience and frequent injustice of enforcing stale demands, adopted certain periods of time after which they would presume payment or satisfaction in some way. The courts of law, in analogy, enacted statutes of limitations, and also observed the rule of presumptions, which had been introduced by the courts of equity. Accordingly, the Statute 21, James I, superseded all previous attempts at limitations on actions, and that statute is still in force in England and in most of the States in the United States, with such modifications as to length of time, etc., as the States have desired. Statutes of limitations act merely upon the remedy, but do not extinguish or disharge the claim. They (779) destroy the remedy unless it is enforced within the specified period, and the bar is not removed by anything less than a new promise or some acknowledgment or act consistent with such promise, whereas a presumption is overcome by sufficient proof that the debt has not been paid, or satisfactory circumstances to account for the delay of the creditor in failing to prosecute his claim.

If the plaintiff had alleged as his cause of action the alleged and concealed fraud, then the time of its discovery would probably have availed

him, if within the statutory period. He seems to have relied on the integrity of his debtor. If there was no fraud, the remedy was barred. If there was fraud, the remedy, after it was discovered, was damages therefor, and was plaintiff's cause of action instead of the balance on his account, which was barred by time. We find no error in the record.

Affirmed.

Cited: Menzel v. Hinton, 132 N. C., 662.

A. U. WOODBURY v. W. E. EVANS.

(Decided 17 May, 1898.)

Action to Recover Purchase Price of Land—Vendor and Vendee—Contract Relating to Land—Fraudulent Representations—Shortage—Duty of Purchaser of Land—Directing Verdict—Best Evidence—Amendment of Pleadings.

1. In all contracts for the sale of land it is the duty of the purchaser to guard himself against defects of title, quantity, encumbrance and the like, and if he suffer loss by his negligence the law will afford him no remedy, unless he has been misled by the fraudulent representations of the bargainor.

2. In the trial of an action for the balance due on a contract for the purchase of land, standing timber and machinery in a lump, in which the number of acres of land to be conveyed was not mentioned, the gist of the defense was the fraudulent representations of the bargainor. *Held*, that it was not error to refuse to submit to the jury the question of shortage in the acreage since that was immaterial in the absence of fraud.

3. Where, in the trial of an action for the balance due on a contract for the purchase of land, an issue of fraud was submitted, and there was no evidence to sustain it, it was proper for the trial Judge to direct the jury to answer the issue in the negative if they believed the evidence.

4. It is not competent to prove by parol the existence of older and superior titles to the land, since the grants and titles themselves are the best evidence.

5. After the close of the evidence on the trial of an action for the recovery of the balance due for the purchase of land, the defendant moved to dismiss because the complaint did not allege the plaintiff's ability, readiness and willingness to make the deed set out in the contract and to tender the same. The plaintiff was then allowed to amend his complaint so as to contain those averments. *Held*, that the allowance of the amendment was within the discretion of the Court (Clark's Code, sec. 273).

ACTION, tried before *Norwood, J.*, and a jury, at Fall Term, (780) 1897, of CHEROKEE. The facts appear in the opinion. There was a judgment for the plaintiff, and the defendant appealed.

J. W. Cooper for plaintiff.
G. S. Ferguson for defendant.

CLARK, J. The contract set out in the complaint and admitted in the answer was for the purchase of land, standing timber and machinery in a lump. It was not a purchase by the acre, and as to only one tract was the number of ares even mentioned. The gist of the defense rests upon the allegation of fraudulent representations, and the issue submitted, "Were the defendants induced to enter into the contract, attached to the complaint, by means of false and fraudulent (781) representations made to them by the plaintiff, as alleged in the answer?" presented fully the defendant's contention. The Court properly declined an issue as to a deficit in the number of acres, though alleged in the answer, because, if shown upon a contract such as this, it would have been immaterial unless fraud had been proved, and at most it would be merely evidential matter tending with other proof to show fraud. But there was no proof of a shortage, nor of fraud, and his Honor properly told the jury that if they believed the evidence to answer the issue "No." *Barber v. Roseboro,* 97 N. C., 192; *Chemical Co. v. Johnson,* 101 N. C., 223; *Purifoy v. R. R.,* 108 N. C., 100.

This is an action to recover the balance due on a contract for the sale of land, and the Court says: "In all contracts for the sale of land it is the duty of the purchaser to guard himself against defects of title, quantity, incumbrance and the like; and if he fail to do so it is his own folly, for the law will not afford him a remedy for the consequences of his own negligence. If, however, representations are made by the bargainor which may be reasonably relied upon by the purchaser and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and cause loss and damage to the party relying upon them, and he has acted with ordinary prudence in the matter, he is entitled to relief." *Etheridge v. Vernoy,* 70 N. C., 713; *Foy v. Haughton,* 85 N. C., 168; *Anderson v. Rainey,* 100 N. C., 321. But such state of facts is not shown in this case.

A witness for the defendant was asked, "State if you know whether of your own knowledge any of these lands embraced in these grants are covered by older and superior grants or titles." This was properly ruled out. It is not competent to prove by parol that there were older and superior titles. The only competent evidence would (782) be the grants and titles themselves.

The defendant, after the close of the evidence, moved to dismiss the action because the complaint failed to allege that the plaintiff, who sued for the balance of the purchase money, was able, ready and willing to make the deed set out in the contract and tender the same. The plaintiff asked leave to amend by making those averments which the Court allowed and consequently denied the motion to dismiss. The leave to amend was within the discretion of the Court. Clark's Code, section 273, and cases there cited.

No error.

Cited: Martin v. Bank, 131 N. C., 123; *Lassiter v. R. R.,* 136 N. C., 95; *Woodbury v. King,* 152 N. C., 681; *Shell v. Roseman,* 155 N. C., 93.

A. Z. ROBERTS v. W. R. ROBERTS.

(Decided 24 May, 1898.)

Action on Note—Verdict—Certainty of Verdict.

In the trial of an action in which the defendant claimed to be entitled to credits in addition to those entered on the notes sued on, the response of the jury to the issue, "Is defendant indebted to the plaintiff, and if so, in what amount?" was "The face of the notes, with interest, less credits": *Held,* that the verdict was not indefinite, but clearly meant that the credits allowed were those endorsed upon the notes.

ACTION, tried before *Norwood, J.,* and a jury, at Fall Term, 1897, of CHEROKEE. The facts are stated in the opinion. From a judgment for plaintiff the defendant appealed.

G. S. Ferguson for plaintiff.
J. W. Cooper for defendant.

(783) FAIRCLOTH, C. J. The plaintiff sues on two notes with one credit on each. The defendant averred that he had made other payments in goods, work, etc., which are not credited on the notes. Each party introduced evidence on said averred payments, and the Court submitted the following and only issue: "Is the defendant W. R. Roberts indebted to the plaintiff, and if so, in what amount?" Answer: "The face of the notes, with interest, less the credits."

The only exception by the defendant is to the judgment, he contending that the verdict was too indefinite to warrant any judgment.

What, then, does "less the credits" mean? Our construction is that it means the credits on the notes. To draw the judgment, only a calculation was necessary, which was done by his Honor. *Id certum est quod certum reddi potest.* Defendant relied on *Morrison v. Watson,* 95 N. C., 479, but it does not fit his case. There were several issues, and the answers were inconsistent. The Court said: "If there be an irreconcilable conflict in the findings of the jury upon the issues submitted or between the verdict and the judgment, a new trial will be awarded." If the jury intended other credits it is reasonable to suppose that they would have specified those allowed and the amount. Those endorsed were specific enough. The judgment is agreeable to the verdict.

Affirmed.

(784)

J. W. COOPER v. H. P. WYMAN.

(Decided 11 May, 1898.)

Process—Nonresidents—Exemption from Service of Process—Privilege—Common Law—Implied Repeal—Judgment Dismissing Action —Not Appealable—Practice.

1. A summons or other civil process cannot be served upon a nonresident who comes into this State for the sole purpose of attending a litigation in our courts as suitor or witness. Such rule is based upon high considerations of public policy and not upon statutory law, since it is to the public interest that suitors and witnesses from other States, who cannot be compelled to attend the courts, may not be deterred from voluntarily appearing.

2. The exemption of non-resident suitors or witnesses from service of civil process while attending courts in this State covers the time of their coming, their stay and a reasonable time for returning.

3. Service of civil process upon a non-resident suitor or witness attending court in this State is not void but voidable and his remedy is not a motion to dismiss the action, but a motion, on a special appearance, to set aside the return of service.

4. The common law privilege of the exemption of non-residents from service of civil process while attending upon litigation in the courts of this State, as suitors or witnesses, was not repealed, by implication, by secs. 1367 and 1735 of the Code prohibiting arrests in civil actions of persons attending courts as witnesses or suitors.

5. The refusal of a motion to dismiss an action is not appealable, the correct practice being to note an exception to such refusal so as to have it considered on appeal from the final judgment.

COOPER *v.* WYMAN.

ACTION, heard before *Norwood, J.*, at Fall Term, 1897, of CHEROKEE, on a motion made by the defendant, who entered a special appearance for the purpose, to dismiss the action upon the ground stated in the opinion. The motion was denied, and defendant appealed.

Davidson & Jones and F. A. Sondley for defendant.
No counsel contra.

(785) CLARK, J. The defendant is a non-resident of this State and was served with a summons in this action while attending Swain Superior Court to prosecute an action, in which he was sued, as a witness in his own behalf, and the affidavit (which was taken as true, not being controverted) states that he was not in this State for any other purpose whatever.

The motion to dismiss the action was properly refused, but the point relied on, which should regularly have been raised by a motion to strike out the return of service, is that a summons or other civil process cannot be served upon a non-resident who comes into this State for the sole purpose of attending a litigation in our courts as suitor or witness. This is the well-established rule of law and the very numerous cases to that effect are collected in some eighteen pages of small type in the notes to *Mullen v. Sanborn,* 25 L. R. A., 721. They represent so universal and so uniform a holding upon the point that it is unnecessary to do more than refer to them. The rule is thus stated in Rorer Interstate Law, 26: "It is the policy of the law to protect (non-resident) suitors and witnesses from service of process in civil actions, whether the process be such as requires their arrest or be merely in the nature of a summons. Service in such cases will be set aside as well upon general principles as upon positive law, if there is such." As stated in many of the cases, this settled rule is based upon high considerations of public policy, not upon statutory law, since it is the public in-
(786) terest that suitors and witnesses from other States who cannot be compelled to attend our courts, may not be deterred from voluntarily appearing by fear of being served with process in other actions, their presence, if obtainable, being calculated to enable the courts to more thoroughly educe the truth of the matters in litigation. *Baldwin v. Emerson,* 16 R. I., 304.

In some few of the earlier cases, it was questioned whether the privilege was not restricted to witnesses, but all the later and better considered cases embrace parties as well as witnesses, more especially since the change which enables parties to be examined as witnesses. *Matthews v. Tufts,* 87 N. Y., 658; *Juneau Bank v. McSpedan,* 5 Biss., 64. No one is hurt by this exemption since, if it did not exist, the non-

residents would not come here, and service of summons on them could not be made any way. *Sherman v. Gundlach,* 37 Minn., 118; *Ballinger v. Eliot,* 72 N. C., 596.

The exemption covers the time of their coming, stay, and reasonable time for returning—*eundo, morando, et redeundo,*—but the exemption is strictly restricted to those instances in which the person claiming it is in this State for the purpose of attending the litigation as a party or as a witness, and for no other purpose whatever. If he is here for no other cause besides attendance upon the suit, the ground of the exemption ceases and he is subject to service of process. There is also an exception where there is an action brought against a plaintiff for maliciously bringing the very action which he comes to the State to prosecute. *Mullen v. Sanborn, supra.*

The exception being long and universally recognized, and not being statutory, could only be repealed by an express statute, which no State has passed. In many States, as in this (Code, sections (787) 1367 and 1735), there are statutes prohibiting the arrest in civil actions of parties attending court as witnesses or jurors. But this is held (*Cooley, C. J.,* in *Mitchell v. Herron,* 53 Mich., 42; *Andrews v. Lembeck,* 46 Ohio St., 38; *Wilson v. Donaldson,* 117 Ind., 356, and in many other cases) not to be an implied repeal of the common law exemption, but a statutory declaration of it *pro tanto,* and indeed, in certain respects it differs materially from the common law rule since, while limited to civil arrest of witnesses and jurors, it is extended to all of those whether residents of the State or not, and whether having other business at the county, town or not; whereas, the common law immunity extends only to parties and witnesses who are non-residents of the State and who have no other business in this State, and protects them not only from arrests in civil actions but from service of summons or any other civil process whatever. Indeed, the common law exemption rests upon an entirely different reason from the statutory exemption from arrest, the latter being that witnesses and jurors shall not be hindered from discharging their duties as such, which they have been summoned by the law to perform; hence, jurors and witnesses, resident in this State, can be served with summons or any process, other than arrest; while the common law exemption of non-resident parties and witnesses is from service of any process and is for the precisely opposite reason that the law cannot compel their attendance in this State, and they should be encouraged to come that the due administration of justice may have the advantage of their presence and examination.

Service in such cases is not void but voidable; hence, the party, before appearing in the action, should by special appear- (788) ance move to set aside the return of service (*Thornton v. Machine*

Co., 83 Ga., 288), and if the motion is denied, should request the judge to find the facts and enter them on the record together with the exception to the ruling, so that it may come up for review on the appeal from final judgment. *Guilford Co. v. Georgia Co.*, 109 N. C., 310.

The well settled rule that no appeal lies from a refusal to dismiss an action (*Guilford v. Ga., supra,* and numerous other cases cited in Clark's Code, 2 Ed., p. 559, and supplement thereto, p. 83) is based upon the patent reason that if an appeal lay in any case from a refusal to dismiss, a defendant could in every case get from six to eighteen months delay by such motion. The presumption is always that the judge correctly refused the motion to dismiss, and if it is in doubt, the point can be decided on the appeal from the final judgment. But while, by a long line of uniform decisions, such appeals do not lie, the Court in a proper case has often discussed and expressed its opinion upon the point intended to be presented, when there were circumstances which justified its doing so. *S. v. Wylde,* 110 N. C., 500, and such is the case here. On motion to that effect, the return on the summons as "Served" should be stricken out.

Appeal dismissed.

Cited: Cooper v. Bogle, post, 789; *White v. Underwood,* 125 N. C., 27; *Duffy v. Meadows,* 131 N. C., 33; *Jester v. Steam Packet Co., ib.,* 57; *Greenleaf v. Bank,* 133 N. C., 294, 299; *Timber Co. v. Butler,* 134 N. C., 52; *Christian v. R. R.,* 136 N. C., 323; *Houston v. Lumber Co., ib.,* 329; *School v. Pierce,* 163 N. C., 429, 430; *Bradshaw v. Bank,* 172 N. C., 633; *Brown v. Taylor,* 174 N. C., 424.

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(789)

J. W. COOPER v. J. C. M. BOGLE.

(Decided 11 May, 1898.)

Process, Service of on Nonresident Attending Court in this State as a Witness—Privilege.

(For syllabus see *Cooper v. Wyman, ante,* 784.)

ACTION, heard before *Norwood, J.,* at Fall Term, 1897, of CHEROKEE, on a motion to dismiss an action in which service of process was made upon the defendant while temporarily in this State in attendance upon court as a witness. The motion was refused, and defendant appealed.

Davidson & Jones and F. A. Sondley for defendant.
No counsel contra.

PER CURIAM. This case is governed by the decision in *Cooper v. Wyman, ante,* 784, from which it differs only in that the nonresident defendant herein was served with summons while attending court in this State as a witness only.

Appeal dismissed.

(790)

H. MECKE ET AL. v. THE VALLEYTOWN MINERAL COMPANY ET AL.

(Dated 5 April, 1898.)

Practice—Removal of Causes—Time of Application—Diverse Citizenship—Separable Controversy.

1. A petition to remove a cause pending in a State court was filed by the defendant, and the order of removal made on 16 August; the order was filed in the office of the Superior Court of the county where the action was pending on 18 August, and on 25 August the notice of appeal was served on the petitioner for removal, and on 30 August the case on appeal was served: *Held*, that the appeal was perfected in due time.

2. The provision of the act of Congress regulating removal of causes from the State to the Federal court (25 U. S. Statutes, 435), to the effect that a petition for removal must be filed at or before the time defendant is required to plead "by the rules of the State courts," applies only to the general rules of the State courts and not to a special order allowing additional time to plead in a particular case.

3. Where an order was made on the motion of one party allowing both parties additional time in which to file pleadings, and no exception was made by the other party, the order is binding on both.

4. The requirement that a petition for removal of a cause from the Federal to the State court must be filed before the defendant is required to plead by the rules of the State court is imperative, and the time cannot be extended by stipulation of the parties.

5. An action in the nature of a creditor's bill to wind up the affairs of a corporation, to administer its assets among its creditors according to their respective rights, to establish a joint and several liability for its debts on the part of another corporation which sustained toward it the relation of a partner, and to sell land in which it is stated that both corporations have equitable interests as well as those persons represented by the defendant trustees, is but a single and inseparable controversy, and although one of the corporations is a nonresident it cannot have the cause removed to a Federal court on the ground of diverse citizenship.

6. Where, in an action in the nature of a creditor's bill, complete relief could not have been granted without the presence of all the defendants, even if plaintiff had elected to split up the action and sue one of defendant corporations for its assumption of the debt of the insolvent defendant cor-

poration, the action is not separable so as to allow a removal to the Federal court on the ground of diversity of citizenship of the first named corporation.

(791) ACTION in the nature of a creditor's bill, filed by the plaintiff for and on behalf of himself and all other creditors of the Valleytown Mineral Company against said Valleytown Mineral Company, The Roessler and Hasslacher Chemical Company and R. L. Cooper, Ben Posey and J. F. Abernathy, Trustees, to which Geo. Hillyer, Ellen E. Hillyer and John Colvin became parties upon their voluntary petition, claiming the forfeiture of a certain lease by the Valleytown Mineral Company.

(794) At Spring Term, 1897, of CHEROKEE, *Brown, J.*, made an order referring the cause to G. S. Ferguson, as a Master in Chancery, to inquire and report who were true creditors, etc. On 16 August, 1897, the said The Roessler and Hasslacher Chemical Company, without notice to the plaintiffs or any other parties to said suit, presented the petition set forth in the record to *Norwood, J.*, at chambers at Asheville, who upon the hearing of said petition, and without the examination of the record, which plaintiffs insist would have contradicted the same, granted the order complained of, removing said cause to the Circuit Court of the United States and commanding that all other proceedings in the Superior Court of Cherokee be stayed.

The plaintiffs excepted to said order which was filed 18 August, 1897, and gave timely notice of appeal.

J. H. Dillard and Davidson & Jones for plaintiffs.
J. H. Merrimon for defendants.

CLARK, J. The summons was returnable to May Term, 1897, of CHEROKEE. The complaint and amended complaint were filed, judgment taken for want of an answer, and a referee appointed to state an account, a receiver having also been duly appointed before the return term. Notwithstanding the judgment appointing a referee recites that no answer had been filed, there is certified up to us this entry from the minutes "Thirty days leave to file amended complaint and sixty days thereafter to file answer." On 16 August, one of the defendants, The Roessler & Hasslacher Chemical Co., a non-resident corporation, appeared before his Honor *Judge Norwood*, at chambers in Asheville, and filed a petition to remove on the ground of diverse citizenship, alleging a separable controversy, the other defendants being residents of this State. The judge ordered the cause removed to the U. S. Circuit Court. The order was filed in the clerk's office in Cherokee County on 18 August, and on 25 August service of the plaintiff's notice of appeal was accepted

by the defendant who had made the motion to remove, and on 30 August the plaintiff served his case on appeal. This was all in due time as to the appeal. The amended statute provides: "The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered (796) in term within ten days after its rendition (unless the appeal was taken at the trial)." Clark's Code, section 549. And the next section, 550, provides that the case on appeal shall be served "within ten days after the entry of appeal." Here, the judgment was filed and the plaintiff acquired notice on 18 August. The notice of appeal was accepted on 25 August, within ten days, and the case on appeal was served on 30 August, in ten days after the notice. When an appeal is taken at the trial, the case on appeal must of course be served within ten days from adjournment of the court, *Delafield v. Construction Co.*, 115 N. C., 21; but the appellant has the right to reserve taking his appeal and enter it within ten days after adjournment of the court, in which case he has ten days after entry of the appeal to serve the case on appeal. The same applies to appeals from judgments taken out of term. Rule 27 of this Court is additional to, but does not restrict, repeal or abrogate any of the provisions of The Code, sections 549 and 550.

The case being here regularly, the plaintiff contends that the judge below erred in granting the removal. The State court has jurisdiction, and to be deprived of it there must be a strict compliance with the act of Congress, since the right of removal is purely statutory and only exists when the case falls within the terms of the law. The removal act of 1888 (25 U. S. Statutes at Large, 435) provides that a petition for removal must be filed "at or before the time at which the defendant is required to plead by the laws of the State, or the rules of the State courts. This was at the return term in May, Code, section 207. The defendant however contends that there was an order of the court allowing further time to answer, and the motion to remove being made within such time was within the time "allowed by the rules of (797) the State courts." But the decisions are uniform in all the courts that this means the general rules of the court (in those States in which the time of pleading is fixed by rules of court) and does not mean a special order or rule in a particular cause. There has been some conflict of decision in the Federal Courts as to whether the extension of time to answer did not extend the time to move for removal, by reason of its being a waiver of the statutory time. All the authorities seem to concur that, where the extension of time is by consent of parties, or by order of court based on such consent, the defendant loses his right by not moving at the term at which, without consent, he was required to answer. There is some conflict as to whether he loses the right by

not moving at that term when the extension of time is *in invitum*. But, here, the entry, as in *Howard v. R. R., post,* 944, does not appear affirmatively to have been made by the court. It was probably placed on the minutes by consent of parties, and if not, the defendant assented to it by not excepting thereto. He has lost no opportunity to remove by any act of the State court against which he objected, and under the act of Congress the time for him to make the motion expired at the Spring Term in May, 1897. The same point is fully discussed and authorities cited in *Howard v. R. R., supra, post,* 944.

This is a creditors' bill to wind up the affairs of an insolvent corporation, to administer its assets among its creditors according to their respective rights, to establish a joint and several liability for its debts on the part of another corporation (the appellee), which sustained to it the relation of a partner, and to sell land in which it is stated that both corporations have equitable interests as well as those persons
(798) represented by the defendant trustees, and is but a single controversy. Even if the plaintiff had elected to split the action up, and had sued the appellee for its assumption of the debt, he could not have subjected the land without the presence of all the defendants. The Valleytown Mineral Company and the trustees (all citizens of this State), are necessary and indispensable parties, and there is no such separable cause of action against the appellee as entitled it to a removal even if the petition and bond had been filed in time. *Springer v. Sheets,* 115 N. C., 370; *Faison v. Hardy,* 114 N. C., 429; *Hyde v. Ruble,* 104 U. S., 407; *Blake v. McKim,* 103 U. S., 336; Removal Cases, 100 U. S., 457.

The appellant also objects that the order of removal should have been made during a term of court in which the action was brought, and not at chambers in another county, and without notice to the plaintiff. But as the other two points are with the plaintiff, it is unnecessary to discuss this.

The order removing the cause is reversed, and the Court below will proceed regularly as if the motion had not been made. *Bradley v. R. R.,* 119 N. C., 74; *Howard v. R. R., post,* 944.

Reversed.

(799)

MAGGIE McCRACKEN v. HENRY A. SMATHERS.

(Decided 15 March, 1898.)

Action for Damages—Dentist—Malpractice—Professional Skill—Negligence— Contributory Negligence— Trial— Instructions—Damages.

1. Where, in the trial of an action against a dentist for damages for injuries resulting from malpractice, the defendant asked a witness whether if the patient, after receiving treatment, should be directed to return in a week and should fail to do so, it would be the duty of the dentist to seek the patient: *Held*, that the questions were properly excluded as being too general and not pertinent to any material issue in the case.

2. If error is committed in excluding questions propounded to a witness on a trial it may be cured by subsequently giving an instruction prayed for by the party asking the question and relating to the matters covered by them.

3. In the trial of an action against a dentist for malpractice, an instruction that "if the defendant did not, at the time of treating the plaintiff, possess the learning and skill ordinarily possessed by members of the dental profession, and, by improper treatment, the plaintiff was injured, the defendant would be liable for the damage sustained," was not erroneous.

4. The degree of learning and skill which a physician and surgeon holds himself out to possess, and which he will be held to apply in his profession, is that degree which is ordinarily possessed by the profession as it exists at the time of his practice, and not as it may have existed at some time in the past.

5. On the trial of an action against a dentist for malpractice, an instruction that if the defendant did possess the learning and skill which ordinarily characterize his profession, and failed to exercise it in serving the plaintiff, and plaintiff was thereby injured, the defendant would be liable for the injuries sustained, was not erroneous.

6. A jury, in fixing the damages in the trial of an action for injuries resulting from the malpractice of a dentist, may take into consideration the injury to the plaintiff, such as the pain suffered by the plaintiff, loss of time, loss of teeth and increased delay in effecting a cure, and the probability of permanent injury necessarily consequent upon the injury sustained by the maltreatment.

7. The care and skill required of a dentist, while not necessarily the highest known to the profession, cannot be limited to such as is exercised by dentists in his neighborhood, but must be such as is ordinarily possessed and practiced by the average of his profession.

8. Where the liability of a dentist for malpractice is established, the fact that the patient, after such malpractice, disobeyed the orders of the dentist, and so aggravated the injury, does not discharge the latter's liability.

ACTION, tried before *Norwood, J.*, and a jury, at Fall Term, (800) 1897, of HAYWOOD. The facts appear in the opinion and in the

report of a former appeal in the same case contained in 119 N. C., 617. The "fifth" prayer for instruction referred to in the opinion, as having been given on the trial, was as follows:

"5th. If the plaintiff went to the defendant to treat her teeth, and he gave her proper treatment according to his best judgment, and gave her proper directions, he was not required to hunt her up or write and inform her father of her condition, and if she neglected to return for treatment as directed, and on account of her neglecting to have her tooth treated, the abscess developed and became chronic, and necrosis of the bone ensued, it is the fault of the plaintiff, and she cannot recover of the defendant for any injury she may have suffered."

The jury returned a verdict awarding the plaintiff $500 as damages, and from the judgment thereon the defendant appealed.

Smathers & Crawford for plaintiff.
Ferguson & Ferguson for defendant.

(801) Douglas, J. This case was before this Court at September Term, 1896, the opinion being in 119 N. C., 617. The defendant asked the witness: "If the patient, after receiving treatment, should be directed to return in a week, and should fail to do so, is it regarded by the profession as the duty of the dentist to seek the patient?" and "At what time does the relation of physician and patient cease?" the plaintiff objecting, and the objection being sustained by the court, the defendant excepted. The court charged the jury in response to prayers of plaintiff:

1. That if defendant did not, at the time of treating the plaintiff, possess the learning and skill ordinarily possessed by members of the dental profession, and by improper treatment the plaintiff was injured, the defendant would be liable for such damage as the plaintiff sustained by reason thereof; and the jury should answer the first issue "Yes." Defendant excepted.

2. The degree of learning and skill which the physician and surgeon holds himself out to possess is that degree which is ordinarily possessed by the profession, as it exists at the time or contemporaneous with himself and not as it may have existed at some time in the past; and the physician and surgeon must in general be held to apply in his practice what is thus settled in his profession. Defendant excepted.

3. That if the defendant did possess the learning and skill which ordinarily characterize his profession, and failed to exercise it in this case, and the plaintiff was injured in consequence thereof, the defendant would be liable to such damages as the plaintiff sustained. (This was given with further explanation as to contributory negligence). Defendant excepted.

7. That the jury, in fixing the damage, may take into consideration the injury the plaintiff sustained by the unskillful treatment of the case; of such would be the pain, loss of time, suffering, loss (802) of teeth and increased delay in effecting a cure, and probability of permanent injury, necessarily consequent upon the injury sustained by the maltreatment. This was given and the defendant excepted.

The defendant asked six special instructions, four of which were given in full, and the sixth given with slight modification. The third and sixth prayers are as follows:

"3. The care and skill required of the defendant is not the highest degree of knowledge and skill known to the profession, but such as is possessed by men of his profession *in the neighborhood.*"

"6. The defendant is responsible to the plaintiff only for ordinary care and skill and the exercise of his best judgment, not for the want of the highest degree of skill; it was the duty of the plaintiff to co-operate with the defendant and to conform to his advice, and if he advised her to return, upon the tooth's giving her trouble, and she did not return, either from want of inclination, because her father was busy with the horses, or on account of sickness, it was her own neglect, and she cannot recover of defendant for her own neglect," to which the court added: "provided the defendant used ordinary skill and his best judgment."

The court refused the third instruction, and gave the sixth with the modification above set forth, to wit: "provided the defendant used ordinary skill and his best judgment." To the modification of the sixth instruction, the defendant excepted.

The court instructed the jury on negligence generally, to the charge as given, and defendant excepted.

Referring to the second and first exceptions, we think that (803) under the circumstances of this case the questions objected to were properly excluded as being too general and not pertinent to any material issue. If there were error in excluding them, it was fully cured by the fifth prayer of the defendant, given in full by the court. Nor do we see any error either in the instruction given or the refusal of prayers.

The plaintiff alleged two distinct acts of malpractice, one in originally filling the tooth upon a live nerve without proper packing, and the other in improperly and unnecessarily boring through the jawbone after the plaintiff had returned for treatment. Whether this malpractice, found by the jury, arose from the want of ordinary knowledge or skill, or the want of reasonable care on the part of the defendant is immaterial, as both are impliedly guaranteed by one offering his services to the public. The degree of care and skill required is that possessed and

exercised by the ordinary members of his profession. It need not be the highest skill and knowledge known to the profession, but it must be such as is ordinarily possessed by the average of the profession. It cannot be measured simply by the profession in the *neighborhood,* as this standard of measurement would be entirely too variable and uncertain. "Neighborhood" might be construed into a very limited area, and is generally so understood among our people. It might contain but few dentists, in sparsely settled sections perhaps only one or two. Both might be men of very inferior qualifications, and to say that they might set themselves up as the standard of a learned profession, and prove the standing of each by the ability of the other, would be equally unjust to the profession and to its patients. The words "the neighborhood" as used in the prayer are essentially different from the phrases
(804) "the same *general* neighborhood" or "the same general locality," which are found in some decisions from other States. In the well-considered case of *Gramm v. Boener,* 56 Ind., 497, 501, the Court says: "It seems to us that physicians or surgeons practicing in small towns, or rural or sparsely populated districts, are bound to possess and exercise at least the average degree of skill possessed and exercised by the profession in such localities generally. It will *not* do, as we think, to say that if a surgeon or physician has exercised such a degree of skill as is ordinarily exercised in the *particular* locality in which he practices, it will be sufficient."

The third prayer of the defendant was therefore properly refused; nor should his sixth prayer have been given without modification. The court was asked to charge in substance that if the plaintiff had failed to return, no matter from what cause, when the tooth began to give trouble, she would be guilty of contributory negligence and could not recover, no matter how great the fault of the defendant. We think that the charge of the Court, especially in the fifth prayer given, presented the question of contributory negligence in a view sufficiently favorable to the defendant, and the finding of the jury that the plaintiff was not guilty of contributory negligence settles that question. In any event the alleged negligence of the plaintiff in not returning within a proper time could not have contributed to the second act of malpractice in improperly boring into her jaw bone nor did it cause the first act of malpractice, but at best could only have aggravated its effects. We think the jury were sufficiently instructed that the defendant would not be liable if he had exercised ordinary skill and care, and that if he failed in either of these particulars he would be responsible for the damages resulting from his own acts alone. In *Du Bois v. Decker,* 130
(805) N. Y., 325, it was held that "When a liability for negligence or malpractice is established, proof that the patient, after the lia-

bility was incurred, disobeyed the orders of the physician and so aggravated the injury, does not discharge the liability; but simply goes in mitigation of damages."

The rule as to ordinary or reasonable skill and care is alluded to in *Woodward v. Hancock,* 52 N. C., 384, and in *Boon v. Murphy,* 108 N. C., 187, but is not fully discussed. We think that the rule as herein laid down is fully in accord with those decisions, and is sustained by the weight of authority in other jurisdictions. Where a different rule is followed, it is almost invariably of a more stringent nature. Shearman & Redfield on Negligence, secs. 431, 443; *Smothers v. Hanks,* 34 Iowa, 286; *Teft v. Wilcox,* 6 Kansas, 46; Elwell on Malpractice, 31, 53; *Howard v. Grover,* 28 Me., 97; *Simonds v. Henry,* 39 *id.,* 155; *Patten v. Miggin,* 51 *id.,* 595; *Lawdon v. Humphrey,* 9 Conn., 209; *Reynolds v. Graves,* 3 Wis., 416; *Gallagher v. Thompson,* Wright (Ohio), 466; *Bowman v. Woods,* 4 G. Greene, 441; *Leighton v. Sergeant,* 7 Foster, 460; *Wilmot v. Howard,* 39 Vt., 447; *Small v. Howard,* 128 Mass., 131; *Carpenter v. Blake,* 17 N. G. S. C., 358; *McCandless v. McWha,* 22 Penn. St., 261; McClelland C. Malp., 18, 32.

The last exception, where neither the obnoxious instructions are given nor the errors pointed out, cannot be considered, being essentially broadside. No error appearing, the judgment is

Affirmed.

Cited: Long v. Austin, 153 N. C., 511.

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(806)

R. D. GILMER, TRUSTEE, v. J. C. YOUNG ET AL.

(Decided 12 April, 1898.)

Contract for Purchase of Land — Contract—Accurate Survey—Horizontal Survey—Custom—Notice.

1. Where a contract for sale and purchase of land provided that it should be paid according to the number of acres contained in the tract, to be ascertained by an "accurate survey": *Held,* that the survey should be by horizontal and not surface measurements.

2. A custom, in order to amount to notice to all persons, must be general, like the common law, and hence, a local or general custom is not notice to any one unless there be actual knowledge of it, and will not be considered as having entered into a contract without such knowledge being shown.

FURCHES, J., dissents, *arguendo,* in which DOUGLAS, J., concurs.

ACTION, tried before *Brown, J.*, at Spring Term, 1897, of HAYWOOD. The action was brought to recover $1,205, the alleged balance of the purchase price of a large boundary of land contracted to be bought by the defendant at so much per acre, the number of acres to be ascertained by an accurate survey. The amount claimed was the difference between the price of the acreage ascertained by two methods of survey—the surface and horizontal—the plaintiff insisting upon the former and the defendants upon the latter as the correct method.

It was admitted that all the works on surveying lay down the level or horizontal methods as the correct mathematical mode for ascertaining the acreage in a given area and boundary.

It was admitted at date of the contract for purchase and long before and since the defendants were residents and citizens of the State of New York.

Upon an intimation by the court of the opinion that plaintiff
(808) could not recover, and that the horizontal method was the proper method of surveying lands, the plaintiff submitted to a nonsuit and appealed.

W. T. Crawford and A. C. Avery for plaintiff.
W. J. Welch for defendants.

FAIRCLOTH, C. J. The object of this action is to ascertain the true number of acres in two large tracts of land. It was admitted that the boundaries were all located and undisputed; that the purpose of this action was to determine the number of acres within said boundaries, and that the only question was whether the acreage was to be
(809) computed by surface measurement or by level or horizontal measurement, according to the rules laid down in the standard works on surveying. The contract was to pay a certain price per acre for all the acres within the admitted boundaries. One clause of the contract was: "Immediately upon the decision of the question of title, an *accurate* survey shall be made of said tracts of land for the purpose of ascertaining the number of acres in each tract." Surveys were made on each theory and the difference ascertained. What is an *accurate* survey, therefore, is the important question.

All the standard authorities being against the method of surface measurement, and this being admitted, there seems to be but little for this Court to consider.

When the State granted its western domain in large bodies, there is no evidence whatever that the State adopted the surface measurement, and there is no ground for presuming that it did so, in spite of the fact

that the authorities agree in laying it down that the horizontal measurement is the correct one. His Honor properly adopted the latter theory, from which the plaintiff appealed.

The difference in the two modes of measurement is material. Suppose the body of a large grant should be comparatively flat and level, and that several of the boundary lines should cross high points and deep ravines. Of course the calculation would show many more than the true number of acres, whereas the horizontal measurement would give the true acreage.

Looking for a corner according to course, distance, chops, and the like is a different question from that of measuring the distance between two admitted corners, on a given course.

In *Stack v. Pepper,* 119 N. C., 434, although an argument was (810) made in support of the surface theory, the opinion recognizes the horizonal theory by eliminating from the distance called for in the deed the height of a cliff nearly perpendicular which lay across the line. The argument of the inconvenience or impracticability of climbing a perpendicular cliff is without force, because mathematics, being a scientific process, the surveyor, by offsets and like means, can accurately find the upper point of a perpendicular line from the last certain point fixed by the surveyor's stick.

The plaintiff offered evidence to show that in Western North Carolina it was customary to measure on the surface line, which was excluded. A custom, in order to amount to notice to all persons, must, like the common law, be general. A local or general local custom is not notice to any one, unless there be actual knowledge of it, and it will not be treated as entering into the contract without such knowledge. 27 Am. & Eng. Enc., 743 *et seq.* The defendant is a citizen of New York, and it is admitted that he had no notice of any alleged local custom when he purchased the land. There was no error.

Affirmed.

FURCHES, J., dissenting. In my opinion there is nothing in the fact that the contract stated that the number of acres were to be determined by an "accurate survey." This, to my mind, means no more than if it had said the number of acres should be determined by a survey of the lands. In either case an accurate survey would be meant. Were this not so, we would have to say that the contract for a survey, without adding the word "accurate," meant an inaccurate survey. This, to my mind, cannot be so. (811)

I think the whole question depends upon what mode of making the survey should be adopted, whether the horizontal or surface measurement. Both modes are taught in works on surveying, and it is

claimed by the defendant that both modes are in practice in North Carolina. The plaintiff offered to prove that the surface measurement was the mode used in Western North Carolina. This evidence was objected to and excluded. It seems to me that it should have been allowed. So far as my knowledge goes, I have never known a survey to be made of lands except by the surface measure; and in my opinion this is the general rule in this State, and if in any cases the horizontal mode has been used, they have been exceptions to the general rule. I do not mean by surface measure that you should go to the bottoms of deep ravines or climb perpendicular cliffs, but that you should follow the undulations of the surface.

It is said there is no evidence that surface measure was the mode adopted by the State in granting this land a century ago, and there is no reason to presume that surface measure was the mode adopted then. I do not agree to this proposition, as I cannot imagine a surveyor out in the wild mountains of Western North Carolina, a hundred years ago, where there were more free lands than anything else, except free Indians and wild animals, plodding along with a Gunter's chain and level, making a survey of a 25,000 or 150,000-acre grant of land.

For such reasons as these, I cannot agree to the judgment of the Court.

DOUGLAS, J. I concur in the dissenting opinion.

Cited: Oil Co. v. Burney, 174 N. C., 387.

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(812)

STATE EX REL. J. M. TATE v. THE BOARD OF COMMISSIONERS OF HAYWOOD COUNTY.

(Decided 24 May, 1898.)

Mandamus—Counties—Legislative Control of Counties—Compulsory Road Improvement—Public Roads—Taxation.

1. Counties are but State agencies and subject to legislative authority which can direct them to do as a duty all such matters as it can empower them to do.

2. The Constitution does not require that, in the exercise of its police power, The Legislature shall require its regulations to be uniform throughout the State; and, hence, the General Assembly may require public roads in one county to be improved by taxation and those in other counties by a different method.

3. Working the public roads is a necessary county expense, and hence, under section 6, Article V of the Constitution, the county commissioners, when

authorized or commanded to do so, may levy a tax in excess of the constitutional limit for the purpose of road improvement without the sanction of a popular vote.

ACTION pending in HAYWOOD, and heard before *Hoke, J.,* at chambers, in Asheville, on 22 March, 1898. The nature of the action and the essential facts appear in the opinion. It being admitted that the defendants had, on the first Monday in June, 1897, levied taxes for the general State and county purposes up to the constitutional limit. His Honor denied the plaintiff's application for a *mandamus,* and plaintiff appealed.

Geo. H. Smathers for plaintiffs.
W. T. Crawford for defendants.

CLARK, J. This is an action brought to compel the defendant county commissioners, by *mandamus,* to levy a tax for road purposes as provided by chapter 249, Laws 1897.

The first section of the act reads as follows: "That the board (813) of county commissioners of Haywood County shall, in order to provide for the proper working and constructing of the public roads of said county of Haywood, at their regular meeting in June, 1897, and at each regular annual meeting thereafter, and it is hereby made their duty to levy a special tax on all property subject to taxation under the State law, in said county of not less than ten cents nor greater than twenty cents on the $100 worth of property, and not less than thirty cents nor greater than sixty cents on the poll, the constitutional equation to be observed at all times, said taxes to be collected as all other taxes are, to be kept separate in the tax book of the county, to be set aside as a special road fund to be used in the construction, improvement, and maintenance of the public roads, culverts and bridges of the county of Haywood, and the purchase of such implements, teams, wagons, camp outfit, quarters or stockade for the use and safe-keeping of the convict force as may be found necessary in the proper carrying on of this work."

The act is explicit and mandatory. The defendants contend that the act is unconstitutional (1) because, while the Legislature may authorize and empower the county commissioners to levy the special tax for a special purpose it cannot direct or order them to do so. This contention is unfounded. Counties are but agencies of the State government. *White v. Comrs.,* 90 N. C., 437. They can be created, changed (*Dare v. Currituck,* 95 N. C., 189) or abolished (*Mills v. Williams,* 33 N. C., 558) at the legislative will. The names of no less than thirteen counties, formerly existing, have disappeared from the map of the State, to wit: Albemarle, Bath, Clarendon, Berkley, Shaftesbury, Pampticough, Archdale, Wickham, Bute, Tryon, Dobbs, Fayette, and Glasgow. Another (814) (Polk) was abolished, but afterwards recreated. They are subject

to legislative authority which can direct them to do as a duty all such matters as they can empower them to do. *Harriss v. Wright,* 121 N. C., 172; *McCormac v. Comrs.,* 90 N. C., 441. *Brodnax v. Groom,* 64 N. C., 244, in no wise militates against this. It merely holds that as to those matters which the statute has legally committed to the discretion of the county commissioners the courts cannot interfere to restrain or supervise the exercise of that discretion. But this is no authority that the law-making power cannot restrict the authority it confers upon the county commissioners by making the manner of working the roads mandatory in any county.

(2) It is further objected that it is unconstitutional for the Legislature to provide that the roads of one county shall be worked by taxation while others are worked in another method. There is nothing in the Constitution which hampers the Legislature by requiring that in the exercise of its police powers its regulations must be uniform throughout the State. *Brown v. Comrs.,* 100 N. C., 92. It would be exceedingly unfortunate if there was. A mode of working the roads, or regulations as to selling liquor, or the total prohibition of it, or provisions as to fence laws, or the sale of seed cotton, or inspection of fertilizers or of cattle which would be highly advantageous in one county might be very inconvenient or obnoxious in another. Accordingly, such statutes of local application have been time and again enacted and have always been sustained by the Court. One of the latest cases, citing many authorities, is *Guy v. Comrs., ante,* 471.

(3) That this road tax, added to the taxation levied for ordinary county purposes, will cause the total State and county tax to exceed the constitutional limitation, and further, that this tax was not au-
(815) thorized by a vote of the people of the county. The same point was raised in *Herring v. Dixon,* at this term. The authorities were there cited and their ruling was thus summed up:

> **A. For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.**
>
> **B. For necessary expenses, the county commissioners may exceed the constitutional limitation by special legislative authority, without a vote of the people. Constitution, Art. V, sec. 6.**
>
> **C. For other purposes than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority. Constitution, Art. VII, sec. 7.**

Working the roads has uniformly been held a necessary county expense (*Herring v. Dixon, supra*), and this levy is not only authorized by special

legislative authority but is commanded. Hence, no vote of the people is required and the constitutional limitation does not apply. "Upon the admissions and facts stated in the pleadings" the *mandamus* should have issued, and judgment will be so entered here.

Reversed.

Cited: Comrs. v. Payne, 123 N. C., 488; *Bennett v. Comrs.,* 125 N. C., 470; *Smathers v. Comrs., ibid.,* 485, 488; *S. v. Sharp, ibid.,* 633; *Black v. Comrs.,* 129 N. C., 126; *Cotton Mills v. Waxhaw,* 130 N. C., 297; *Jones v. Comrs.,* 135 N. C., 223; *Bank v. Comrs., ibid.,* 248; *Jones v. Comrs.,* 137 N. C., 597, 610; *Glenn v. Comrs.,* 139 N. C., 420; *Crocker v. Moore,* 140 N. C., 432; *Smith v. School Trustees,* 141 N. C., 153; *Jones v. Comrs.,* 143 N. C., 64; *S. v. Wolf,* 145 N. C., 445; *Ward v. Comrs.,* 146 N. C., 538; *R. R. v. Comrs.,* 148 N. C., 237, 251; *Board of Education v. Comrs.,* 150 N. C., 123, 126; *Burgin v. Smith,* 151 N. C., 566, 567; *Trustees v. Webb,* 155 N. C., 384; *Comrs. v. Comrs.,* 157 N. C., 517; *S. v. Blake, ibid.,* 610; *Bunch v. Comrs.,* 159 N. C., 336; *Pritchard v. Comrs.,* 160 N. C., 478; *Withers v. Comrs.,* 163 N. C., 345; *Hargrave v. Comrs.,* 168 N. C., 627; *Newell v. Green,* 169 N. C., 463, 464, 466; *Moose v. Comrs.,* 172 N. C., 429, 451.

(816)

LANGLEY R. BOWEN v. A. T. GAYLORD.

(Decided 1 March, 1898.)

Action for Trespass—Deed, Construction of—Boundaries.

An inconsistent course and distance must give way to a natural object or well-known line of another tract when called for in a deed.

ACTION to recover damages for entering and cutting timber upon plaintiff's land, tried before *Brown, J.,* at Fall Term, 1897, of WASHINGTON, upon admissions of the parties, a jury trial being waived. The facts appear in the opinion. His Honor being of opinion that plaintiff could not recover so adjudged, and plaintiff appealed.

James E. Moore and W. B. Rodman for plaintiff.
A. O. Gaylord for defendant.

DOUGLAS, J. This cause was, by consent of parties, heard upon the admissions of counsel. It is admitted that the plaintiff claims under a grant to Thomas Mackey and Edmund Blount, dated 18 May, 1789, and that if this grant covers the *locus in quo* the plaintiff is entitled to recover

(Map referred to in the opinion.)

damages for a trespass committed by the defendant, in entering and cutting upon said lands. The description in the grant is as follows: "Beginning at a forked cypress, running thence south 30 degrees west 110 poles; thence south 45 degrees west 700 poles, the various courses of Edward Van Daniel's line; then north 60 degrees west 320 poles; then north 40 degrees east 520 poles; then south 69 degrees east 120 poles; then north 45 degrees east 200 poles; then south 28 degrees east 250 poles to the first station, as by the plot hereunto annexed doth (817) appear." The plot of said lands, showing the contention of the plaintiff and defendant as agreed upon, was made a part of the decree and hereunto annexed. The red lines show the location of the Van Daniel patent called for and referred to in the Mackey and Blount patent. It is admitted that the beginning of the Mackey and Blount patent is at a forked cypress at black A on the may and runs to black B.

It is admitted that the Edward Van Daniel patent begins at red A and runs to red B, and thence following the red lines on the map to red D and red E, and thence back to red A.

The plaintiff contends that when the line of the Mackey and Blount grant reaches black B, the course and distance called for in the grant should not be followed, but that the line should then run from black B with the red line to red A, the course of the Edward Van Daniel patent, and thence along the red line to red E, and thence completing the 700 poles called by following the black line D and E, marked on the map as the Dwight patent line. If this contention be correct, and the Mackey and Blount patent is located as contended by the plaintiff, it is admitted that the plaintiff is entitled to recover.....dollars damages, together with the costs of this action.

The defendant contends that when the Mackey and Blount grant reaches black B on the map it should follow course and distance, south 45 degrees west 700 poles, which is delineated on the map as the Mackey and Blount patent line as claimed by Alfred Gaylord; that if this contention be not true, the Mackey and Blount grant, when it leaves black B, should follow the course of the red lines from B, marked (819) on the map, the windings of the swamp to red D and E; that inasmuch as the Mackey and Blount grant does not designate which of the courses of the Edward Van Daniel patent is to be followed, and inasmuch as it is impossible to follow both of the courses of it when the Mackey and Blount line reaches it, then the only means left for locating the Mackey line is to follow course and distance. It is admitted that if the defendant's contentions are correct and the Mackey and Blount grant is located as contended by the defendant, then the plaintiff is not entitled to recover. The court below being of the opinion with the defendant, it was adjudged that the defendant go without day.

As it would be impracticable to print the red lines and red letters designating the boundaries and corners of the Van Daniel grant, the corners marked "Red A, B, C, D, and E" are herein referred to as V, W, X, Y, and Z, respectively.

In this Court the plaintiff's counsel abandoned the contention that the line of the Mackey and Blount grant ran from black B to red A or V, and thence along the southeast line of the Daniel patent; and contended that it should run from black B to red B or W, thence along the northwest boundary of the Van Daniel grant, with its various courses, along the edge of the swamp, to red C or X, thence to red D or Y, thence to red E or Z, and thence south 45 degrees west to complete the distance called for, to wit, seven hundred poles. This latter contention of the plaintiff seems to us to be correct, and is certainly much more plausible than his original claim, which would include the entire area of the Van Daniel grant within the limits of his own grant.

When one deed or grant calls for the line of another deed it
(820) evidently refers to the adjoining line which is the common boundary. If, therefore, the second line in the Mackey and Blount grant, the location of which is the only question before us, must follow the Van Daniel line, we have no difficulty in determining its location. The disputed call reads thus: "Thence south 45 degrees west, 700 poles, the various courses of Edward Van Daniel's line."

There is now no question as to the location of Van Daniel's line, and never has been as far as appears from the record. Being a well-known line it must, therefore, control the course and distance of any other line calling for it. That an inconsistent course and distance must give way to a natural object or the well-known line of another tract when called for in the deed, was settled as far back as *Witherspoon v. Blanks,* 1 N. C., 65, and *Bustin v. Christie, ibid.,* 68. It would be useless to cite the long line of decisions to the same effect, ending in *Deaver v. Jones,* 119 N. C., 598. Among those most usually cited are perhaps *Sandifer v. Foster,* 2 N. C., 237 (271); *Cherry v. Slade,* 7 N. C., 82; *Haughton v. Rascoe,* 10 N. C., 21; *Hurley v. Morgan,* 18 N. C., 425; *Slade v. Neal,* 19 N. C., 61; *Becton v. Chestnut,* 20 N. C., 335; *Corn v. McCrary,* 48 N. C., 496; and among more recent cases, *Dickson v. Wilson,* 82 N. C., 487; *Jones v. Bunker,* 83 N. C., 324; *Credle v. Hays,* 88 N. C., 321; *Smith v. Headrick,* 93 N. C., 210; *Redmond v. Stepp,* 100 N. C., 212.

In *Houser v. Belton,* 32 N. C., 358, *Judge Pearson* gives the reason for the rule as follows: "Marked lines and corners control course and distance, because a mistake is less apt to be committed in reference to the former than the latter. Indeed, the latter is considered as the
(821) most uncertain kind of description, for it is very easy to make a mistake in setting down the course and distance, when transcrib-

ing from the field book, or copying from the grant or some prior deed, or a mistake may occur in making the survey by losing a stick, as to distance, or making a wrong entry as to course. For these reasons when there is a discrepancy between course and distance and the other descriptions, the former is made to give way." Of course, this rule applies only where the natural object or line called for in the deed can be located to a reasonable certainty.

The case at bar seems almost to have been decided for us in ..... *v. Heritage,* 3 N. C., 327, in which the entire case, a model of brevity, is as follows: "Heritage had sold lands to the plaintiff, and covenanted for the goodness of the title. He had in his deed described the lands by line of a certain course and distance to A. B.'s line, thence a certain course and distance *with his line* to, etc. The course and distance of these two lines included land which belonged to another, but not if A. B.'s line be considered as the boundary.

"*McCoy, Judge.* The line of A. B. is to be considered as the boundary of the land sold by Heritage. He did not sell any beyond that, and of course did not sell to the plaintiff the land he says he did. If that land has been recovered from the plaintiff, this covenant does not subject the defendant to pay for the value of it."

As in that case, the line contended for by the defendant in the case at bar would cut off a part of the land admittedly belonging to the Van Daniel grant.

We are of opinion that the line in question, being the second call in the Mackey and Blount grant, runs from Black A to Black B, thence to Red B or W, thence with the various courses of the Van Daniel grant to Red C or X, thence with the line of the same grant to (822) Red B or Y and Red E or Z, and thence south 45 degrees west a sufficient distance to complete the call for 700 poles. Therefore, the *locus in quo,* lying southeast of the red line running from Red D or Y to Red E or Z, and between the lines marked respectively "The Dwight Patent line" and "Mackey and Blount Patent line as claimed by Alfred Gaylord" belongs to the plaintiff.

Two significant facts that tend to this conclusion are that the first course called for by the Van Daniel line after leaving Red B or W, is *south* 45 degrees *west,* the exact course called for by the Mackey and Blount grant, and that the line held by us practically follows the edge of the swamp throughout its entire extent. For the reasons herein stated, the judgment of the court below is reversed.

Judgment reversed.

Cited: Tucker v. Satterthwaite, 123 N. C., 529; *McKenzie v. Houston,* 130 N. C., 573; *Elliott v. Jefferson,* 133 N. C., 214; *Waters v. Lumber Co.,* 154 N. C., 235; *Lumber Co. v. Lumber Co.,* 169 N. C., 88.

W. R. HARRELL v. NORFOLK AND CAROLINA RAILROAD COMPANY.

(Decided 22 February, 1898.)

Action for Damages—Permanent Injury to Land by Construction of Railroad—Statute of Limitations.

1. Before the act of 1895 (chapter 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.
2. Chapter 224, Acts of 1895, reducing the time for bringing action 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.

(823) ACTION to recover permanent damages for injury to plaintiff's land by the construction of defendant's railroad, tried before *Brown, J.*, and a jury, at Fall Term, 1894, of GATES. The facts sufficiently appear in the opinion. There was judgment for the plaintiff, and defendant appealed.

L. L. Smith for plaintiff.
George Cowper for defendant.

FAIRCLOTH, C. J. This action, begun 26 September, 1894, is brought to recover damages by reason of defendant's construction of its road across plaintiff's land, and thereby backing water and sobbing his cleared land. The road was completed in 1889. The defendant urges that "all the injury" resulted simultaneously with the completion of its road, and that being so, the statute of limitations began to run from that time, and its only exception is that his Honor refused to so charge the jury.

The evidence is that the land has been all the time and still is sobbed with back-water. This question was decided in *Nichols v. R. R.*, 120 N. C., 495, to which the profession is referred for the reason.

The action was for permanent damages. The Acts of 1895, ch. 224, was passed since this action was instituted.

Affirmed.

Cited: Ridley v. R. R., 124 N. C., 36.

(824)

JOHN MANNING v. ROANOKE AND TAR RIVER RAILROAD COMPANY.

(Decided 22 February, 1898.)

Practice—Service of Process—Amendment of Return—Attorney—Laches—Failure to File Answer—Judgment by Default—Appeal—Motion to Dismiss.

1. Where a summons has been properly served the return may be amended to show that the deputy officer making the service had been duly appointed by the sheriff, and the defendant cannot be prejudiced by such amendment.

2. A nonresident attorney does not acquire the right to practice habitually in the courts by having been previously allowed, by courtesy of the court, to appear in special cases.

3. A party will be held excusable for relying upon the diligence of counsel, who has been neglectful, only when it appears that he himself has not been neglectful, but has given all proper attention to the litigation.

4. If a party seeks to be excused for laches on the ground of his counsel's neglect he must show that the counsel employed is one who regularly practices in the court where the litigation is pending, or at least one who is entitled to practice therein, and who specially engaged to go thither and attend to the case.

5. If a party employs counsel whose duty is not to attend to the case himself but merely to select counsel who will do so, the first named counsel is *pro hac vice*, an agent merely, his duty not being professional, and his neglect is the neglect of the party himself and not excusable; hence,

6. Where a railroad company had a general counsel residing in another State and not entitled to practice regularly in the courts of this State, and whose duty it was to employ local counsel to attend to an action brought against the company, and through the neglect of the "general counsel" the answer to the complaint was not filed in time: *Held*, that the defendant company is not excused by such neglect.

7. The fact that a defendant has the right to take advantage of the plaintiff's failure to file a complaint within the first three days of the return term, does not abrogate the mandate to the defendant, contained in the summons, requiring him to appear on the first day and answer at that term. *Williams v. R. R.*, 110 N. C., 466, overruled.

8. In an action for damages the plaintiff, having filed his complaint within the first three days of the return term, is entitled to judgment by default and inquiry if the defendant does not appear and answer, or obtain an extension of time to answer, at such term.

9. It is only when there is excusable negligence (and not where there is inexcusable negligence) that the trial judge can, in his discretion, set aside or refuse to set aside a verdict and judgment by default, and the exercise of such discretion is not reviewable.

10. A motion to dismiss an action because the complaint fails to state a cause of action can be made in this Court, though not made below, even where there has been a jury trial, verdict, and judgment.

11. A complaint which alleges that the defendant, a railroad company, failed and neglected to protect the plaintiff, who had purchased a ticket for his passage, and was entitled to be on the defendant's train, from the violence and assault of fellow-passengers and intruders, whereby he was humiliated, frightened and injured, states a cause of action.

12. *Williams v. R. R.*, 110 N. C., 466, overruled.

(825) MOTION by defendant to set aside a judgment by default and inquiry, heard on affidavit before *Brown, J.*, at December Special Term, 1897, of BERTIE. The judgment sought to be set aside was rendered at November Term, 1897, of said court. His Honor refused the motion, the facts found by him and his judgment thereon being as follows:

"Summons was served in this action on defendant's local agent at Lewiston, Bertie County, N. C., on 4 October, 1897, by leaving a copy; the copy was sent to Whisnant, superintendent, at once by local agent, and the summons was returnable on Monday, 8 November, 1897. Whisnant at once forwarded said copy of summons with the information that it had been served on local agent to Legh R. Watts, general counsel of said road, at Portsmouth, Virginia, who at once wrote clerk of this court for a copy of complaint, expressing readiness at once to pay all
(826) necessary fees as soon as informed of amount. Clerk wrote Watts that complaint was not filed, and it had not then been filed. It was filed on Wednesday, the third day of term, at 4 p. m., just as court took a recess for that day. Whisnant, when he forwarded the copy, wrote said Watts to give the matter his professional attention at once, which Watts promised to do. The clerk of this Court wrote Watts that he would send copy of complaint as soon as filed, and the clerk informed counsel for plaintiff that the said Watts had written for a copy of complaint, and what he had written Watts, and said clerk forwarded said copy on Friday, 12 November, 1897. The judgment was rendered, no answer having been filed and no attorney being present representing defendant, on Friday, 12 November, 1897, immediately preceding the final adjournment of the court for the term.

The complaint was verified on 6 November, 1897, before a justice of the peace in Windsor. The clerk of this court was present in his office all during term of this court and for many weeks preceding. The said Legh R. Watts, so far as it appears, had no other information as to the suit except the said summons.

Before counsel for plaintiff moved for judgment he asked if any member of the bar appeared for defendant, and no appearance was

announced. It was the purpose and intention of said Watts to answer said complaints as soon as he received a copy.

Said Watts is an attorney located in the city of Portsmouth, Virginia, and is the general counsel of the defendant company, a North Carolina corporation. Said Watts does not practice in the courts of Bertie County. The Court finds that Watt's name is printed in Supreme Court Reports as appearing before that Court, but whether or not he is (827) authorized to practice generally in the courts of this State this court cannot find, but supposes the Supreme Court can take judicial notice as to whether it has ever so authorized said Watts. The court is of opinion, and so finds, that the said defendant company should have employed counsel practicing in said court, and that it had reason to know that said Watts did not practice therein but was general counsel located in another State. The court is willing to exercise its discretion and set aside said judgment, provided it is authorized in law to do so, upon the facts as herein found and set forth, but being of opinion that it is not, declines to set same aside." From this judgment defendant appealed.

St. Leon Scull for plaintiff.
Francis D. Winston and MacRae & Day for defendant.

CLARK, J. The summons having in fact been served, any irregularity in the signature of the officer to the return of service was corrected by the affidavit showing that the deputy serving the summons had been duly appointed by the sheriff. It was a full and complete amendment of the return, and related back and had the same effect as if the amended return had been originally made. *Grady v. R. R.*, 116 N. C., 952. The defendant having in fact been served with process by a properly authorized officer, cannot be prejudiced by an amendment which merely makes the record speak the truth.

Litigation must ordinarily be conducted by means of counsel, and hence, if there is neglect of counsel the client will be held excusable for relying upon the diligence of his counsel, provided he is in no default himself. *Roberts v. Allman,* 106 N. C., 391; *Burke v.* (828) *Stokely,* 65 N. C., 569. He must, however, not only pay proper attention to the cause himself, but he must employ counsel who ordinarily practices in the court where the case is pending, or who is at least entitled to practice in said court and engage to go thither. If he employ counsel whose duty is not to attend to the case himself, but merely to select counsel who will do so, the first named counsel is *pro hac vice* an agent merely, his duty not being professional, and his neglect is the neglect of the party himself, and not excusable. *Finlayson v. Acci-*

dent Company, 109 N. C., 196, at p. 200, citing *Churchill v. Ins. Co.,* 92 N. C., 485; *Griffin v. Nelson,* 106 N. C., 235; *Boing v. R. R.,* 88 N. C., 62.

In the present instance, the summons was sent to the general counsel of the defendant, resident in Norfolk, Va., who had no authority to practice in this State, not having obtained license so to do in the manner required by The Code, sec. 17, and, in fact, being debarred as a citizen of another State from so doing by section 19, which requires all attorneys to take an oath of allegiance to this State. That said nonresident had appeared in some causes in this State does not militate against this, since the appearance of such counsel is a matter of courtesy in each and every case, and on motion in each case, and only for the occasion on which it is allowed. The statute forbids the courts from allowing nonresident counsel (when citizens of other States and not holding license from this Court) from practicing habitually in our courts, and they cannot acquire the right to do so. Besides, even if the general counsel of the defendant, to whom the summons was sent, had been counsel regularly author-

(829) ized and empowered to practice in the courts of this State, it does not appear that he was in the habit of attending regularly the courts of Bertie County, or especially agreed to attend the term of said court on this matter, and in the absence of such proof the defendant has not shown that it has paid proper attention to the case, and that its neglect was excusable, and this burden was on the defendant. *Kerchner v. Baker,* 82 N. C., 169. It is no doubt very convenient for the defendant to have a general counsel to whom notice of the service of process can be sent, who shall parcel out the legal matters of the company and select local counsel to whom each case shall be intrusted; but in doing this the general counsel is simply discharging the duty the president or any other officer of the company could discharge, and is *pro hac vice* acting merely as an agent of the defendant, and not as an officer of the Court; hence his neglect cannot excuse the defendant.

The defendant has the same rights as any other litigant. Neither more nor less. The law requires the summons to be served ten days before court, to give defendants time to secure counsel. There is no greater time allowed one class of defendants than others. In fact, this defendant was served with process thirty-five days before the first day of the court at which it was summoned to appear. It was its duty to employ, like any other litigant, an attorney regularly practicing in the court where the action was brought, or who agreed to be there to represent the defendant. There is no reason why it should delay to employ counsel till the answer was filed. If the defendant's "system" of procuring counsel does not enable it to file its answers in the time required of other defendants, it must change its methods to conform to the

(830) requirements of the law instead of asking that the courts give it

special privileges. The summons on its face commanded the defendant to be at said court on the first day thereof and to answer at that term. It is true the plaintiff is given three days in which to file complaint, but this is a privilege to the plaintiff, not to the defendant. The plaintiff might file his complaint before the expiration of the three days or even before court met. The duty of the defendant, by the terms of the summons, is to be at court on "the first day" thereof to answer the complaint whenever filed, and with the right to have the action dismissed if it is not filed within the first three days thereof. But the right to take advantage of the plaintiff's failure to file the complaint in the first three days in no wise repeals the mandate to the defendant to appear on the first day of the term and to answer at that term. The defendant is simply protected against being detained longer than three days to see the complaint.

In this case the complaint was filed on Wednesday and the court did not adjourn till Friday. There is nothing to show that the answer could not have been filed if the defendant had employed counsel who were practicing in that court and who had engaged to be present. If the time had proved too short, the court, on motion, was empowered to extend the time. Code, sec. 274. But no counsel was there, nor was such motion made. In fact, defendant avers that its general counsel in Norfolk was waiting for the clerk to send him by mail a copy of the complaint when filed. Before it could have gotten to him (even if he had been at his office), and the answer could have been prepared and returned, the court had adjourned.

Our laws do not recognize this leisurely, kid-glove and dilet- (831) tante manner of attending to legal proceedings at long range. What would be left of the statute if every defendant demanded the same privileges of answering at his own convenience or by his own system? All litigants are on a level in our courts, subject to the same statutes and required to pay the same attention to matters before the courts. As the answer was not filed at the first term, the plaintiff was under the law entitled to his judgment against this defendant, as he would have been against any other. *Williams v. R. R.,* 110 N. C., 466, is *overruled.*

Upon the facts found there was not excusable neglect and his Honor correctly ruled that he was not authorized to set the judgment aside. It is only when there is excusable negligence (and not when there is inexcusable negligence) that the judge can in his discretion set the judgment aside or refuse to do so, and the exercise of such discretion is not reviewable. *Stith v. Jones,* 119 N. C., 428.

The defendant moves to dismiss the action in this Court because the complaint fails to state a cause of action. This is a motion which can

always be made in this Court, though not made below, and even when there has been a jury trial, verdict, and judgment. Rule 27; *Ladd v. Ladd,* 121 N. C., 118. The complaint, however, does state a cause of action. *Britton v. R. R.,* 88 N. C., 536, and other cases cited in *Daniel v. R. R.,* 117 N. C., 592, at p. 608.

No error.

Cited: Vick v. Baker, ante, 100; *Marsh v. Griffin,* 123 N. C., 670; *Norton v. McLaurin,* 125 N. C., 188, 189; *Killian v. R. R.,* 128 N. C., 261; *Koch v. Porter,* 129 N. C., 137; *Clement v. Ireland, ibid.,* 222; *Pepper v. Clegg,* 132 N. C., 316; *Greenleaf v. Bank,* 133 N. C., 301; *Osborn v. Leach, ibid.,* 430; *Stockton v. Mining Co.,* 144 N. C., 598; *Bank v. Palmer,* 153 N. C., 503; *Hardware Co. v. Buhmann,* 159 N. C., 513; *Allen v. McPherson,* 168 N. C., 437; *Seawell v. Lumber Co.,* 172 N. C., 325; *Ham v. Person,* 173 N. C., 73; *Lumber Co. v. Cottingham, ibid,* 327; *Grandy v. Products Co.,* 175 N. C., 514.

(832)

W. G. PURNELL, ADMINISTRATOR OF ROBERT B. PURNELL, v. THE RALEIGH AND GASTON RAILROAD COMPANY.

(Decided 12 April, 1898.)

Action for Damages—Nonsuit—Hinsdale's Act—Railroads—Injury to Persons on Track—Negligence—Contributory Negligence—Evidence —Instruction.

1. Prior to the passage of chapter 109, Laws 1897, the defendant might at the close of plaintiff's evidence in chief move to dismiss the action, as upon a demurrer to the evidence, but if refused, the benefit of the motion was lost, and if renewed at the close of the evidence subsequently offered, the motion would then depend upon the whole evidence in the case; but now, since the passage of said act, the defendant has the right to have the ruling of the court reviewed upon the state of the case as it existed at the time of the motion at the close of the plaintiff's evidence in chief.

2. On a motion to nonsuit under chapter 109, Acts of 1897, every fact that plaintiff's evidence tends to prove must be taken as proved.

3. Where, in the trial of an action for damages for injuries resulting in the death of plaintiff's intestate, it appeared that deceased went upon the track of defendant company under a railroad shed containing five tracks and not lighted by defendant and dark, except so far as the darkness was relieved by the reflection of lights from a hotel and stores on either side of the shed and from a passing train of another railroad company; and that the shed was a common resort for the people of the town, and that through and across it and across the track of defendant company thereunder was a frequented passway for the public with the consent of the defendant; and that deceased was standing on the passway when defend-

ant's train, four hours late, backed under the shed without light or flagman, at the rate of four miles an hour, and ran over and killed the deceased: *Held*, that such facts raised an issue of negligence to be submitted to the jury.

4. In such case the evidence of witnesses to the effect that they were there and did not see lights or flagman where they should have been, although negative evidence, was competent as tending to prove that such lights and flagman were not on the backing train.

5. Where, in an action for damages for the negligent killing of plaintiff's intestate by the backing of defendant's train under a shed which was an accustomed thoroughfare, the court instructed the jury that if the defendant backed its train under a depot shed "without displaying a light from the front end of the leading car and without having a flagman stationed thereon" it was negligent; that if deceased was standing on the track he was not required to look out for a backing train "which displayed no light and had no flagman," as it was the duty of defendant "to display the light and have a flagman at his post," and that if defendant backed its train under the shed "without the light on the front end of the leading car or in a conspicuous place thereon, or without a flagman thereon," it was negligent: *Held*, that the charge did not mean that there should have been both a light in the hands of some person (or held by some other means) and also another person acting as a flagman.

6. In the trial of an action for damages for the killing of plaintiff's intestate by the negligence of defendant railroad company in backing its train under a depot shed frequented by passengers and townspeople, an instruction that if deceased was standing on the track and defendant backed its train without light or signal, the defendant was negligent and the negligence was the cause of the injury, was proper when, in the same connection, the court charged that the defendant was not liable if deceased discovered the train in time to escape by ordinary care.

FAIRCLOTH, C. J., and CLARK, J., dissent.

ACTION for damages for injuries resulting in the death of (833) plaintiff's intestate, tried before *Timberlake, J.*, and a jury, at May Term, 1897, of HALIFAX. The facts appear in the opinion. There was a verdict for the plaintiff for $5,000 and defendant appealed.

R. O. Burton for plaintiff.
MacRae & Day, Thos. N. Hill and J. B. Batchelor for defendant.

FURCHES, J. Plaintiff's intestate was run over and killed by a freight train of the defendant company, and this is an action for damages.

There was evidence tending to show that defendant has, and maintains a large shed, 275 feet long and 80 feet wide in the thickly settled and the business part of the town of Weldon; that under (834) this shed there are as many as five railroad tracks, and the trains

and cars of four different roads pass under and through this shed; this shed was used as a depot for these different roads, where they received and discharged their passengers, and was a place of general resort for the inhabitants of the town, and all other persons; that on the night of 18 October, 1895, about 9:30, when the passenger train of the Atlantic Coast Line (this being one of the roads that used and occupied the shed) was leaving, the defendant company backed a freight train under this shed, which ran over and killed the plaintiff's intestate; that it was dark under this shed, which was not lighted except from lamps of the "Coast Line Hotel" and the Coast Line mail and passenger train, composed principally of "sleepers," which gave little or no light, and which was between the hotel and the defendant's freight train that killed the intestate of plaintiff, and such light as was reflected from some building across the street on the opposite side of the shed from the "Coast Line" Hotel; that defendant's train was due at 5:30 but was belated until 9:30, and was being pushed backwards at a speed of not more than four miles an hour, and the intestate had been on the track but a few minutes when he was run over and killed.

The plaintiff contended that there was no light or lantern displayed from the front end of the leading car of the backing train, and that there was no one there acting as flagman or signalman, in charge of the backing train, as there should have been.

(835) For the purpose of proving these allegations, the plaintiff introduced several witnesses who testified that they were there; that it was dark; some of them say it was very dark and they saw no light, nor did they see any one on the car with a light or lantern.

With this evidence, the plaintiff rested his case, and the defendant moved to nonsuit him under chapter 109, Laws 1897, contending that the plaintiff had not made a *prima facie* case; that, taking everything to be true, the plaintiff's evidence proved or tended to prove that plaintiff had failed to show negligence on the part of defendant.

The Court refused the motion to dismiss and the defendant excepted, and then proceeded to introduce evidence, and the trial proceeded to verdict and judgment against the defendant.

The defendant contends, now, that the judge erred in not dismissing the plaintiff's action at the conclusion of this evidence in chief, and insists that he is entitled to have the Court reviewed upon that motion. The plaintiff contended that the Court committed no error; that he is not so entitled, and this brings the construction of this statute before us for the first time.

As we understand the practice of the courts before this statute, the defendant might make this motion, but if the Court refused it and the defendant offered further evidence, he lost the benefit of that mo-

tion. The motion could be renewed at the close of the evidence in the case, but would then depend upon the whole evidence offered in the case. *Sugg v. Watson,* 101 N. C., 188.

To give this statute the construction contended for by the plaintiff, would be to make it meaningless, and to leave the law as it was before its passage. This we cannot do. Whether its enforcement will tend to the advancement of justice or to the economy of time, (836) is not for us to say.

The rule it has changed is one of long standing, with the approval of this Court. But it was within the province of the Legislature to change it, and in our opinion it has done so. We must, therefore, hold that the defendant has the right to have the ruling of the Court reviewed upon the state of the case as it existed at the time the motion was made.

This brings us to a review of the judge's ruling in refusing the defendant's motion to dismiss the plaintiff's action at the close of his evidence in chief.

This motion is substantially a demurrer to the plaintiff's evidence. And this being so, and the Court having no right to pass upon the weight of evidence, every fact that plaintiff's evidence proved or *tended* to prove must be taken by the Court to be proved. It must be taken in the strongest light, as against the defendant.

Then the plaintiff's evidence proved or *tended* to prove that the defendant kept and used a shed 275 feet long and 80 feet wide, under which there were five railroad tracks, used in common by defendant with three other railroads; that this shed was the depot for all these roads in receiving and discharging their passengers; that it was not lighted by the defendant, and that it was dark under this shed; that it was a place of common resort for the inhabitants of the town and all other persons; that there was a frequent pass-way across the railroad tracks under this shed, which was used with the knowledge and consent of the defendant; that defendant's train that killed the intestate of plaintiff was not on schedule time—was due at 5:30, but did not arrive until 9:30, when the intestate was killed; that this train was backing under this dark shed at a rate of speed not greater than four miles an hour, without light, or flagman, or signalman on the (837) front of the leading car of the backing train.

It is true that it was contended by the defendant that plaintiff's evidence failed to prove—to establish—the fact that there was no light and no flagman on the front of the leading car; that plaintiff's witnesses only testified that they were there, that it was dark, and they saw no light or flagman. This was negative but competent evidence. *Henderson v. Crouse,* 52 N. C., 623. This evidence was competent and not

objected to. It was evidently introduced for the purpose of showing—proving that defendant had no light or flagman on the car. If it did not prove this, nor *tend* to prove it, it was incompetent and should have been objected to by defendant. But if it tended to establish the fact, could the Court say that it did not do so? If it did tend to do so—and this proposition seems too plain to call for authority or argument—it was then no longer a question for the Court, but an issue for the jury—the Court has no right to pass upon the weight of evidence. *Sugg v. Watson, supra.*

We have not said and do not say that the evidence introduced by plaintiff established negligence in the defendant. It is not necessary, in the consideration of the judge's ruling upon the defendant's motion to dismiss, that we should do so.

But we say the evidence *tends* to establish the facts as we have stated them, and it then became an issue of fact for the jury and not a question for the Court. There was no error in refusing defendant's motion to dismiss under the act of 1897.

The discussion of this case so far has been as to the duty of the Court under Laws 1897, chapter 109. The discussion has involved
(838) the question as to defendant's negligence. But the question as to whether the plaintiff's intestate was guilty of negligence or not, has in no wise been discussed.

We have seen that there was evidence tending to show negligence on the part of defendant at the close of the plaintiff's evidence.

And it is insisted by plaintiff that there was much more, going to show defendant's negligence, at the final close of the evidence, than there was at the time the defendant moved to dismiss under the act of 1897.

The burden of the issue as to defendant's negligence was on the plaintiff. But, whenever the evidence tended to show negligence on the part of the defendant, it then became an issue to be found by the jury under proper instruction from the Court. The jury has found this issue against the defendant, and it must stand unless there has been improper evidence allowed to the prejudice of defendant, or the Court has given the jury improper instructions, or has failed to give proper instructions asked by defendant.

The burden of establishing the second issue, "Did the negligence of the plaintiff contribute to cause the injury?" was upon the defendant. The jury has found this issue against the defendant, and it must stand unless the Court has committed error in the charge or in admitting or refusing evidence.

The prayers of defendant for instructions, and exceptions to the charge, and for failing to give instructions asked, are so numerous—

many of them involving the same questions of law—that we will not undertake to give each a separate treatment. This fact is recognized by the learned counsel for defendant in their well considered brief, as they only discuss the 4th, 5th and 6th exceptions, found on pp. 50, 51, 52 of the printed record, and one other exception as to evidence on p. 45. (839)

The principal exception discussed in defendant's brief is the exception to the following paragraph of the judge's charge, which in substance covers all the exceptions to the charge:

"Again, if the train was backing under the shed without displaying the light from the front end of the leading car and without having a flagman stationed thereon, and was backing without due care and the intestate knew it and placed himself in a position of danger, his negligence was the proximate cause of the injury—he had the last chance to avoid the injury—and this being so, he and not the defendant would be responsible for his death. On the contrary, if Purnell was standing on or near the track he was not called upon to look out for a backing train which displayed no light and had no flagman, if you should so find, on the front of the leading car, for it was the duty of the defendant, as before explained, to display the light and have a flagman at his post, he not being bound to expect a violation of duty. If, therefore, he, (Purnell), was standing on or near the track and the defendant backed its train under the shed without the light on the front end of the leading car, or in a conspicuous place thereon, or without a flagman thereon, and if the jury should further find that Purnell did not discover the train in time to escape, then the defendant was negligent, and such negligence was the cause of the injury."

The criticism upon the charge is twofold—that it charged the jury that there must have been a light in the hands of one person, or held by some other means, and also a separate person acting as flagman or signalman of the moving train. Whatever effect this exception might have, if true in fact, we are not called upon to say, as in our opinion a fair interpretation of the charge does not mean this. (840) As we understand the matter, there must be both a man and a light at night, and a man and a flag in day. It may be one person but he must have a light, and this is what we understand the judge to charge.

This man, called a flagman, is in control of this backing train. This train is moved and stopped at his direction. This is done in the daytime by the use of a flag, and at night by the use of the light. By these means he informs the man in control of the engine when and how to move the train. At night, the light is used not only for the purpose of signaling the movement of the train, but also to enable the

flagman to look out for danger and to give notice to all persons of the approach of the train. This is regarded so essential to the safe operation of the road, that the defendant has adopted a rule to this effect, which it has had printed in a book of instructions and made a part of the evidence in this case.

This charge was given as applicable to the facts in this case, of a train backing under this dark shed, a public thoroughfare, four hours late, and at a time when the passenger train on one of the other roads was just leaving.

To hold that it could thus back in, without light or flagman, would be to overrule *Lloyd v. R. R.*, 118 N. C., 1010, and authorities there cited. *Stanley v. R. R.*, 120 N. C., 514; *Mesic v. R. R.*, 120 N. C., 489.

The other portion of this exception is pointed out as follows: "Defendant further excepts to so much of the foregoing paragraph as holds that, if intestate was standing on or near the track and defendant backed its train under the shed without the light on the front end or in a conspicuous place thereon, or without a flagman, etc., the defendant was
(841) negligent, and such negligence was the cause of the injury."

It will be seen that defendant in pointing this exception has left out of the charge quoted the following sentence, "And if the jury should further find that Purnell did not discover the train in time to escape, then the defendant was negligent." This it seems to us makes a material difference in the charge, and especially so when taken in connection with the following paragraph, which comes after that excepted to, and which is as follows:

"If the jury should find that Purnell was standing on or near the track and knew that defendant's train was backing under the shed with or without lights, or with or without a flagman, then he was bound to look out for his own safety and the jury should answer this issue, yes. Again, if you should find that the train was backing with its light *and* flagman in position, though the plaintiff's intestate did not know it, it was his duty to be on the lookout for all trains that had proper lights and signals, and if he failed he was negligent, and your answer to this issue should be, yes."

The lines between what is negligence and what is not, and what is contributory negligence and what is not, are sometimes so dimly drawn that it is hard to keep from crossing them. But, taking the whole charge in this case (set out in full in the record), we find it full, clear, and distinct to a degree sometimes not attained in cases of so much complication, and it appears to us to be entirely fair to the defendant.

This disposes of the case, except as to the evidence of some one that measured the car and gave his opinion, and the evidence of the sister of the intestate that the deceased was there to meet some one he ex-

pected on the train. We are not able to see that this evidence did (842) or could have influenced the finding of the jury. The judgment is

Affirmed.

FAIRCLOTH, C. J., dissenting. I agree with the majority of the Court in its construction of Laws 1897, ch. 109. I am unable to agree with the Court on the question of contributory negligence on the part of the plaintiff's intestate. I think the defendant was guilty of negligence, and that the plaintiff's intestate was guilty of contributory negligence on the evidence, and that the Court should have so held as a matter of law without submitting the second issue to the jury.

I do not recite the evidence, as it fully appears in the case. The evidence that the train was backing under the shed at a speed not more than four miles an hour and that the bell on the engine was ringing all the time—that there were two lights under the shed on the hotel side and some lights in business places on the opposite side of the shed, and that the defendant's track was the second one from the latter named lights, is not contradicted by any witness or denied in the argument. A few witnesses said it was very dark under the shed, but they do not deny the existence of the light located as stated above. It does not appear that there was any obstruction between the backing train and the lights on the east side of the shed, and we can take notice that lights will cast their rays out and produce some light, such as the bulk of the witnesses say was present, and called by them "dim lights," at the place of the injury. The intestate was necessarily on the track when hurt, instead of the safe spaces between the tracks, and no witness says otherwise. That he was looking across the shed at another train, instead of looking along the track north, on which he voluntarily took his stand, and that (843) he stepped on the track so recently before he was struck as to give the defendant *no last chance* to avoid striking, is not contradicted by any of the evidence. A railroad track is universally regarded as a place of danger, and all authorities require persons going along or crossing the same to look and listen for trains. This is prudent and the exercise of ordinary care only. It does not appear that the intestate was doing either; in fact, it appears that he was otherwise engaged and looking across the tracks under the shed. If he had exercised such ordinary care, I cannot understand why he would not have, under the present circumstances, discovered an object the size of a freight car within a few feet of him, nor why he would not have heard the noise of a moving freight train. I am aware of the rule that in doubtful cases the better course is to submit the question to a jury. There is another rule equally well settled, and that is that the judge should not submit a question to the jury unless the evidence be of such a character that it would warrant

the jury in returning a verdict against the party introducing it, who has the burden of proof. The duty of deciding such questions is a delicate one, and I think it can be best performed by the application of reasonable common sense rules in each case. I think upon the case now before us the plaintiff is not entitled to recover any damages.

CLARK, J., dissenting. The defendant asked the court to instruct the jury, "If, by the exercise of reasonable care, the plaintiff's intestate might have seen the approaching train and escaped from danger, and failed to keep a reasonable lookout, then they must respond to the (844) second issue (contributory negligence) 'Yes.'" The defendant was entitled to this instruction without the modification added by the court, which was in effect, "Provided defendant had not been negligent." Whether the defendant had been negligent or not did not affect this proposition, that if the plaintiff's intestate, by reasonable care, might have escaped the danger, he was guilty of negligence. The defendant had a right to have that issue fairly put to the jury, and it was in no wise dependent upon the defendant's being negligent or not. If, notwithstanding the contributory negligence, the defendant, with proper care, might have avoided the injury, is the inquiry presented by the third issue, and the result upon all the issues submitted would then be for the court. The defendant was seriously prejudiced by this ruling, which was in effect that the plaintiff's intestate could not be guilty of contributory negligence if the defendant was negligent, and reduced the three issues in effect to one, *i. e.*, was the defendant negligent? Whereas the defendant was entitled to the substantive finding whether there was contributory negligence. If there was, and the defendant was negligent, there could be no recovery unless, notwithstanding the contributory negligence of the plaintiff's intestate and subsequent thereto, the defendant could have avoided the consequences thereof. *Pickett v. R. R.*, 117 N. C., 616. The court, in effect, told the jury that, though the plaintiff's intestate by the exercise of reasonable care might have seen the approaching train and escaped injury, and did not so escape because he failed to keep a reasonable lookout, he could not be guilty of contributory negligence if the defendant had been negligent. The jury, therefore, were forced to respond "No" to this issue, if they found that the defendant had been negligent, whereas, if the defendant had been negligent (845) and the plaintiff's intestate had been guilty of contributory negligence, there could be no recovery unless there had been subsequent negligence on the part of the defendant. In the present case the jury did not find upon that issue at all. The only defense to such a charge is that no one can be guilty of contributory negligence on a railroad track at night—a position that has never yet been maintained in any decision of any court. In *Lloyd v. R. R.*, 118 N. C., 1010, it was

admitted, and the opinion was based on the fact that the plaintiff's intestate was guilty of contributory negligence, but it was held that, notwithstanding that, the plaintiff could recover, if the defendant was guilty of the continuing and therefore subsequent negligence of failing to have a headlight which might have enabled it to avoid the killing. In the present case the defendant was entitled to the instruction it asked, and upon it the jury, upon the uncontradicted testimony, would doubtless have found that there was contributory negligence. How they would have found upon the third issue, as to a subsequent or continuing negligence, we do not know, for the case was made to turn entirely upon the question whether there was negligence on the part of the defendant, the court instructing in effect that if there was such, the plaintiff's intestate, though he might have escaped injury by the exercise of reasonable care, could not be guilty of contributory negligence. The other case relied on to support this proposition is *Stanley v. R. R.*, 120 N. C., 514, which went upon the ground as to what was contributory negligence, and held that it was error to say that it was such negligence to walk thoughtlessly and recklessly along the track, when by using his senses the plaintiff might have seen and heard the train coming, since there was evidence that he was put off his guard by the train not having a light in front. But every case must be read in connection with the facts. (846) There, the plaintiff "was walking along the track commonly used by the public between Durham and East Durham as a walking way"; he was looking in the direction the train was coming from, and it was held that, being put off his guard by the absence of a light in front, he was not guilty of contributory negligence in not having kept a strict lookout. That case goes to the very verge, but it is very far from sustaining the proposition that at night-time no one can be guilty of contributory negligence on a railroad track, if the defendant has been negligent, nor that (as in this case) at a place with six tracks, which is not "habitually used as a walking path," but which is constantly used by the railroad companies night and day, a party who steps backwards on one of those tracks and is run over by a train rolling at the rate of three to four miles an hour, with its bell ringing, cannot be guilty of contributory negligence. There was uncontradicted evidence that the bell on the train (of only three cars) was constantly tolled, and the great weight of evidence was that there were lights, besides, on the front end. Whether, notwithstanding such negligence of the plaintiff's intestate, the defendant was liable by reason of its subsequent or continuing negligence is the third issue, and upon that there has been no finding.

The naked proposition charged below was: In the night-time no person can be guilty of contributory negligence on a railroad track, if the defendant is guilty of negligence.

This proposition is new, but it is clearly presented. It is not sustained by any precedent. Can there be any good and just reason found to support it?

This is not the case of crossing the track when the ordinary
(847) duty of looking and listening is condoned by there being no light on the approaching train, as in *Mayes v. R. R.*, 119 N. C., 758, and *Russell v. R. R.*, 118 N. C., 1098; but here, the intestate visited the station of the defendant where he knew there were six tracks with trains constantly coming and going, and it was his duty to exercise ordinary care at least, and to stand between the tracks and not to take his stand upon one of the tracks, and especially not to take his stand thereon without reasonable care, without any lookout, and with his back to a train which was at that very moment approaching, ringing its bell as it very slowly rolled on. This certainly was contributory negligence; the jury should not have been told that it became not contributory negligence if the defendant was negligent.

The defendant asked the court to charge that "the place where the injury was done was known to the plaintiff's intestate to be a place of danger, and it was his duty to keep a reasonable lookout when he went on the tracks, for approaching trains, and if he failed to do so it was contributory negligence." This surely the defendant was entitled to, leaving the question whether the defendant was nevertheless liable by reason of its continuing or subsequent negligence to the finding and charge upon the third issue, but his Honor again refused by adding in effect that the plaintiff's intestate, even under those circumstances, could not be guilty of contributory negligence unless the defendant was found not negligent itself—thus making the case turn solely upon the one issue of the defendant's negligence, and putting the burden on the defendant to prove it was not negligent too, whereas the burden was on the plaintiff to prove the negligence of the defendant.

The defendant further asked the court to instruct the jury
(848) that "It was the duty of the plaintiff's intestate to keep a reasonable lookout when he stepped upon the track, and if he failed to do so and the agents of the defendant gave notice of the approach of the train by the lights and bell and signalman, there was no negligence on the part of the defendant, and the jury should respond to the first issue "No" and to the second issue "Yes." The court refused to give this without the proviso added (as before charged) that there must have been "a white light displayed *on* the front of the leading car *and* a flagman in a conspicuous place thereon." There was a vast preponderance of evidence that there was a flagman on the top of the advancing car, and near the front end, with two lights in his hand, but the jury were cut off from all benefit of this evidence by the oft repeated declaration of the court

that the defendant was negligent if there was not "a light *on* the front of the advancing car *and* a signalman in a conspicuous place thereon," and that if the defendant was negligent in that regard no conduct of the plaintiff's intestate could make him guilty of contributory negligence. There was no evidence that Purnell would not have gone on the track but for the absence of lights, and the burden was on the plaintiff to prove that. *Deans v. R. R.*, 107 N. C., 686; *Rigler v. R. R.*, 94 N. C., 604; *Parker v. R. R.*, 86 N. C., 221, bottom of page 227. *Troy v. R. R.*, 99 N. C., 298, is exactly in point. There the accident occurred at night and the court below charged (page 302): "Had the intestate used his senses he might have heard or seen the coming train. If he omitted to do so and walked thoughtlessly and carelessly on the track, he was guilty of culpable negligence and contributed to his own injury," and on appeal this Court said "the charge of the court was given with care and stated the law fully and fairly." In the present case, deceased (849) could see the tramp on top of a car, two lengths away, and on another track. It was his own negligence that he did not see this car within ten feet of him, but instead stepped on the track with his back to the approaching car. The second and third issues of the present case were in *Troy's case* included in the second issue, and hence the conclusion of the instruction which would have been contradictory to the charge if there had been a third issue. That case settles that, though an engine is run at night without a headlight, without sounding whistle or ringing the bell, a person getting on the track without due care is guilty of contributory negligence.

The defendant further asked the court to charge the jury that "If the noise of the Atlantic Coast Line train was so great that it prevented the plaintiff's intestate from hearing the approach of the defendant's train, the plaintiff's intestate should have used additional care and diligence in looking for the approaching train, and his failure to do so is negligence, and the jury should find the second issue 'Yes.'" The court again charged in effect that the plaintiff's intestate could not possibly be guilty of contributory negligence, if the defendant was negligent, by adding, "*provided* there was a light on the front end of the advancing train and a signalman in a conspicuous place thereon." Though the light might be there and the bell was ringing and the train moving slowly, the plaintiff's intestate could not be guilty of negligence if that signalman was not there and in a conspicuous place. This is what the court told the jury by making the instruction depend upon that proviso.

The defendant further asked the court to instruct the jury that (850) "if the plaintiff's intestate went under the shed to watch a tramp steal a ride on the Atlantic Coast Line train, and while so watching the tramp backed on the track on which the defendant's train was backing,

and the jury are satisfied the defendant could not have avoided running into him, for the reason that the defendant could not stop its train in time to have avoided the injury, then you will answer the first issue 'No' and the second issue 'Yes.'" There was plenary evidence to that state of facts, yet this prayer was unqualifiedly refused. The company had the right, even if its agent had seen Purnell in time, to assume that he would get off the track. *Meredith v. R. R.*, 108 N. C., 616; *High v. R. R.*, 112 N. C., 385; *Deans v. R. R., supra; Daily v. R. R.*, 106 N. C., 301; *McAdoo v. R. R.*, 105 N. C., 140.

The evidence was uncontradicted as to these facts: that the plaintiff's intestate went to the station, where there were six tracks constantly in use, to escort a tramp to steal a ride on a train going south, and was actively aiding him by preventing bystanders from making a noise which would cause his detection, and while doing so, and as the train was pulling out, he stepped backwards upon the track of the defendant's road and was struck from behind by a shifting train of three cars, moving at the rate of three or four miles an hour, with the bell being constantly rung, the whistle not being sounded because forbidden by a town ordinance. These facts were not controverted.

By a very great preponderance of evidence it was shown that there was a brakeman near the front end of the advancing car, a red light and a white light in his hand. There was some evidence tending to
(851) show that there was no light on top of the train. It was also in evidence that the conductor was walking along by the side of the train with a lantern in his hand, and that the plaintiff's intestate stepped backwards on the track so near the front of the moving train that it was impossible to stop it in time to save him. But upon these facts and phases of the question the court constantly instructed the jury, time and again, that the plaintiff's intestate could not by any want of care be guilty of contributory negligence if the defendant "failed to have a light *on* the front end of the leading car *and* a signalman in a conspicuous place thereon."

There is no precedent that under such surroundings a person cannot make himself guilty of contributory negligence if the defendant is also negligent. *Pickett's case* and *Lloyd's case* were as to the duty to helpless persons subsequent to their contributory negligence. In *May's case* and *Stanley's case* the track was used for customary purposes and no signal was given. In this case, the track was not a thoroughfare and the bell was constantly rung, the whistle being forbidden to be used by a town ordinance.

This would be hard measure to mete out to railroad companies. They are entitled to the unrestricted use of their tracks. They are chartered for that purpose. They are not insurers of the safety of every individual

who sees fit to place himself on their tracks at the same time they are in actual use. If the company is negligent, a person who is injured cannot recover, notwithstanding the defendant's negligence, if he could have avoided the injury therefrom, and failed to do so by his own negligence. *Meredith v. Coal and Iron Co.*, 99 N. C., 576; *Farmer v. R. R.*, 88 N. C., 564. The only exception to this is where the defendant by reasonable care could have subsequently avoided the accident, notwith- (852) standing the negligence of the party injured. Whether that was the case here is a fact not passed upon by the jury, upon the instructions which were, in effect, that if the defendant was negligent the plaintiff's intestate could not have contributed to the injury by his own negligence. Surely in this there was error.

Cited: Wood v. Bartholomew, ante, 185; *Cox v. R. R.*, 123 N. C., 606; *Featherston v. Wilson, ibid.*, 626; *Gates v. Max,* 125 N. C., 140; *Powell v. R. R., ibid.*, 372; *Means v. R. R.*, 126 N. C., 428; *McMillan v. R. R., ibid.*, 726; *Thomas v. R. R.*, 129 N. C., 394; *Coley v. R. R., ibid.*, 413; *Lea v. R. R., ibid.*, 463; *Smith v. R. R.*, 130 N. C., 310; *Hopkins v. R. R.*, 131 N. C., 464; *Lassiter v. R. R.*, 133 N. C., 248; *Trust Co. v. Benbow,* 135 N. C., 305; *Brittain v. Westhall, ibid.*, 495; *Craft v. R. R.*, 136 N. C., 50; *Kearns v. R. R.*, 139 N. C., 481; *Reid v. R. R.*, 140 N. C., 148, 150; *Millhiser v. Leatherwood, ibid.*, 235; *Ray v. R. R.*, 141 N. C., 86; *Gerringer v. R. R.*, 146 N. C., 34; *Morrow v. R. R.*, 147 N. C., 627; *Champion v. R. R.*, 151 N. C., 197; *Edge v. R. R.*, 153 N. C., 215; *Zachary v. R. R.*, 156 N. C., 501; *Hammett v. R. R.*, 157 N. C., 324; *Madry v. Moore,* 161 N. C., 298; *Shepherd v. R. R.*, 163 N. C., 520; *Talley v. R. R., ibid.*, 571, 579; *Meroney v. R. R.*, 165 N. C., 612; *Hill v. R. R.*, 166 N. C., 595; *Ward v. R. R.*, 167 N. C., 157, 163; *Horton v. R. R.*, 169 N. C., 116; *LeGwin v. R. R.*, 170 N. C., 361; *Hinson v. R. R.*, 172 N. C., 652; *Mumpower v. R. R.*, 174 N. C., 743.

J. W. WRIGHT, JR. v. NORTHAMPTON AND HERTFORD RAILROAD COMPANY.

(Decided 1 March, 1898.)

Action for Damages—Master and Servant—Fellow-servants—Conductor and Engineer—Section Master—Passengers.

1. A conductor of a train is not a vice-principal of a section master in the employment of the company, since the latter is not subject to the orders or commands of the former.

2. A locomotive engineer, who also acts as conductor of a train, is a fellow-servant of a section master of the same company to whom is accorded the privilege of riding on trains to and from his place of labor.

3. A section master who, after his day's work, rides on a train to his lodging place, without paying or being expected to pay his fare, is not a passenger.

ACTION for damages for personal injuries, tried before *Bryan, J.*, and a jury, at August Term, 1897, of NORTHAMPTON. The facts sufficiently appear in the opinion. There was a verdict of $1,200 for the plaintiff, and from the judgment thereon the defendant appealed.

(853) *R. B. Peebles for plaintiff.*
MacRae & Day and W. W. Peebles & Son for defendant.

MONTGOMERY, J. This action was commenced 1 March, 1895, and the plaintiff's object was to recover of the defendant company damages for injuries which the plaintiff alleged he had sustained on account of the negligence of the defendant. Whether or not the plaintiff and the engineer (Lester) of the defendant company were fellow-servants when the plaintiff was injured is the question raised by the defendant's exceptions to his Honor's instructions to the jury on that point. The third issue submitted to the jury was in the following words: "Was the plaintiff injured by the negligence of a fellow-servant? If so, which one?" The jury in response answered "No." Upon that issue the court instructed the jury that if the train on which the plaintiff was riding at the time he was injured was under control of Lester, he acting both as engineer and conductor, then the plaintiff and Lester were not fellow-servants, and the jury should answer the third issue "No." There was error in that instruction. That Lester was engineer and conductor did not constitute him a vice-principal as to the plaintiff. A section master's duties have no connection whatever with the train service, and for the performance of his duties he is not responsible to the conductors of trains. A conductor stands in the relation of vice-principal only towards such employees of the common master as have employment on his own train, and who are under his orders and subject to his command. *Shadd v. R. R.*, 116 N. C., 968; *Pleasants v. R. R.*, 121 N. C., 492.

His Honor further instructed the jury that if they believed the evi-
dence they should answer the first issue "Yes." That issue was
(854) in these words: "Was the plaintiff injured by the negligence of
the defendant, as alleged in the complaint?" The complaint alleged that the plaintiff was a passenger on the defendant's train, and not an employee, and also that the general manager, who was also superintendent, was present at the time the plaintiff was injured, and gave the order to the engineer which resulted in the plaintiff's injury. His

Honor erred in giving this instruction. In reference to the conduct of the superintendent and general manager, Kell, the plaintiff testified that that officer was on the engine, and upon being informed by the engineer that the headlight was out, and asked by the superior whether he should go ahead, answered, "Yes, go ahead." Kell, in his testimony, said that he never spoke to the engineer on the subject, nor did he give him any orders on the occasion.

The contention of the plaintiff was that when the manager and superintendent ordered the engineer to go ahead on a dark night and without a light, the plaintiff suffering injury by the engine being driven over the "bumping post," the plaintiff's injury was in consequence of the order, and that the company was, therefore, liable. But the plaintiff's testimony was flatly contradicted by that of the superintendent, and the matter should have been submitted to the jury. The facts as they bear upon the question as to whether the plaintiff was a passenger on the defendant's train are as follows: The plaintiff was a section master in the employment of the defendant, and slept sometimes at Gumberry, the northern terminus of the road, sometimes at Jackson, the southern terminus, and sometimes at Mowfield, an intermediate station. After his day's work was over he went to his sleeping place on a hand-car or the defendant's train, as suited his convenience. On the night when the plaintiff was injured he and the laborers working under him, (855) having left off work for the day, with a light for a signal on the side of the railroad, were waiting for the train on its way to Gumberry. All were taken on, the plaintiff getting on the engine and the hands on the flat cars loaded with logs. No fares at any time were received or expected from the plaintiff. These facts do not, in our opinion, constitute the plaintiff a passenger on the train. He invariably used the hand-car, or the train of the company, to aid him in the prosecution of his work. The act of going to and from his work in the manner pointed out, although for the benefit of the plaintiff, connects him with the service of the company, although he was not *actually* engaged in the work for which he was employed at the time of his injury. If there had been a contract between the plaintiff and the company that the plaintiff should be carried to and from his work to his sleeping place, then certainly the plaintiff would have been injured while engaged in the service for which he was employed. *Abell v. R. R.*, 63 Md., 433; *Turney v. R. R.*, L. R., 1 C. P., 291; *Seaver v. R. R.*, 14 Gray, 466.

Again, if it cannot be inferred from the evidence that there was a contract between the parties to the effect that the plaintiff was to be carried to and from his place of labor by the defendant, there does appear a privilege permitted to the plaintiff to use the defendant's train whenever he chose to use it, and of which he availed himself, to aid and facilitate

his labors and service, and connects him by such privilege and user with the service of the company, thereby creating the relation of fellow-servant between him and the engineer. *Gillshaum v. R. R.*, 10 (856) Cushing, 228. There was error as pointed out.

New trial.

DOUGLAS, J., dissents.

Cited: S. c., 123 N. C., 281; *Hancock v. R. R.*, 124 N. C., 224.

JOHN A NARRON, TRUSTEE, ET AL. v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 29 March, 1898.)

Proceeding for Assessment of Damages for Railroad Right of Way—Easement—Adverse Possession—Statute of Limitations.

1. Since a railroad is authorized by its charter under the State's right of eminent domain to enter and occupy land for its right of way, it needs no grant from the owner of the soil, and, therefore, cannot acquire title to the easement by prescription.
2. No one can grant an easement in land who cannot convey the fee simple.
3. Where land was conveyed to a trustee for the separate use of a married woman, the latter and her husband cannot convey to a railroad company the right of way over the land.
4. The act of 1893 (chapter 152, sections 1 and 2), limiting actions for damages for occupation of land by a railroad company to five years and exempting from its operation companies chartered prior to 1868, is not in violation of the Fourteenth Amendment of the Constitution of the United States, prohibiting any State from denying to any person the equal protection of the laws.

PROCEEDINGS begun before the Clerk of the Superior Court for the assessment of damages for right of way under the defendant's charter, and transferred to term and heard before *Robinson, J.*, at November Term, 1897, of JOHNSTON. A jury trial was waived, and his Honor rendered judgment for the defendant on an agreed statement of facts, which are summarized in the opinion. The plaintiffs appealed.

(857) *Simmons, Pou & Ward for plaintiffs.*

Robt. O. Burton for defendant.

FURCHES, J. On 20 March, 1871, a part of the land upon which the defendant's road-bed is located was conveyed to Wiley Simms, and on 6 July, 1872, the residue was conveyed to him. These lands were conveyed to Simms as trustee for the sole and separate use and benefit of Maria Heath for life, to be held free from all debt, charges and encumbrances of her husband, A. J. Heath; and at her death for Ora M. Heath, Preston S. Heath, and Ava E. Heath, children of the said Maria Heath.

On 28 August, 1885, A. J. Heath and wife, Maria, J. W. Wellons, and Ora, one of the *cestuis que trust,* and who had intermarried with J. W. Wellons, made and executed a deed to the defendant corporation, granting it the right of way over said lands. Thereafter, and in the fall of 1881, the defendant entered upon the lands, located its roadbed, and has continuously held and occupied the same from that time until the commencement of this proceeding for damages.

The trustee, Simms, was not a party to the deed to the defendant, nor did he assent to the appropriation and occupancy by defendant of said land. The said Simms is dead, and the plaintiff, Narron, has been duly appointed trustee in his stead.

Upon these facts, which were agreed to by the parties, the Court held that the defendant was the owner of the 130 feet of land running across said lands for a mile, upon which its roadbed was located; that "it had been possessed of said right of way under known and (858) visible lines and boundaries, and under color of title for seven years next before the bringing of the action, and that the plaintiff's claim is also barred by the five years statute of limitations."

These facts and this ruling of the Court present the only question necessary for our consideration in determining the rights of the parties.

It is not contended that the defendant is the *owner* of the land upon which its roadbed is located; but that, by the deed of Heath and wife, the defendant is the owner of an *easement* upon the land covered by its roadbed; that this deed is color of title at least, and that the defendant has occupied this land under said deed for more than seven years, which has perfected its title, if it was at first defective.

The defendant further contends that this proceeding was not commenced within five years from the time the defendant entered upon and took possession of its roadbed, and that the plaintiff's right to recover, if he had any, is barred by the lapse of time, under chapter 152, Laws 1893.

An easement must be an interest in or over the soil; it cannot be made by livery—by deed—but lies only in grant. Washburn on Easement and Servitude, 27. It may also be acquired by prescription, or, more properly speaking under the modern dectrine, by presumption.

This presumption of a grant may arise by the continuous occupation for twenty years. Whether this presumption arises from the occupation of a railroad, it may not be necessary for us to decide in this case. But it would seem that the reason for presuming a grant by the continued occupation of the land for twenty years is wanting. This rule (859) is founded upon the idea that, if there had not been a grant, the owner would have put an end to the wrongful occupation before the expiration of twenty years. In this case, and that of other railroads, it is not necessary that they should have a grant to authorize their entry and occupation. This is authorized by the charter under the State's right of eminent domain. And the owner of the soil has no right to prevent the entry and continuous occupation of the defendant road. This being so, the reason for the rule creating the presumption fails, and it would seem that the defendant would acquire no title by occupation and the lapse of time, and this opinion seems to be sustained by the decisions of the Court in *Land v. R. R.*, 107 N. C., 72, and *Utley v. R. R.*, 119 N. C., 720. This being so, the defendant must rely upon the deed from Heath and wife, and the plea of the statute of limitations.

No one but the owner of the soil can grant an easement—no one who could not convey the fee-simple estate. *Washburn, supra,* 40. Heath and wife could not have done this. *Kirby v. Boyette,* 116 N. C., 165; *S. c.,* 118 N. C., 244. And as they could not have conveyed the land, they could not create the easement by grant. This leaves the statute of limitations to be considered.

At common law there was no limitation to the right of action. This defense is entirely statutory. It does not affect the right of the parties. It does not pay any debt or satisfy any demand. It only closes the courts—puts up a *legal bar* between plaintiff and defendant. The defendant claims that the act of 1893 does this, as against the plaintiff's demand. In the first section of this act, it provides a bar against all such actions as this, not commenced within five years from the time the defendant's occupation commenced. And if the act had stopped with this section, the defendant's plea would have been a protection (860) to the defendant, as against the plaintiff's demand, in the proceeding. But the second section of this act provides that it shall not apply to any railroad chartered before 1868; and as the defendant's road was charteredd before 1868, it is admitted that this statute does not bar the plaintiff's action, if the second section is constitutional. But the defendant contends that this section of the act is in violation of the 14th Amendment to the Constitution of the United States and void, for the reason that it does not afford this road the same protection that it does some other roads; that it discriminates against this road in favor

of some other roads. If this were true, all other statutes of limitations would be void, as they all have such discriminations. They all except from their operation *feme coverts,* infants and persons of unsound mind. But we cannot understand how it can be unconstitutional not to give a party that which it has no legal right to demand. The statute of limitations gives no rights to any one, and in a legal sense it gives no protection to any one. It may deprive a party of his legal remedy, and this, it is said, should not be done without giving such party reasonable time to commence his action. *Nichols v. R. R.,* 120 N. C., 495.

This rule would apply to the plaintiff, if it were his right of action that might be affected. But as the statute of limitations takes from the defendant no right he has, this rule does not apply to him.

But the defendant is one of a class—"all railroads chartered (861) before 1868." This being so, it is no discrimination against the defendant. *Gatlin v. Tarboro,* 78 N. C., 119; *S. v. Call,* 121 N. C., 643, and the great number of cases there cited.

New trial.

CLARK, J., concurring. When an action is brought for ejectment, one who has been in possession under color of title for seven years is protected by the statute because, having been exposed to an action for that length of time, the statute has run in his favor. So, where one has been exposed to an action for trespass for 20 years, the law presumes therefrom the grant of an easement. But, here, the defendant under its charter enjoys legal possession and its easement by virtue of the right of eminent domain and has never been exposed either to an action of ejectment or for trespass for an hour. The plaintiff could not have maintained an action for either of these causes and has not now attempted to do so. His sole remedy is under the constitutional provision giving him right to compensation. As to that cause of action there was no statute of limitations (*Land v. R. R.,* 107 N. C., 72; *Utley v. R. R.,* 119 N. C., 720), until chapter 152, Laws 1893. But that statute conferred the right to plead that defense only upon railroads chartered since 1 January, 1868, and the defendant cannot avail itself thereof. Chapter 224, Laws 1895 applies to all railroads, but does not embrace "compensation for right of way," and chapter 339, Laws 1897, making the act of 1893 apply to railroad companies chartered prior to 1868, cannot affect this action. *Nichols v. R. R.,* 120 N. C., 495; *Culbreth v. Downing,* 121 N. C., 205.

Cited: Harkins v. Asheville, 123 N. C., 639; *Hodges v. Tel. Co.,* 133 N. C., 237.

(862)

W. J. McLAMB, ADMINISTRATOR OF J. R. McLAMB, v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 12 April, 1898.)

Action for Damages— Railroads— Negligence— Damages—Evidence— Trial—Remarks of Counsel.

1. Where, on the trial of an action, the remarks of counsel are improper or not warranted by the evidence, and are calculated to mislead or prejudice the jury, it is the duty of the court to interfere.

2. Where the trial judge interferes to stop the improper remarks of counsel, and cautions the jury against their effect, no exception to the same can be sustained on appeal.

3. In the trial of an action for damages for injuries resulting in the death of plaintiff's intestate, it appeared that deceased was negligently standing on a trestle 30 feet high and 400 feet long; that defendant's engineer was running a heavy train down-grade at the rate of about a mile a minute; that when three-fourths of a mile away he saw deceased, but made no attempt to slow up, and gave no signal until he was so near deceased that the train could not be stopped before it struck and killed deceased, and that the engineer thought that deceased was a trestle hand who could take care of himself by standing on the edge of a platform in the middle of the trestle: *Held*, that defendant was negligent and liable.

4. Where, in the trial of an action for damages, the trial judge instructed the jury that the measure of damages for negligently causing the death of plaintiff's intestate was the gross income, less living expenses, and in another part of the charge told the jury to consider decedent's capacity for earning money in determining his income: *Held*, that such instruction was not calculated to mislead the jury into believing that they might consider any source of income other than decedent's earnings, especially when the argument of counsel showed that the jury understood the instruction.

5. It is competent to show the value of the personal services of a decedent, who was a skilled farmer, by the estimates of experienced farmers who were well acquainted with him.

ACTION, tried before *Adams, J.*, and a jury, at Fall Term, 1897, of JOHNSTON. The facts appear in the opinion. There was a verdict for the plaintiff for $2,000, and from the judgment thereon the de-
(863) fendant appealed.

J. H. Pou for plaintiff.
Aycock & Daniels and W. C. Monroe for defendant.

DOUGLAS, J. This was an action brought by the administrator of J. R. McLamb to recover damages for the killing of his intestate by the

alleged negligence of the defendant. The deceased was on a trestle about thirty feet high, belonging to the defendant company, and was struck by the defendant's train, knocked from the trestle and killed. It appears from the testimony of the engineer that the train was 25 or 30 minutes late, and was running at the rate of fifty or sixty miles an hour, and could not be stopped in less than four hundred and fifty or five hundred yards; that when three-quarters of a mile south of the trestle, he saw two men on the track; that he could not locate them until he got within half a mile, when he saw they were on the trestle; that he blew the whistle at the crossing, about half a mile from trestle, when one of the men got off the trestle entirely, while the other, the deceased, stepped off the track on to a narrow platform on the side of the trestle, and then stepped back and began to run across the track; that he was then two hundred or two hundred and fifty yards south of the trestle, when he blew the danger signal, put on the emergency brakes, sanded the track and did everything he could to stop the train; that up to that time he had done nothing to stop the train or reduce its speed, because he thought the deceased was in a safe place on the platform, where he had often passed trestle hands at full speed; that the trestle is a little over four hundred feet long, and the platform, situated about midway the trestle, is one hundred and forty feet long and five feet five inches (864) wide from the T iron to the railing; that the engine and cars project nearly two feet beyond the rail, leaving a clear space on the platform about three and a half feet, where a person could stand with perfect safety.

This is of course the evidence most favorable to the defendant, and is in the main sustained by other testimony; but there is strong conflicting evidence tending to show that the platform was not a safe place from a passing train, and that the engineer did not blow at the crossing, where it was the custom to blow. There was also testimony going to show that the trestle was much used as a passage way by other than railroad employees.

The issues submitted and the answers therto, the prayers of the defendant, and the charge of the Court, as they appear in the record, are as follows:

1. Was J. R. McLamb killed by the defendant's train? A. "Yes."
2. Was he killed by the negligence of the defendant? A. "Yes."
3. Did J. R. McLamb, by his own negligence, contribute to his injury? A. "Yes."
4. Notwithstanding the negligence of J. R. McLamb, could the defendant's engineer, by the exercise of ordinary care, have prevented the injury? A. "Yes."
5. What damage, if any, has the plaintiff sustained? A. "$2,000."

Before the close of the evidence the defendant requested the Court to reduce its charge to writing and read the same to the jury, which was done.

Before the close of the evidence the defendant requested the Court to give the following special instructions:

(865) "*a.* It is not the duty of the defendant, through its engineer, to lessen the speed of the train as it approached the trestle, until he had reasonable grounds to believe that the plaintiff's intestate was not capable of caring for himself."

(This special instruction was included in the charge of the Court, as read to the jury.)

"*b.* The engineer had a right to assume that any one who had entered upon the trestle was capable of caring for himself under all circumstances of this case, until such time as the person on the trestle exhibited signs of terror; and if the jury shall believe that as soon as the engineer discovered that the intestate of the plaintiff was frightened the engineer did all in his power to stop the train, the defendant was not guilty of negligence, and the jury will so find."

(This special instruction was included in the charge of the Court, as read to the jury.)

"*c.* If the jury believe that the engineer was a competent man, and was ordinarily and reasonably observant of his duties, and was honestly mistaken in his judgment, and that the accident resulted from a mistake of judgment and not from negligence, then the jury will find that the defendant was not guilty of negligence."

(This special instruction was included in the charge of the Court, as read to the jury.)

"*d.* A mistake of judgment is not negligence. Ordinary and reasonable care is all that is required of an engineer."

(866) (This special instruction was included in the charge of the Court, as read to the jury.)

"I. That upon the whole evidence, the plaintiff's intestate was guilty of contributory negligence."

(This instruction was not given, for the reason that the third issue, as to the negligence of the deceased was, by consent of plaintiff, answered in the affirmative before the charge of the Court was read.)

"II. That the defendant, upon the whole evidence, is not guilty of negligence."

(This was refused, and defendant excepted.)

"IV. That by plaintiff's own evidence, a witness who was well acquainted with the intestate and in full view of him, within a distance short of that within which the train could have been stopped, mistook

the intestate for an employee of the railroad; and it could not be negligence on the part of the defendant to make the same mistake the plaintiff's own witness made."

(This was refused, except in so far as it may be covered by the charge as read.)

"V. That if the jury shall believe that the engineer mistook the intestate for an employee of the road until it was too late to avoid the accident, then the defendant is not guilty of negligence."

(This was refused, except in so far as it may be covered by the charge as read.)

"VI. That if the jury shall believe that the defendant had posted notices at each end of the trestle to the effect: 'Danger: this bridge is no thoroughfare; keep off!' then it was not negligence on the part of the defendant for its engineer to assume that any person on the bridge was an employee of the defendant and would put himself in a place of safety."

(This was refused, except in so far as it may be covered by (867) the charge as read to the jury.)

"VII. That if the jury shall believe that there was a platform on each side of the trestle extending five feet and five inches wide from rail to edge of platform, this was a place of safety, and the engineer had a right to expect the intestate McLamb to get upon said platform, and it was not the duty of the engineer to stop his train, or endeavor to do so, until he discovered the intestate had become 'rattled.'"

(This was refused, except as covered by the charge as read to the jury.)

"VIII. It was the duty of the plaintiff's intestate not to go on the trestle, and especially without stopping to look back and ascertain whether a train was approaching or not, and in so going on said trestle he was guilty of contributory negligence."

(This special instruction was not given, for the reason that previous to the time when the same was asked to be given, counsel for the plaintiff had agreed that the issue as to the negligence of the intestate of the plaintiff should be answered in the affirmative.)

"IX. That the measure of damages, if the jury find for the plaintiff, is the present value of the gross income of the plaintiff's intestate from his personal services, less the cost of living and his expenditures. This is his net income, and these damages could not exceed the present value of the net accumulations to the estate of the plaintiff, based upon the expectancy of life."

(This special instruction was substantially included in the charge as given.)

"X. The damages cannot exceed a sum which, put at interested until the natural death of the intestate, would equal what he would
(868) have saved had he not been killed."

(This special instruction was not given as requested. The same was refused, except in so far as it was covered by the charge as read. Defendant excepted.)

It was admitted in the argument on both sides that only the net earnings from the labor and personal services of the deceased could be considered by the jury in estimating the damages, in case any damages should be awarded, and that the income from any property of the defendant should not be considered.

To the refusal of the Court to give such of the above special instructions as were refused, the defendant excepted.

The Court gave the jury the following instruction in writing:

"1. It is the duty of the plaintiff to satisfy the jury, by a preponderance of the evidence, that the deceased was killed by the train of the defendants, or was knocked from the track by the train and was killed by the fall. If the plaintiff has so satisfied your minds, then you should answer the first issue, 'Yes.' If he has failed to satisfy your minds that the deceased was killed as above stated, then you need not consider the other issues at all, for if the train did not cause the death of McLamb the defendant would not be liable in damages, and you should answer, 'No.'

"2. If you should find that the train did cause the death of Mr. McLamb, as alleged by the plaintiff, then you will proceed to consider the other issues.

"It is agreed that you may answer the third issue in the affirmative, so you need not consider that issue at all.

"3. As to the second and fourth issues, the Court charges you that the plaintiff should satisfy you, by a proponderance of the evi-
(869) dence, that the servants of the defendant company could, by the exercise of ordinary care, have avoided the killing of deceased, and that they or any of them did not exercise ordinary care in attempting to avoid the accident.

"Now, with reference to these two issues, the second and fourth, the Court charges you, that if you should find, by a preponderance of the evidence, that the engineer could have stopped his train before reaching the deceased, after he saw him leave the platform (if you shall find that he went on the platform), then you shall find that the servant of the defendant did not exercise ordinary care in attempting to avoid the accident, and should answer both the fourth and the second issues, 'Yes'; otherwise, answer, 'No.' For it was the duty of the engineer to do all in his power to stop his train after he saw the deceased on the trestle in a place of danger.

"The Court charges you further, that if you are satisfied, by a preponderance of the evidence, that the engineer, after he saw the deceased on the trestle, a place of danger, could have so reduced the speed of his train as to enable the deceased to reach a place of safety, and that he failed to do so, then you should find that he failed to exercise ordinary care and diligence in attempting to avoid the accident, and you should answer the second and fourth issues, 'Yes.' Provided, of course, the deceased lost his life by reason of such negligence.

"Now, if you shall find, by a preponderance of the evidence, that the deceased was simply walking on the trestle as testified to and that the engineer could have seen him from a quarter to a half mile away, and that the engineer made no effort to stop his train until he got within such distance that it was impossible to stop before reaching the place where the deceased was, and that the deceased was knocked (870) from the trestle, and thereby lost his life, then you will answer both the second and the fourth issues 'Yes,' even though you may be satisfied the engineer, at the last moment, did all in his power to stop the train. If the engineer saw a person on the trestle, when he was about half a mile away, with his train running at the rate of fifty or sixty miles per hour, not knowing who he was or at what place on the trestle he was, then it was his duty to give warning of the approach of the train; and as he approached, if he saw he had not reached a place of safety, it was his duty to reduce the speed of his train and acquire control over the movement of his engine until he saw that said person had reached a place of safety. If the plaintiff has satisfied you by a preponderance of the evidence that the engineer failed to do this, when he saw the person on the trestle in danger, and that by reason thereof the deceased was struck and killed, then you should answer the second and the fourth issues 'Yes.' If you find the contrary, 'No.' Under these circumstances it is the duty of the engineer to stop his train, if possible, and if necessary in order to save life, even though the person on the trestle was a trespasser and was on the trestle against the orders of the company.

"4. It was not the duty of the defendant, through its engineer, to lessen the speed of its train as it approached the trestle, until he had reasonable grounds to believe that plaintiff's intstate was not capable of caring for himself.

"The engineer has a right to assume that any one who had entered on the trestle was capable of caring for himself under all the circumstances of this case, until such time as the person on the trestle (871) exhibited signs of terror; and if the jury shall believe that as soon as the engineer discovered that the intestate of plaintiff was

frightened the engineer did all in his power to stop the train, the defendant was not guilty of negligence, and the jury will so find.

"If the jury believe that the engineer was a competent man, and was ordinarily and reasonably observant of his duties, and was honestly mistaken in his judgment, and that the accident resulted from a mistake of judgment and not from negligence, then the jury will find that the defendant was not guilty of negligence. A mistake of judgment is not negligence; ordinary and reasonable care is all that is required of an engineer.

"If you answer the first, the second and the fourth issues 'Yes,' then you will proceed to answer the fifth or last issue. If you answer the other issues in the affirmative, the Court charges you that you should award some damages in your verdict.

In determining the damages, the Court gives you this rule: The measure of the damages is the present value of the gross income of the deceased less the cost of living and his expenditures—that is, his net income. And these damages cannot exceed what the jury believe to be the present value of the accumulations to the estate of the deceased, based upon his expectancy for life as prescribed in The Code, to which your attention is called. First, you will ascertain what the net value of his income was, then you will consider how long the deceased was expected to live considering his age, then you will ascertain what sum would be the present value of his net earnings. When you have arrived at this amount, you should make it in figures the answer to the last issue.

(872) In determining this amount, you should consider the evidence bearing on the capacity of the deceased to earn money, his character for thrift and industry; on the contrary, the condition of his health and his capacity to work. You should also consider that as he grew older the less able he would be for work, and perhaps the greater his expense. As to the probable length of his life, you should consider the table of expectancy as laid down in The Code, to which your attention has been called by counsel, but you may also consider the condition of the health of the deceased. Of course, in passing upon this, you will ascertain the age of the deceased at the time of the accident. You should consider all these things, and all the evidence on both sides, and the arguments of counsel addressed to you, and render such a verdict as you deem just.

"It is the duty of the plaintiff to make out his case by the greater weight of the evidence. You should consider the character of the witnesses, their interest in the result of this suit (if they have any), their bearing upon the stand. In determining the preponderance of the evidence you are not necessarily to be governed by the number of witnesses on either side or upon any point, but you should determine what

evidence you believe to be true; decide how this matter is and render your verdict in accordance with that finding."

All those parts of the charge included in brackets were excepted to by the defendant.

During the progress of the trial there was some verbal sparring between counsel, to which exception was taken, which, however, unnecessary and perhaps unbecoming, was deprived of any harmful influence by the caution of his Honor. Much allowance must be made for the zeal of counsel in a hotly contested case, especially where the colloquy is mutual; and indeed much latitude is necessarily given in the argument of a case where there is conflicting evidence; but (873) counsel should be careful not to abuse their high prerogative, and where the remarks are improper in themselves, or are not warranted by the evidence and are calculated to mislead or prejudice the jury, it is the duty of the Court to interfere, as it did in this case. This exception cannot be sustained.

By the consent of counsel, the third issue as to the negligence of the deceased, was answered in the affirmative by the Court.

This raises the question whether the defendant could, by the exercise of ordinary care, have prevented the injury notwithstanding the negligence of the deceased, and whether the negligence of the defendant could, under all the circumstances of the case, be held to be such gross and *continuing* negligence as would be deemed the proximate cause of the injury. The doctrine of the "last clear chance" means nothing else. If, in spite of the negligence of the deceased, the defendant could by the exercise of reasonable care, have discovered the dangerous situation of the deceased, and have prevented the accident by any means that would not have really endangered the safety of the train, the defendant would have been guilty of negligence, and such negligence would be the immediate and, therefore, proximate cause of the injury. This is the principle laid down in *Davies v. Mann,* 10 M. & W., 546, and *Gunter v. Wicker,* 85 N. C., 310, and has now become the settled rule of this Court. Its logical result is the rule of continuing negligence, which has also been repeatedly recognized and approved by us. If the negligence of the defendant, even if it preceded the negligence of the deceased, were such as to mislead the deceased, and induce or permit him unknowingly to take such risk as otherwise he would not incur, then the negligence of the defendant would *continue* in its natural results up to the (874) moment of the accident, and would be the proximate cause of the injury. Again, if the preceding negligence of the defendant were such as to deprive it of the power to take advantage of the last clear chance, should it occur, its negligence would be continuing and proximate, inasmuch as its inevitable consequences would be the cause of the injury.

Much learning has been spent in the discussion of contributory and concurring negligence and proximate cause, which is unnecessary here to review, and many of the attempted definitions and distinctions show more acuteness and refinement of intellect than practical application in the trial of a cause. Of course, the proximate cause of all such injuries is the train striking the man; and yet, if the man were not there, he would not be struck. Hence, in one sense, his mere presence would be contributory, and, if at all negligent, would prevent a recovery no matter how great or continuing the negligence of the defendant. So extreme a construction would be in violation of every principle of natural justice, and is not required either by law or public policy. Contributory negligence is the want of such care as a prudent man would ordinarily take under similar circumstances, and must in its natural results immediately concur in producing the injury. The degree of care required would depend upon the peculiar circumstances of each case, since, as is said in *R. R. v. Ives,* 144 U. S., 408, 417, "what may be deemed ordinary care in one case may, under different surroundings and circumstances, be *gross negligence.*"

But the same relative degree of care is required of the defendant as of the plaintiff; and where the defendant has, by its own act, increased the danger, it must take greater care to prevent the natural or probable results of the greater danger it has created. It cannot take ad-
(875) vantage of its wrong to escape all liability on account of the contributory negligence of the plaintiff by holding him to a greater degree of care to avoid a greater danger of which he had no warning, and had no reason to anticipate.

In the present case the engineer was running a heavy train down grade at the rate of fifty or sixty miles an hour, about a mile a minute. When three-quarters of a mile away, he saw two men upon the track, whom he would overtake in three-quarters of a minute, and yet he did not blow his whistle or give them any warning of swiftly approaching danger. He says he blew at the crossing, for what purpose he does not say, and there is testimony that he did not blow at all. When within half a mile, he saw the deceased upon the trestle, admittedly in a place of danger to the ordinary man, and yet he neither checked the speed of his train nor blew the ordinary alarm, because he thought the deceased was a trestle hand and knew how to take care of himself. This mistake in judgment was a death sentence upon a fellow being. Why did he not give to the deceased the benefit of the doubt? He might at least have sounded the whistle when he first saw him, and have continued sounding it until he passed him, without any inconvenience. If he saw any probability of danger, he ought to have reduced the speed of his train so as to bring it within his control, and, if necessary, to stop

entirely. So much is due to the sanctity of human life. A man upon a trestle thirty feet high and over four hundred feet long has not the same opportunity of escape as if he were on the ground, where (876) he could jump off the track without serious danger.

The engineer says he did not blow the danger signal or check the speed of his train until he was within two hundred or two hundred and fifty yards of the trestle, when it was impossible for him to stop in time to save the deceased. We think that the defendant was guilty of culpable negligence, and that such negligence continued in its inevitable consequences up to the moment of the accident, and was, therefore, the proximate cause of the injury.

Of course, a railroad company is not bound to the same degree of care to prevent injury to persons walking along its ordinary track as it would be at the intersection of a highway, and such a person, whether trespasser or licensee, would be held to a greater degree of care, but the rule is the same in principle. Each is bound to that relative and mutual degree of care and diligence required by the peculiar circumstances and surroundings of the case. These principles are discussed fully in *Norton v. R. R., post,* 662, where authorities are cited.

It is impracticable to examine in detail each of the numerous exceptions to the charge, and the refusal to charge, as we see no error in either. Some parts of the charge, taken alone, might be subject to criticism, but, taken as a whole, we think it presented the merits of the action in a fair and intelligible manner. It does not seem possible that the jury could have been misled into supposing that the Court intended them to take into consideration any other source of income except the net earnings of the deceased arising from his personal services, after deducting his necessary personal expenses. This seems to have been clearly understood by counsel for both sides, and was so argued to the jury. Nor do we think there was error in the admission (877) of testimony as to the net value of the personal services of the deceased. The estimates were all made by persons well acquainted with him and his habits and surroundings; and in each case the facts were given in detail on which the estimate was based. The personal services of a skilled farmer are worth more than the mere manual labor he may perform. His judgment, skill and experience, gained by a long life of successful toil, should be also considered, and none are better qualified to give such an estimate as those who know him well, and are themselves farmers of character and experience.

The judgment is

Affirmed.

FAIRCLOTH, C. J., and MONTGOMERY, J., dissent.

Cited: Troxler v. R. R., 124 N. C., 191; *Brinkley v. R. R.*, 126 N. C., 93; *Cox v. R. R., ib.*, 106; *Perry v. R. R.*, 128 N. C., 475; *Bogan v. R. R.*, 129 N. C., 157; *McCall v. R. R., ib.*, 302; *Coley v. R. R., ib.*, 415; *Lea v. R. R., ib.*, 463; *Smith v. R. R.*, 131 N. C., 622; *Hopkins v. Hopkins*, 132 N. C., 27; *Harris v. R. R., ib.*, 163, 165; *Orr v. Telephone Co., ib.*, 693; *Smith v. R. R., ib.*, 829; *S. v. Tyson*, 133 N. C., 696; *Walker v. R. R.*, 135 N. C., 741; *Speight v. R. R.*, 161 N. C., 86.

STATE EX REL. BOARD OF RAILROAD COMMISSIONERS AND C. T. PATE ET AL. (PETITIONERS) V. THE WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 8 March, 1898.)

Railroad Commission—Powers of General Assembly—Establishment of Courts—Allotment of Jurisdiction—Appeals to Supreme Court.

1. The Superior Court having been created by the Constitution, the General Assembly cannot abolish it in whole or in part.
2. While the General Assembly may, under section 12, Article IV of the Constitution, confer upon the courts established by it inferior to the Supreme Court original jurisdiction, exclusive or concurrent with the Superior Court, of any matters heretofore cognizable in the latter court (except appellate jurisdiction over justices of the peace), it cannot change the status of the Superior Court as the head of the Superior Court system.
3. Though the Railroad Commission is a court of record, "inferior to the Supreme Court," with the inherent power pertaining to all courts to punish for contempt, etc., it is properly an administrative court, and all its orders and regulations are merely the basis of judicial action in the Superior Court to enforce them or punish their violation, and, until there has been a judicial adjudication of the validity of its action in any particular case, there can be no appeal to the Supreme Court, whose jurisdiction (save in the case of claims against the State) is appellate. Hence,
4. Section 29 of the Railroad Commission Act (chapter 320, Laws 1891), authorizing an appeal from the commission direct to the Supreme Court, "where no exception is made to the facts as found by the commission," is in conflict with section 9, Article IV of the Constitution, which gives to the Supreme Court appellate jurisdiction only, except of claims against the State.
5. An appeal lies from the Railroad Commission to the Superior Court.

(878) PETITION by C. T. Pate and other citizens of the State living near Purvis, on the Wilson & Fayetteville branch of the Wilmington & Weldon Railroad Company, filed with the Railroad Commission,

asking that an order be made requiring the defendant to establish a railroad station, with freight, express and telegraph office at Purvis. The Commission, after finding the facts, rendered judgment as follows:

"The Commission concludes, from the evidence and information received, that the public convenience and necessity demand, and the business that is and would be offered at Purvis is such as to justify the defendant in erecting a station building and establishing an agency, but the Commission is of opinion, and it is so adjudged, that it cannot grant relief asked for by the petitioners, in that it is not authorized by the act creating the Commission to compel the erection of station houses and the establishment of agencies where there is no building or regular station already established." The petition was therefore dismissed, and the petitioners excepted and appealed to the Supreme Court.

(879)

Jones & Boykin for petitioners.
R. O. Burton for defendant.

CLARK, J. The appellee moves to dismiss this appeal because taken direct from the Railroad Commission to this Court instead of to the Superior Court. The point was considered in *Rhyne v. Lipscombe, ante,* 650; *S. v. Ray, post,* 1097, and *Tate v. Commissioners, ante,* 661. It was held in those cases that the Superior Court having been created by the Constitution, the Legislature could not abolish it either in whole or in part, and that sec. 12, Art. IV, authorizing the General Assembly to allot and apportion the jurisdiction of courts below the Supreme Court "without conflict with other provisions of the Constitution," conferred on the Legislature power to give to courts created by its original jurisdiction exclusive or concurrent with the Superior Court, of any matters heretofore cognizable in the latter court (though not appellate jurisdiction over justices of the peace), but this did not carry power to change the status of the Superior Court, which was created as the head of the court system, below this Court, and that from it alone appeals lie to this Court. The historic and legal meaning of the term "Superior Court," well understood when the Constitution was adopted, is to be regarded in construing the language of the Constitution which again created it and provided for the election and terms of its officers, the residence and rotation of its judges. Consequently, it was held that while the General Assembly could allot and distribute the original jurisdiction hitherto belonging to the Superior Court, it could not deprive that court of its headship of the court system below this Court. (880)

Section 7 of the act creating the Railroad Commission (ch. 320, Laws 1891), recognizes this by providing for appeals from the commission to the Superior Court, and that from the judgment of the

latter either party might appeal to this Court. The provision in section 29 of said act authorizing an appeal from said commission direct to this Court "when no exception is made to the facts as found by the commission," we are constrained to hold invalid for even a stronger reason than that which impelled us to dismiss an appeal from the Criminal Circuit Court in *S. v. Ray, post,* 1097.

The Railroad Commission is a court of record (Acts 1891, ch. 428), and a court "inferior to the Supreme Court," in the purview of sec. 12, Art. IV of the Constitution, and of course with powers inherent in all courts as to punish for contempt, etc. (*Express Co. v. R. R.,* 111 N. C., 463), but as was held in *Caldwell v. Wilson,* 121 N. C., 425, it is an administrative court (somewhat like the board of commissioners). It can issue no execution upon the fines or penalties laid by it, but they must be collected by action in the Superior Court (*Mayo v. Tel. Co.,* 112 N. C., 343), and in such action the Railroad Commission occupies the position of relator and not that of a lower court from which an appeal has been taken. *R. R. Commission v. Tel. Co.,* 113 N. C., 213. Its orders and regulations are merely the basis of judicial action in the Superior Court to enforce them to punish their violation. Acts 1891, ch. 320, secs. 7 and 10. If, therefore, this Court could entertain appeals direct from an order of the Railroad Commission, it would be assuming original jurisdiction of a matter as to which, though heard and (881) determined by a board of competent jurisdiction, *Leavell v. Tel. Co.,* 116 N. C., 211, there has been no judicial adjudication of its validity nor proceedings to punish its violation whereas, the jurisdiction of this Court is appellate only, except in the case of claim against the State (Art. IV, sec. 9), in which instance its decisions are merely recommendatory. The appeal must be dismissed. In *Leavell v. Tel. Co., supra,* this point was not raised. If the Railroad Commission shall adhere to the ruling made in this case, the appeal will lie in the first instance to the Superior Court, and thence the party cast has his appeal, if he so elect, to this Court.

Appeal dismissed.

Cited: S. v. Hanna, post, 1077; *Mott v. Comrs.,* 126 N. C., 877, 881; *Corporation Commission v. R. R.,* 170 N. C., 568, 569.

HYGIENIC PLATE ICE MANUFACTURING COMPANY v. THE RALEIGH AND GASTON RAILROAD COMPANY.

(Decided 22 March, 1898.)

Action for Damages—Railroads—Fires—Negligence and Contributory Negligence—Burden of Proof—Questions for Jury—Nonsuit Under Hinsdale's Act.

1. Where, in an action for damages resulting from the alleged negligence of the defendant, contributory negligence is relied upon as a defense, the burden of the issue is upon the defendant, and the court cannot direct an affirmative finding thereon.

2. While, in an action for damages resulting from alleged negligence and in which contributory negligence is pleaded as a defense, a motion to nonsuit the plaintiff at the close of his evidence, under chapter 109, Acts of 1897, is in the nature of a demurrer to the evidence and admits its truth, the trial judge cannot grant such motion if the evidence be such as that reasonable men might fairly and reasonably draw different conclusions therefrom, for, in that case, it should be left to a jury.

3. Whenever it is necessary to introduce extrinsic evidence to establish the fact that a defendant caused the injury complained of in an action for damages, the doctrine of "*res ipsa loquitur*" does not apply.

4. Where, in the trial of an action for damages resulting from the alleged negligence of defendant railroad company, it appeared that plaintiff's ice plant was situated twenty feet north of defendant's track; that about 9 o'clock p. m. defendant's train passed, emitting from the locomotive large quantities of sparks as large as a man's finger; that the weather was dry and the wind was from the south, and that fire was discovered on the southwest corner of the roof about fifteen minutes after the train passed: *Held*, that it was error to nonsuit the plaintiff on the ground that there was no evidence of negligence, and, as the issue of contributory negligence was on the defendant, and as a finding that there was such contributory negligence was an affirmative finding of fact which the court was not authorized to make, the nonsuit on the latter ground was erroneous.

ACTION, tried before *Robinson, J.*, and a jury, at October Term, (882) 1897, of WAKE. The facts appear in the opinion. From the judgment of nonsuit entered on motion of the defendant under chapter 109, Acts of 1897, the plaintiff appealed.

Ernest Haywood, F. H. Busbee, and Jones & Boykin for plaintiff.
MacRae & Day and Jos. B. Batchelor for defendant.

FURCHES, J. The plaintiff was the owner of an ice plant near the Union Depot in the city of Raleigh, which was destroyed by fire on 29

August, 1893. Plaintiff alleges that this burning was caused by the negligence of the defendant road. The statement of the case on appeal shows the following facts as admitted or testified to by witnesses:

The plaintiff was the owner of the ice plant referred to in the pleadings; it was located about twenty feet from the track of the defendant's road and on the north side thereof, and was about three hundred (883) feet from the Union Depot in the city of Raleigh, it was constructed in part on the defendant's right of way under a registered lease from the defendant to plaintiff, and in part on the lands of William Boylan. It was almost entirely destroyed by fire about 8:30 or 9 o'clock on the evening of 29 August, 1893. It was dry weather, and the wind at that time was blowing directly across the defendant's roadbed from the south to the north, towards the plaintiff's factory. About the hour above named the Atlanta Special, one of the defendant's trains, pulled out of the Union Depot. It was behind schedule time. Charles Locklear, the fireman of plaintiff's engine, was sitting in front of his engine in the engine-room of the factory when the Atlanta Special left the depot. It started off faster than usual. It made a louder noise exhausting than usual. This attracted his attention. He walked to the door of the engine-room. He saw that it was running faster than usual, to wit, about twenty miles an hour. As it approached and passed the factory it emitted large quantities of sparks of the size of his little finger. The wind blew the smoke and sparks from defendant's train in the direction of the factory. He could not see from his engine-room whether any of the sparks fell on the factory. The fire was discovered fifteen minutes after the train passed.

A witness for plaintiff, H. E. Ford, who was night watchman at Jones & Powell's factory, was between the depot and the factory, and about halfway between the two when the Atlanta Special started out. He testified that the factory was discovered on fire between 8 and 9 o'clock of the evening named; that the Atlanta Special, a train of the defendant, passed out about fifteen minutes before; it was run- (884) ning unusually fast; sparks were going out of it unusually heavy from the time it started from the depot till it passed the factory; the sparks were about the size of a man's finger, and there was a great quantity of them; the wind was blowing across the defendant's railroad towards the factory, and the smoke and sparks from defendant's locomotive engine drifted towards factory as the train passed it; fire was discovered on the factory about fifteen minutes after the Atlanta Special passed; it was in the southwest corner next to the railroad; the train was running about twenty miles an hour as it passed the factory.

There was no building on the south side of the defendant's track within several hundred yards of the factory, by which the fire could be com-

municated to it. No other train had passed the factory that evening within an hour and a half before the Atlanta Special passed.

The engine-room of the plaintiff's factory was provided with a brick floor. The smokestack of the boiler was sixty feet high, and did not emit sparks, the fuel used being coal and the engine being stationary and not exhausting. Besides, any sparks it might have emitted at the time of the fire would have been driven by the wind in an opposite direction to the corner in which the fire was discovered, the boiler-room of the plaintiff's plant being in the southeast corner, while the fire began in the southwest.

One Branch, the ice-maker, discovered the fire, and at once notified Locklear, the fireman. Locklear seized buckets and, accompanied by Branch, ran up the ladder leading to the tank filled with water, but found that they could not reach the fire. He descended, ran to the fire box to send in the alarm, but found another attending to it.

It was not possible for the factory hands to extinguish the fire. (885) It had caught in a loft over the weighing room. There was a small space, two or three inches wide, on a line with the floor of the loft and under the eaves of the factory roof. It was left there for the purpose of ventilation. The eaves of the roof projected over and in the main covered this open space. The fire, when first seen, was in the southwest corner of the loft next to the railroad and near this open space under the eaves. There was nothing in the loft. There was no door or window in it, and no one could approach it and set it afire in this particular corner. There was no ladder or steps leading up to the loft.

The fire burned northward, away from the track of the defendant's road, destroying the center and rear of the building, and leaving a part of the front intact.

The front roof of the factory was iron, and the center and rear roof was asbestos, both practically fireproof. The roof of the factory could be reached through the engine-room. Locklear did not leave his engine-room when the engine passed to look for fire on the factory. No special precautions, except as herein above set forth, were taken to prevent fire. The same train and other trains of defendant had on previous occasions emitted sparks when passing the factory, and no fire followed.

After the fire alarm was sent in the city fire department force arrived and undertook to extinguish the flames, playing mostly on the front of the plant, but failed to accomplish it.

Perry, the superintendent, usually remained at the factory until 11 o'clock at night, and always went over it before leaving, to see everything was in order. On the evening of the fire he was sick; and after looking over the factory as usual, and finding nothing wrong, went home about thirty minutes before the fire. Hearing the alarm, he (886)

started down-down, met Locklear, learned the factory was burning, and hastened on, and with others endeavored to put out the fire.

When the plaintiff rested, having introduced evidence of the foregoing tenor, the defendant introduced no evidence, but moved to nonsuit the plaintiff under chapter 109, Acts of 1897. The court sustained defendant's motion, and the plaintiff appealed.

The judgment of nonsuit can only be sustained upon one of two grounds—that the plaintiff failed to make a case against the defendant, or that plaintiff had shown such contributory negligence as to discharge the defendant from liability.

The case was argued in this Court almost entirely upon the ground of contributory negligence on the part of plaintiff, but the case on appeal does not show upon what grounds the judgment of the court was put. In our opinion it cannot be sustained upon either ground.

If the doctrine of *"res ipsa loquitur"* does not apply, the issue of contributory negligence was upon the defendant, and to find there was contributory negligence on the part of the plaintiff would be an affirmative finding of facts and not for the court. *S. v. Shule,* 32 N. C., 153; *S. v. Allen,* 48 N. C., 257; *Spruill v. Ins. Co.,* 120 N. C., 141; *Hardison v. R. R.,* 120 N. C., 492; *Bank v. School Com.,* 121 N. C., 107; *White v. R. R.,* 121 N. C., 484.

It was contended that as this case is upon admitted facts and evidence offered by plaintiff it is distinguishable from the cases cited, that is a demurrer to the evidence, which admits it to be true, and there is nothing for the jury to find, and it thus becomes a question of law for the court.

(887) This seems to be a sound proposition of law, and may distinguish this case from those cited, unless reasonable men might fairly and reasonably draw different conclusions from such evidence. If this is so, then such evidence should be submitted to the jury. *Hinshaw v. R. R.,* 118 N. C., 1047. If there was no evidence of contributory negligence it was error to nonsuit the plaintiff upon the ground of contributory negligence.

For the purpose of this case it is only necessary for us to say that in our opinion the record as *now presented* does not show such facts as authorized the court to decide as a question of law that plaintiff had been guilty of contributory negligence.

But, as it is not stated upon what ground the judgment of nonsuit was based, it is necessary that we should examine the other ground—that of negligence on the part of the defendant.

We are of the opinion that the doctrine of *"res ipsa loquitur"* does not apply to this case. That doctrine only applies where the injury—the thing done—speaks for itself, and establishes the fact that the defendant was the author of the injury. That if it is necessary to introduce ex-

trinsic evidence to establish the fact that defendant caused the injury, that doctrine does not apply. 1st Shear. & Red. on Law of Negligence, secs. 59 and 60.

But where the plaintiff alleges that he has been injured by *fire* originating from sparks issued from the defendant's locomotive, "he must not only prove that the fire *might* have proceeded from the defendant's locomotive, but must show by reasonable affirmative evidence that it did so originate."

"It is not necessary, however, to prove this beyond a reasonable doubt. Evidence showing that the engine emitted sparks in size and number sufficient to account for the fire, and flying near the build- (888) ing or field, which actually caught fire, and that the fire was discovered very soon afterwards, no other cause being known, is sufficient to go to the jury on this point." 2 Shearman & Red., *supra,* sec. 675.

When the origin of the fire is fixed on the defendant the presumption then arises that it was guilty of negligence and the burden rests upon it to show that it used approved appliances in the operation of its road to prevent the emission of sparks and cinders, or that the damage was caused by some extraordinary cause over which defendant had no control." 2 Shearman & Red., *supra,* sec. 676. And this is the rule in North Carolina. *Lawton v. Giles,* 90 N. C., 374; *Ellis v. R. R.,* 24 N. C., 138; *Aycock v. R. R.,* 89 N. C., 321.

Understanding as we do, instructed as we are by these authorities, we cannot hold that there was not such evidence of negligence on the part of the defendant as should not have been submitted to the jury. As the jury might take a different view of the evidence to what the court does, the plaintiff should not be nonsuited under this statute except in plain cases of failing to make out a case. The plaintiff should not have been nonsuited.

This case is another evidence of the unwisdom of the act of 1897 establishing this practice. About one-half of the appeals from the Fourth District and a very great number from other districts come to us upon appeal from rulings of the courts under this statute. A large number of them if not a majority go back for a new trial. Whereas, but for this statute, these cases would have been tried upon their merits, and in all probability that would have been the end of them. The Legislature is composed for the most part of plain, intelligent farmers and business men, who wish to do right. But they know nothing of (889) legal procedure, and we have no idea that any of them drew this bill or that they would have voted for it if they had known the vast amount of harm they were inflicting upon their constituents. It must have been drawn and promoted by some lawyer or lawyers who wanted to speculate upon the opinion of the court—to try cases by technicalities

instead of upon their merits—taking "two bites at a cherry." The practice it displaced was the result of judicial wisdom and experience for the past century, and should not have been disturbed without some better reason for doing so than appears to have been for the passage of this act. We have refrained from expressing our opinion on the facts as far as we could, as the case goes back for a new trial.

Error. New trial.

Cited: Sims v. Lindsay, ante, 681; *Commission Co. v. Porter, ante,* 698; *Willis v. R. R., post,* 908; *Whitley v. R. R., post,* 989; *Johnson v. R. R., post,* 958; *Roscoe v. Lumber Co.,* 124 N. C., 45; *Gates v. Max,* 125 N. C., 140; *Neal v. R. R.,* 126 N. C., 641; *Hosiery Co. v. R. R.,* 131 N. C., 239; *Deppe v. R. R.,* 152 N. C., 83; *Maguire v. R. R.,* 154 N. C., 386; *Currie v. R. R.,* 156 N. C., 423; *Hardy v. Lumber Co.,* 160 N. C., 118.

PARRY LEE MOSS, BY HER NEXT FRIEND, v. THE NORTH CAROLINA RAILROAD COMPANY.

(Decided 22 March, 1898.)

Action for Damages—Railroads—Public Carriers—Negligence—Pleading—Trial—Variance.

1. A complaint proceeding upon one theory will not authorize a recovery upon another and entirely different theory.
2. In an action by a passenger against a railroad company for personal injuries in which the allegations of negligence were that the defendant failed to stop its train at a station where she was to change cars, to allow her to get off, and suddenly and carelessly accelerated the speed of the train while she was getting off there, plaintiff cannot recover upon proof that the company failed to show her the safe way to go from one train to another at that station or from any train to the station or from the station to any train.

(890) ACTION, tried at Fall Term, 1897, of ALAMANCE, before *Adams, J.*, and a jury. The facts appear in the opinion. There was a verdict for the plaintiff, and from the judgment thereon defendant appealed.

E. S. Parker, Jr., A. W. Graham, and J. A. Long for plaintiff.
F. H. Busbee and A. B. Andrews, Jr., for defendant.

FAIRCLOTH, C. J. The plaintiff sues for personal injury caused by the alleged negligence of the defendant. The plaintiff entered defendant's

passenger car at Oxford en route to Chapel Hill, N. C. At University Station, on said line, it was necessary to change cars and take the Chapel Hill train, which stood out some short distance from the station, where the train on which the plaintiff came usually stops. The complaint alleges: "That when the train upon which they came (the plaintiff and her mother) reached the said University Station it did not stop but continued moving slowly by said station; that the said Parry Lee Moss, accompanied by her mother, came upon the platform of the car in which they were and that the conductor of said train commanded them in an angry and vehement way to get off if they were going to get off, and that at the said command the said Parry Lee Moss immediately descended from said train, and that while she was in the act of so descending the speed of said train was suddenly accelerated, and that, owing to the failure of the said train to stop at said University Station and to the sudden and careless acceleration of the speed of the said (891) train, and owing to the command of said conductor, the said Parry Lee Moss was thrown under the train and her feet crushed, to her great damage," etc.

These allegations were denied, and there was conflicting evidence on each material point.

First issue: Was the plaintiff injured by the negligence of the defendant *as alleged in the complaint?*

The charge was at length, and numerous prayers for instructions and exceptions were made in the course of the trial.

Among other things his Honor charged the jury: "That the plaintiff being a passenger on the defendant's train going from Oxford to Chapel Hill, and it being necessary for the plaintiff to change cars at University, that while she was going from the train on which she came to the said station or from said station to any other train she was still a passenger, and that if she was injured by the failure of the company to direct and show her the safe way to go from one train to another, or from any train to the station, or from the station to any train, then the company is guilty of negligence, and you should answer the first issue 'Yes.'" Exception by defendant.

The above part of the charge was erroneous, and without intimating any opinion on the abstract question of law involved in the above quoted part of the charge, we find the error to consist in charging on a feature of negligence not alleged in the complaint. A defendant is called upon to answer the accusations made against him, but he is not called upon, and it would be unreasonable to do so, to anticipate and come prepared to defend any other accusation. It is a settled maxim of law that proof without allegation is as unavailable as allegation without (892) proof. There is nothing in the answer to assist the complaint,

if the facts were as the charge assumes them to be. *Conley v. R. R.*, 109 N. C., 692. "A complaint proceeding upon one theory will not authorize a recovery upon another and entirely distinct and independent theory." 4 Elliott on Railroads, sec. 1594. Several interesting questions were discussed before this Court. Some of them do not arise out of the pleadings and some do so only incidentally. We cannot see that it would serve any useful purpose to consider them at present. The judgment below is reversed and a new trial is awarded.

New trial.

Cited: Wall v. Wall, 142 N. C., 387; *Fleming v. R. R.*, 160 N. C., 201; *Green v. Biggs,* 167 N. C., 422.

M. L. CABLE v. SOUTHERN RAILWAY COMPANY.

(Decided 15 March, 1898.)

Action for Damages—Appeal—Practice—Railroads—Injuries to Passenger—Passenger Alighting from Train—Negligence—Contributory Negligence.

1. The burden of showing the negligence being upon the plaintiff in the trial of an action for damages resulting from the alleged negligence of the defendant, the court may properly direct a verdict in favor of the defendant when there is not any, or only a scintilla, of evidence tending to prove the negligence of the defendant.

2. Where judgment of nonsuit is entered against a plaintiff at the close of his evidence, only his evidence and so much of the defendant's as is most favorable to the plaintiff will be considered on appeal, and both must be considered in the light most favorable to him.

3. Where, on the trial of an action for damages for injuries caused by the alleged negligence of defendant railroad company, it appeared by the plaintiff's evidence that the defendant's train on which plaintiff was a passenger did not stop at the station to which he had paid his fare, and when he saw the conductor the latter said he had forgotten him and suggested that he should jump off the train as it was going slow, which plaintiff refused to do; and that the conductor then agreed that he would slow up the train at a safe place for plaintiff to alight and plaintiff consented to jump off, and went upon the platform as the train slowed up, but seeing a "go ahead" signal from the rear, did not step for that reason; that then, feeling the increased motion of the train, he stepped off, believing he was at a safe place and relying upon the conductor's promise to put him off at a safe place, and was injured: *Held*, that the evidence of the defendant's negligence was sufficient to be submitted to the jury.

4. In determining whether the plaintiff's evidence is sufficient to be submitted to a jury, the court cannot consider the defendant's rebuttal evdience no matter how strong in contradiction, for that would be to compare the conflicting evidence and determine its relative weight, which is solely within the province of the jury.

5. No matter how strong and uncontradictory is the evidence in support of an issue as to contributory negligence, the court cannot withdraw such issue from the jury and direct an affirmative finding.

6. Under the well-settled rules of law, and plainly under section 1963 of The Code, a railroad company is liable for nominal damages for its negligence in failing to stop its train at and conveying a passenger beyond the destination to which he has paid his fare, it being a regular station on the line.

7. The Court does not favor the growing practice of taking cases from the consideration of the jury; and when there is any more than a scintilla of evidence or any reasonable doubt as to the sufficiency of evidence on the part of the side upon which rests the burden, it is proper and certainly safer to leave to the jury the exclusive determination of the facts.

ACTION for damages, tried before *McIver, J.*, and a jury, at (893) August Term, 1897, of GUILFORD. The facts are stated in the opinion. After all the evidence had been offered and argument had commenced, his Honor stated that he would charge the jury that the plaintiff, on his own testimony, could not recover; whereupon the plaintiff submitted to a nonsuit and appealed. (894)

C. M. Stedman, R. R. King, and Schenck & Schenck for plaintiff.
F. H. Busbee for defendant.

DOUGLAS, J. This is an action brought by the plaintiff to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. The plaintiff, a passenger on defendant's train, was carried past his destination and was injured by stepping off the train, while in motion, by the direction of the conductor, as alleged. After the close of the testimony, the court below refused all prayers for instructions offered by the plaintiff, and "stated that he would charge the jury that the plaintiff on his own testimony was not entitled to recover. Whereupon the plaintiff submitted to a nonsuit and appealed." This brings before us the single question whether there was sufficient evidence to go to the jury as to the negligence of the defendant. As upon this issue the burden was upon the plaintiff, the court might properly have directed a verdict in favor of the defendant, provided there was no evidence or nothing more than a mere scintilla tending to prove the negligence of the defendant. *Wittkowsky v. Wasson*, 71 N. C., 451; *Spruill v. Ins. Co.*, 120 N. C., 141. In the absence of such negligence the plaintiff could not recover. This brings us to a consideration of the evidence.

In the present status of this case we can consider only the evidence of the plaintiff and such of the defendant's evidence as is favorable to him, and must construe both in the light most favorable to the plaintiff.

Abernathy v. Stowe, 92 N. C., 213; *Gibbs v. Lyon,* 95 N. C., 146;
(895) *Hodges v. R. R.,* 120 N. C., 555; *Collins v. Swanson,* 121 N. C., 67. In *Springs v. Schenck,* 99 N. C., 551, at page 555, this Court says: "As the court in effect intimated on the trial that in no reasonable view of the evidence could the appellant recover, it must for the present purpose be accepted as *true, and taken in the most favorable light for him, because the jury might have taken that view of it if it had been submitted to them.* In *S. v. Allen,* 48 N. C., 257, at page 268, *Chief Justice Pearson,* speaking for the Court, says: "In the case now under consideration the judge withdrew the facts from the jury and instructed them that if the testimony was believed it was a case of murder, and there was no evidence of a legal provocation. So the prisoner has the right to insist that the testimony should be taken *in the point of view most favorable to him;* and that if in *any* aspect the evidence is consistent with his being guilty of manslaughter only, there was error in the manner in which the case was put to the jury," citing *Avera v. Sexton,* 35 N. C., 247, and *Hathaway v. Hinton,* 46 N. C., 243.

Among other things the plaintiff testified that he got on the train at Stokesland and paid his fare to Benaja, his destination; that the train did not stop at Benaja, and that as soon as he saw it was not going to stop he went back to see the conductor and found him in the first-class car. The plaintiff further testified as follows: "He (the conductor) jumped up and remarked that he had forgotten me, that he had to meet a train at Benaja, but at the same time he remarked that he was on a hill and could not stop, and suggested that I jump from the train as it was running slow. I refused. He suggested again that I jump, and I refused. He said he would slow up at the top of the hill, *which was a safe place.* I took him at his advice. As the train slowed up,
(896) about as fast as a man could walk, I went out on the platform. I saw a signal at the rear end of the train; it was a signal to go ahead. I did not step off the train because I saw the lantern moving. At the same time I felt the increased motion of the train. I stepped off the train, thinking I was at a safe place. . . . I believed it to be a perfectly safe place. In fact the conductor had told me he would slow up at a safe place for me to get off. . . . When he first told me to jump off the train was not making less than 15 miles an hour—as fast as it could go up-hill. . . . The conductor told me that he would slow up at a safe place on the top of the hill and for me to get off when the train slowed up. I relied on his picking a safe place for me to get off. I got off when the train became very slow—I suppose not faster than a

man could walk, probably not so fast." The plaintiff also testified as to his injuries, loss of income, and other matters.

Taken in its most favorable light, this evidence was unquestionably sufficient to go to the jury. The court could not consider the rebutting evidence of the defendant, no matter how strong in contradiction, because that would be to *compare* the conflicting evidence and determine its relative *weight*. This can never be done by the court, as it is within the exclusive province of the jury. *S. v. Shule,* 32 N. C., 153; *S. v. Allen, supra; Wittkowsky v. Wasson,* and *Spruill v. Ins. Co., supra,* and cases cited therein; *Hardison v. R. R.,* 120 N. C., 492; *Bank v. School Com.,* 121 N. C., 107; *White v. R. R., ibid.,* 484, at page 489.

We have assumed that his Honor intended to charge the jury that there was no evidence tending to prove negligence on the part of the defendant, since, if the defendant's negligence were proved or admitted, under no circumstances could the court find as an (897) affirmative fact that there was contributory negligence. Contributory negligence is a plea in bar, the burden of which always rests upon the defendant, both as to allegation and proof. Any doubt that may have existed as to its character is now settled by chapter 33, Laws 1887, which provides "that in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and *proved* on the trial." In *Hardison v. R. R.,* 120 N. C., 492, at page 494, which was an action for the killing of stock, where section 2326 of The Code made a *prima facie* case of negligence against the defendant, the Court says: "Under this statute, as we understand it, at the close of the plaintiff's (if the defendant had introduced no evidence) it would have been the duty of the court in instructing 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 the 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 have been found by the court, and should have been left to the jury.*"

In *Bank v. School Committee,* 121 N. C., 107, 109, this Court says: "But no matter how strong and uncontradictory the evidence is in support of the issue, the court cannot withdraw such issue from the jury and direct an affirmative finding. To do this is to violate the act of 1796—section 413 of The Code." In *White v. R. R.,* 121 N. C., 484, 489, this Court says: "The court can never find nor direct an affirmative finding of the jury"—citing *S. v. Shule,* 32 N. C., 153. This (898) doctrine is also affirmed in *Spruill v. Ins. Co.,* and *Collins v. Swanson, supra,* and in *Eller v. Church,* 121 N. C., 269, all recent cases. In the United States courts, in which the judges are permitted to express

an opinion upon the facts, it is held that the court may under certain circumstances find contributory negligence, but the following quotations from a long line of cases will show how strictly the rule is guarded: "The court proceeded upon the ground that contributory negligence upon the part of the plaintiff was so conclusively established that it would have been compelled in the exercise of a sound judicial discretion to set aside any verdict returned in his favor. If the evidence, giving the plaintiff every benefit of every inference to be fairly drawn from it, sustained his view, then the direction to find for the defendant was proper." *Kane v. R. R.,* 128 U. S., 91, 94. "It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." *R. R. v. Ives,* 144 U. S., 427. "In determining whether the plaintiff was so guilty of contributory negligence as to entitle the defendant to a verdict, we are bound to put upon the testimony the construction most favorable to him." *R. R. v. Lowell,* 151 U. S., 209, 217.

The inference from the facts must be "so plain as to be a legal conclusion" before the question can be withdrawn from the jury. *R. R. v. Egeland,* 163 U. S., 93, 98. "We see no reason, as long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these (899) (negligence and contributory negligence) as well as others." *Jones v. R. R.,* 128 U. S., 443, 445. The court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow *as matter of law* that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." *Dunlap v. R. R.,* 130 U. S., 652. In *R. R. v. Egeland, supra,* where the plaintiff, a laborer in the employ of the defendant, was ordered by the conductor to jump off a train going about 4 miles an hour, and was injured in doing so, the court says: "If plaintiff reasonably thought he could with safety obey the order by taking care and jumping carefully, and if because of the order he did jump, the jury ought to be at liberty to say whether under such circumstances he was or was not guilty of negligence."

There is another point in the case at bar on which the plaintiff was clearly entitled to go to the jury. He testified without contradiction that he was on the train as a passenger, had paid his fare to Benaja, a regular station of the defendant company, and was carried beyond his destination by the failure of the conductor to stop his train. This of itself was negligence on the part of the defendant, and entitled the plaintiff to at least nominal damages. This is a well-settled rule of law, even in the absence of a local statute. Fetter Carriers of Passengers, secs. 66 and 300, and cases therein cited; Schouler Bailments

and Carriers, sec. 661; Thompson on Carriers of Passengers, page 581; Hutchinson on Carriers, secs. 612 and 614; Am. & Eng. Enc. of Law, pages 565, 566, 572, and notes thereunder. In this State the liability is directly imposed by statute. The Code, sec. 1963, provides that "Every railroad corporation shall start and run their cars (900) for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting, and the junction of other railroads, and at *usual* stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport, and *discharge* such passengers and property at, from, and *to* such places on due payment of the freight or fare legally authorized therefor, and shall be *liable* to the party aggrieved in an action for damages for any neglect or refusal in the premises." As to the *quantum* of damages, the rule may be found in *Purcell v. R. R.*, 108 N. C., 414, and in *Hansley v. R. R.*, 117 N. C., 565.

This Court does not favor the growing practice of taking cases from the jury. The jury is a constitutional body, as much so as the court itself, and, in the exercise of its peculiar powers, of equal responsibility and independence. Its members are selected on account of their peculiar fitness from the body of the people and by the lawful officers of the people. Any of its members can be challenged by any party for cause, and to a certain extent peremptorily, at the will of the objector. They represent the average intelligence and virtue of our people, and we cannot discredit them without at the same time reflecting upon the controlling element of our State. They may not possess the high order of intelligence and cultivation required of the judge, but as an average they do possess that common sense which gives a clearer insight into the motives and conduct of men, and is better fitted to deal with the ordinary affairs of life than the highest order of intellectual brilliancy. We should (901) remember that our organic law is not the product of John Locke, but is the outgrowth of the practical wisdom and experience of the hardy frontiersmen for whom he attempted in vain to legislate. The number of the jury is large, and they are required to render a unanimous verdict, because it is the *consensus* of their *average* judgment that the law seeks as the safest protection against prejudice and oppression. It is true that some of the "advanced thinkers" of the day attack the jury system as a cumbersome relic of the ignorance of the past; but in spite of their criticism it is not only imbedded in our organic law but remains of the very warp and woof of the jurisprudence of the two great English-speaking nations who today hold the world in awe. In the large ma-

jority of cases where the court directs a verdict, if the matter were left to them under proper instructions, the jury would render a verdict in accordance with the views of the court, and that would be an end of the case. But, even if the jury should render a verdict against the weight of the evidence, no harm would be done beyond a brief delay, as the court could in its discretion set aside any verdict other than that of acquittal on a criminal charge. It would involve no greater responsibility to set aside a verdict than to direct one, and it is certainly more in accordance with the policy of our laws to recommit the case to a jury rather than to take it entirely from their consideration. This Court has said in *Edwards v. Phifer,* 120 N. C., 405, that "no principle is more fully settled than that this Court will not interfere with the discretion of a trial judge in setting aside a verdict as being against the weight of evidence," while the re-reports of every term abound with cases
(902) where we are compelled to order a new trial for the improper *direction* of the verdict. Of course, every presumption is in favor of the verdict, and it should not lightly be set aside. It is equally true that it is the duty of the court to direct a verdict against the party on whom rests the burden of proof where there is nothing more than a mere scintilla of evidence; but where there is any reasonable doubt, it is proper and certainly safer to leave to the jury the exclusive determination of the facts.

These views are not new to this Court either in principle or application, but are again suggested by the increasing number of such cases. *S. v. Allen, supra.* We fully appreciate the difficulties experienced by our brethren upon the circuit in deciding, offhand, difficult and novel questions, and we make these suggestions in no captious spirit, but believing that their observance will tend to the easier and better administration of the law. A new trial must be ordered.

New trial.

Cited: Willis v. R. R., post, 908; *Thomas v. Club,* 123 N. C., 288; *Cox v. R. R., ibid.,* 607, 613; *Dunn v. R. R.,* 124 N. C., 255; *Cogdell v. R. R., ibid.,* 304; *Bank v. Nimocks, ibid.,* 360; *Webb v. Atkinson, ibid.,* 453; *Bank v. Wilson, ibid.,* 567; *Gates v. Max,* 125 N. C., 141, 143; *Cowles v. McNeill, ibid.,* 388; *Neal v. R. R.,* 126 N. C., 655; *Meekins v. R. R.,* 127 N. C., 36; *Aiken v. Lyon, ibid.,* 177; *Mfg. Co. v. R. R.,* 128 N. C., 285; *Moore v. R. R., ibid.,* 457; *Cogdell v. R. R.,* 129 N. C., 400; *Coley v. R. R., ibid.,* 413; *Smith v. R. R.,* 130 N. C., 310; *S. v. Peoples,* 131 N. C., 795; *Gordon v. R. R.,* 132 N. C., 570; *S. v. Cole, ibid.,* 1088; *Darden v. R. R.,* 144 N. C., 3.

S. H. TROXLER v. SOUTHERN RAILWAY COMPANY.

(Decided 26 May, 1898.)

Action for Damages—Railroad—Negligence—Defective Appliances—Injury to Employee.

Where, in the trial of an action by a brakeman against the railroad company, in whose service he was employed, for damages for personal injuries, it appeared that, while attempting to couple two freight cars of unequal height whose drawheads were skeletons, and one of them was so open that the link would not go in except in a slanting direction, which made it necessary for him to put in his hand and reach over the deadblocks in order to make the coupling, his hand was crushed; and it also appeared that the failure of a fellow-brakeman to do his duty contributed to the accident: *Held*, that the railroad was negligent in using defective and dangerous drawheads, and that the true question was not whether the plaintiff was injured by a fellow-servant but whether the injury was caused by the defective appliances for coupling the cars.

ACTION, tried before *Robinson, J.*, and a jury, at January (903) Special Term, 1898, of GUILFORD. The facts appear in the opinion. Upon the close of the evidence the defendant moved to dismiss the action, and, upon an intimation from his Honor that the plaintiff could not recover, the plaintiff submitted to a nonsuit and appealed.

C. M. Stedman and Schenck & Schenck for plaintiff.
F. H. Busbee for defendant.

MONTGOMERY, J. The plaintiff was a brakeman in the employment of the defendant company. At Stokeland a car, the eighth or ninth from the engine, was taken from the train and set off on the side-track, and in an effort to couple the two cars uncoupled in the setting off of the one on the side-track the plaintiff was injured. His account, as a witness in the case, of injury was as follows: "We came back to couple the train on the main line. I entered the link with a stick on the S. C. I. L. car that was on the main line. As I entered the link, on account of the skeleton drawhead, the link got crossways in the head and the pin failed to go down, and there were dead-blocks on each side of the drawhead and I could not get the link below the dead-blocks. I had to run my hand over the dead-block. I got hold of the pin in order to straighten the link to get the pin down. As I got hold of the pin the slack (904) rolled out of the rear part of the train and the rebound caught my hand between the dead-blocks. It mashed my right hand so it had to be taken off." Harvey, another brakeman, was along on the same train, and the plaintiff testified substantially that the injury was caused

by a failure on the part of Harvey to perform his duty. His Honor, being of opinion at the close of the plaintiff's evidence that he could not recover, because he was injured by the negligence of a fellow-servant, intimated his purpose to so instruct the jury. Upon which the plaintiff took a nonsuit and appealed.

We think that his Honor was in error in the course he took. The plaintiff testified (and his evidence must be taken as true) that these cars belonged to different railroad systems; that one of them was higher than the other, and that made it necessary to raise or lower the link in coupling; that the drawheads on both cars were *skeletons, and that one of them was so open* that the link would go in slanting and make it necessary to put in the hand, and that the dead-blocks were so arranged as to make it necessary to reach over them. The true question in the case, then, was not whether the plaintiff was injured by a fellow-servant but whether he was injured by the defective appliances with which the coupling of the cars was to be made. We have no hesitancy in deciding that the defendant was negligent in that it was using drawheads on its cars that were defective and dangerous. It was the defendant's duty to furnish safe appliances.

There was error in the respect pointed out for which there must be a New trial.

Cited: S. c., 124 N. C., 190, 191; *Coley v. R. R.,* 129 N. C., 415; *Elmore v. R. R.,* 132 N. C., 875; *Walker v. R. R.,* 135 N. C., 741; *Hicks v. Mfg. Co.,* 138 N. C., 335; *Pressley v. Yarn Mills, ibid.,* 423; *Rich v. Electric Co.,* 152 N. C., 695.

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(905)

A. D. WILLIS v. ATLANTIC AND DANVILLE RAILROAD COMPANY.

(Decided 5 April, 1898.)

Action for Damages—Issues—Trial—Nonsuit on Plaintiff's Evidence—Hinsdale's Act — Instructions — Evidence—Railroads—Personal Injuries—Negligence.

1. Where the issues submitted by the court on the trial of an action were those properly arising on the pleadings, and every phase of the contentions of the parties could be presented thereon, it was not error to refuse to submit others tendered by the defendant.

2. It was not the intention or effect of the passage of chapter 109, Acts of 1897, to deprive parties of the right of trial by jury in cases where there is any evidence or to make the weight and effect of the evidence always a question of law for the courts.

3. In the trial of a civil action for damages where negligence was alleged it was not error to refuse an instruction that "when the minds of the jury are in doubt they must find for the defendant." Such instruction would not be proper even in the trial of a criminal action in which it is only when there is no reasonable doubt that the jury should find against the defendant.

4. In the trial of an action for damages for personal injuries, where negligence was alleged and contributory negligence was relied upon as a defense, a prayer for an instruction that "the plaintiff would not be entitled to recover" was properly refused since it asked for no instruction as to an issue or issues, and also because it left out of consideration the question whether, notwithstanding the plaintiff's contributory negligence (if there was such), the defendant might not have avoided the injury by reasonable care.

5. In the trial of an action against a railroad company for personal injuries, defendant's request for instruction, which assumed that its rules and regulations were in evidence though defendant had failed to produce them when asked to put them in evidence, and where the testimony of witnesses differed from the facts as recited in the request, was properly refused.

6. A regulation of a railroad company that it is the duty of the track foreman to protect himself against all trains, regular and extra, and that he is entitled to no notice thereof, is unreasonable.

7. A railroad in operating its train is negligent if it fails to carry a headlight, if dark enough to have one, or to ring its bell or sound a whistle at public crossings.

8. The fact that the plaintiff, who was injured by the collision of defendant's train with a hand-car on which he was riding by permission, was not a passenger but a mere licensee, does not excuse defendant's gross negligence by which he was injured.

ACTION, tried before *Adams, J.*, and a jury, at October Term, (906) 1897, of CASWELL. (For report of former appeal in same case, see 120 N. C., 508.) The issues submitted and the responses thereto were as follows:

1. Was the plaintiff injured by the negligence of defendant? A. "Yes."

2. Did the plaintiff, by his own negligence, contribute to his injury? A. "No."

3. Could the defendant, by the exercise of ordinary care, have prevented the injury? A. "Yes."

4. What damages, if any, has plaintiff sustained? A. "$500."

The defendant tendered the following issues in lieu of or as additional to those submitted:

1. Was the accident by which plaintiff was injured the result of negligence of the section foreman in charge of the hand-car at the time of the accident?

2. Could the defendant, through the engineer and other employees in charge of the excursion train, by due and proper care have discovered the hand-car upon the track in time to stop train and prevent accident?

The court refused to submit the issues, and defendant excepted.

Defendant also objected to the submission of the third issue as given to the jury, on the ground that it did not correctly state the principles governing the question of contributory negligence, which objection
(907) the court overruled, and submitted the issue to the jury; whereupon defendant excepted.

Certain instructions asked for by the defendant and refused by the court are set out in the opinion. There was judgment for the plaintiff according to the verdict, and defendant appealed.

J. W. Graham and J. A. Long for plaintiff.

W. A. Fentress for defendant.

CLARK, J. Every phase of defendant's contention could be presented upon the issues submitted, and the first three exceptions are without merit, *Patterson v. Mills,* 121 N. C., 258; *Coley v. Statesville, ibid.,* 301; indeed, the issues were those properly arising on the pleadings. *Denmark v. R. R.,* 107 N. C., 185.

This case was here at a former term—*Willis v. R. R.,* 120 N. C., 508. After it went back, the plaintiff amended his complaint in several particulars, especially in charging negligence, specifically in that the defendant ran the excursion train "without any notice to the section master of the hand-car, though there was ample opportunity; that it was run at great speed, with no headlight on the engine, after 7 o'clock p. m., around a sharp curve known to be dangerous, and where it was impossible to see far ahead, and though a storm was raging, which prevented the train from being heard, no bell was rung nor any whistle sounded for the station at Blanch or the crossings near that place, though the track was much used by pedestrians, which fact was well known to the defendant; that the hand-car was also run at a dangerous speed and in disregard of the regulations caused by the failure of the defendant to give notice of the running of said excursion train, and that the plaintiff was assigned
(908) a seat on the hand-car, and in nothing contributed to his own injury."

The fourth exception was that the court refused to nonsuit the plaintiff under the provisions of chapter 109, Acts 1897. That act was not intended to deprive parties of the right to trial by jury where there is any evidence, and it is but rare that counsel, who advise the bringing of an action, will not be able to produce at least enough evidence to carry the case to the jury. This has been sufficiently commented upon in *Mfg. Co. v. R. R., ante,* 881; *Cable v. R. R., ante,* 892; *Whitley v. R. R., post,*

987; *Johnson v. R. R., post,* 955, and other cases at this term, to make it plain that the Court does not deem that the effect of the act has been to make the weight and effect of the evidence in damage suits always a question of law for the courts.

The refusal of the defendant's 1st, 12th, and 13th prayers are his 5th, 6th, and 7th exceptions.

The first prayer of the defendant was that "When the minds of the jury are in doubt (whether there was negligence or not) they must find for the defendant." This was properly refused. It would not even be correct in a criminal action. In every case, civil or criminal, where there is conflicting evidence, there is probably more or less doubt in the minds of the jury. It is only when there is no reasonable doubt that they should find against the defendant in a criminal action. In a civil action, as the judge charged, the burden is on the plaintiff to make out his case by the preponderance of the evidence.

The twelfth prayer was properly refused. First, because it did not ask an instruction as to an issue or issues, but that "the plaintiff would not be entitled to recover" (*Witsell v. R. R.,* 120 N. C., 557; *Bottoms v. R. R.,* 109 N. C., 72; *Farrell v. R. R.,* 102 N. C., 390; *McDonald v. Carson,* 94 N. C., 497), and also because it leaves out of con- (909) sideration whether, notwithstanding the plaintiff's contributory negligence (if there was such), the defendant might have avoided the injury by reasonable care.

The thirteenth prayer was properly refused. It assumed that the rules and regulations were in evidence though the defendant failed to produce them when asked to put them in evidence, and the testimony of the witnesses differed from the recital of facts in the prayer. Besides, if there was a regulation that "it was the duty of the track foreman to protect himself against all trains, regular trains and extra, and was entitled to no notice," it would be an unreasonable regulation.

The eighth and ninth exceptions are to the modification of the seventh and eighth prayers for instructions by adding the words "unless they believed the defendant was guilty of negligence in these other respects which I have mentioned." These other respects were the failure to carry a headlight if dark enough to require it, and the failure to ring the bell or sound the whistle at public crossings, near the point of collision, which were more than usually imperative in consideration of the sharpness of the curve, the darkness, and the storm. All the balance of the thirteen prayers offered by the defendant were given.

The court properly told the jury that the plaintiff was not a passenger, but a mere licensee riding on the hand-car by permission, and that as such he took all the risks of that mode of travel (such as injury by the hand-car running off the track, and the like). But this did not

give the defendant the privilege of killing or maiming him at sight by its gross negligence in running a train at high speed out of sched-
(910) ule time, without notice to the foreman, without sounding the whistle at the crossing, ringing no bell, and without a headlight in the approaching darkness, and in a raging storm.

The tenth and eleventh exceptions are that there was no evidence to justify the charge of the court as to the absence of a headlight and the failure to sound the whistle at the crossings. These instructions were guarded and properly left to the jury for the determination of the questions whether there was a necessity for a headlight, and as to whether there were any public crossings near by, and whether the whistle was sounded. There was enough evidence to warrant his doing so.

The other exceptions present no substantial error. The case was fairly presented to the jury.

Affirmed.

Cited: Pretzfelder v. Ins. Co., 123 N. C., 165; *Pierce v. R. R.,* 124 N. C., 93; *Powell v. R. R.,* 125 N. C., 374; *Bradley v. R. R.,* 126 N. C., 739; *Foy v. Winston,* 135 N. C., 440; *Stewart v. Lumber Co.,* 146 N. C., 62; *Morrow v. R. R.,* 147 N. C., 629; *Thompson v. R. R.,* 149 N. C., 157; *Shepherd v. R. R.,* 163 N. C., 522; *Hill v. R. R.,* 166 N. C., 597; *Powers v. R. R., ibid.,* 601; *McNeill v. R. R.,* 167 N. C., 399; *Cullifer v. R. R.,* 168 N. C., 311; *Horne v. R. R.,* 170 N. C., 651; *Ferrell v. R. R.,* 172 N. C., 689.

CHARLES H. NORTON v. THE NORTH CAROLINA RAILROAD COMPANY.

(Decided 12 April, 1898.)

Action for Damages—Railroads—Injury at Crossings—Negligence—City Ordinance Regulating Speed of Train—Obstructions to View of Railroad Track — Signals — Contributory Negligence — Continuing Negligence—Proximate Cause—Excessive Damages—Setting Aside Verdict—Liability of Lessor Railroad Company for Wrongful Act of Lessee.

1. Where, in the trial of an action for damages for injuries to the plaintiff while crossing defendant's track, it appeared by uncontradicted testimony that the crossing where the accident occurred was a public street in a populous part of the town, the plaintiff's view of the track and approaching train was cut off by a long line of box cars; that the train approached the crossing at a speed of about twenty miles an hour without giving any signal whatever, and that the municipal ordinances prohibited a greater

rate of speed than eight miles per hour: *Held*, that such facts constituted negligence *per se*, in its nature gross and continuing to the moment of the accident, and the court properly refused an instruction that, if the jury believed the evidence, the plaintiff's injuries were not caused by the defendant's negligence, and plaintiff was guilty of contributory negligence.

2. A city ordinance regulating the rate of speed of a railway train is presumably passed for the protection of the people, and when within the scope of the city charter has the force and effect of law, and a citizen has the right to expect that it will be respected and obeyed by the railroad corporation.

3. While the fact that a train is running at an excessive speed, beyond that allowed by a city ordinance, will not relieve a person approaching a railroad crossing from the necessity of observing ordinary care; still, if it misleads him or the defendant is deprived thereby of its last clear chance to avoid an accident, it may go to the jury, both on the issues of negligence and contributory negligence.

4. While, in a certain sense, a railroad train has the right of way on its track and it is the duty of a person approaching the track to stop if he knows it is immediately coming or could know it by due care, it is equally the duty of the railroad company to give suitable notice of its approach to the crossing by signal in order that a collision may be avoided; and while greater care is required of one so approaching a crossing where his view is obstructed by a long line of box cars on a contiguous track, equal care is demanded of the railroad *in* the matter of giving notice of approach of a train the view of which is so obstructed.

5. The obligations, rights, and duties of railroads and travelers upon intersecting highways are mutual and reciprocal, and no greater degree of care is required of one than of the other, the right of precedence allowed to the railroad on its track and the duty of the traveler to avoid a collision being accompanied with and conditioned upon the duty of the train to give due and timely warning of approach.

6. There is never any presumption of contributory negligence; on the contrary, where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of a statute making it a matter of affirmative defense.

7. It was not error in the trial judge to refuse to give instructions which, while containing legal principles correct in the abstract, were based on a partial statement of selected facts without reference to other or qualifying circumstances, where such principles were embraced in the charge to as great an extent as could be rightfully asked, it being a well-settled rule that the court below is not required to give special instructions in *ipsissimis verbis*, even if otherwise unobjectionable, and is not required to give them at all in a separate and distinct form if they are substantially included in the charge as given.

8. Where, in the trial of an action for damages for personal injuries caused by the alleged negligence of defendant railroad, it appeared that plaintiff, on approaching the defendant's track at a street crossing, stopped at a distance of 60 feet therefrom and looked and listened; that his view of the track was obstructed by a line of box cars standing on a sidetrack; and that, in attempting to cross, he was struck by a train running at an

unlawful rate of speed, without giving any signal of its approach: *Held*, that the court properly refused an instruction that if the plaintiff's injury was due to the fact that such cars were standing on the sidetrack, such injury was not the result of the defendant's alleged negligence.

9. Where the negligent omission of duty continues up to the time of an accident causing an injury, it becomes the proximate cause, the *causa causans*, of the injury, and to a certain extent relieves the person injured from liability for the want of such care as he would otherwise take had he not been thrown off his guard by such negligent act or omission of duty.

10. A lessor railroad company is liable for the negligence of its lessee in operating the railroad.

11. The refusal of the trial court to set aside a verdict on account of excessive damages cannot be reviewed on appeal.

(912) ACTION for damages for personal injuries to plaintiff, tried before *Allen, J.*, and a jury at March Term, 1897, of DURHAM. There was a verdict for the plaintiff who was awarded $20,000 as damages, and from the judgment thereon defendant appealed. The defendant company is and was at the time of the injury to the plaintiff, leased to and operated by the Southern Railway Company. The facts necessary to an understanding of the opinion, the instructions asked for and given or refused, the exceptions noted on the trial, and his Honor's (913) charge in full, are all set out in the opinion of *Associate Justice Douglas.*

Winston & Fuller for plaintiff.

Charles Price, F. H. Busbee, and Guthrie & Guthrie for defendant.

DOUGLAS, J. This is an action to recover damages for injuries received by the plaintiff through the negligence of the defendant's lessee, the Southern Railway Company. The plaintiff alleged that through such negligence he was injured in attempting to cross the track of the defendant on Dillard street, in the town of Durham, on 2 May, 1896. The defendant, answering, denied any negligence of itself or its lessee, and alleged that the plaintiff was injured by his own negligence, and that if there was any negligence on the part of its lessee the plaintiff contributed to his injury by his own negligence; and further, that it was not responsible in any event for the negligence of such lessee. The following issues were submitted on motion of the defendant:

1. Was the plaintiff injured by the negligence of the lessee of defendant, as alleged in the complaint? A. "Yes."

2. Did the plaintiff, by his own negligence, contribute to the injury complained of? A. "No."

3. What damage did plaintiff sustain? A. "$20,000."

All the issues having been found in favor of the plaintiff, judg- (914) ment was rendered accordingly.

The defendant appealed to this Court, assigning as error:

1. The failure of the court to give the instruction prayed for by the defendant as set out in the case on appeal, exceptions 1 to 8 inclusive.

2. The charge of the court as set out in exceptions 9 to 13 inclusive.

3. The refusal of the court to grant a new trial, as set forth in exception 14.

4. The refusal of the court to set aside the verdict because it was excessive, as set out in exception 15.

5. The refusal of the court to arrest the judgment because it was not responsive to the issues, as set out in exception 15.

The defendant offered no evidence and objected to none of the plaintiff's evidence. The only exceptions are to the charge of the court and the refusal to give certain of the defendant's prayers for instructions.

At the close of the evidence the defendant asked for the following instructions to the jury:

1. If the jury believe the evidence, plaintiff's injury was not caused by the negligence of the defendant, and the answer to the first issue should be "No."

(This instruction was refused, and the defendant excepted. First exception.)

2. Defendant had a right to leave its cars on its side-track in the position described by the witnesses, and if the plaintiff's injury was due to the fact that the cars were standing on the side-track as described, the answer to the first issue should be "No."

(This instruction was refused except as given in the charge, and defendant excepted. Second exception.)

3. The rate of speed at which the train was run has nothing (915) to do with this case unless the jury believe that, if the train had been running within the limit prescribed by the town ordinance, to wit, not more than eight miles an hour, it could have been stopped after plaintiff's danger might, by reasonable care, have been discovered by the engineer in time to have avoided the accident.

(This instruction was refused except as given in the charge, and defendant excepted. Third exception.)

The court also gave the following instructions, Nos. 4, 5, 6, 7.

4. If the jury believe that the defendant was ringing its bell as it approached the crossing, and continued to ring it up to the crossing or to a point where it would have given the plaintiff warning of the approach of the train, if he had been exercising proper care, the answer to the first issue should be "No."

5. It was the duty of the plaintiff to look and listen carefully for trains, as he approached the crossing, and if he failed to do either, and this was the proximate cause of his injury, the answer to the second issue should be "Yes."

6. When the plaintiff saw the cars on the side-track obscuring his view of the main line of the defendant's road it was his duty to use his sense of hearing all the more diligently, and if he could have heard the approaching train by listening carefully in time to avoid the accident, the answer to the second issue should be "Yes."

7. If the jury believe the train was running beyond the rate of eight miles an hour, that no bell was ringing or other signal given of the approach of the train to the crossing, still this or any other negligence of the defendant did not excuse the plaintiff from his use of the proper care for his own safety; he should have looked and listened all
(916) the time until he reached the crossing, and if his failure to do either was the cause of his injury, the answer to the second issue should be "Yes."

8. If the jury believe that the plaintiff stopped to listen at the first track of the D. & N., and then proceeded to cross, without further stopping to listen, the answer to the second issue should be "Yes."

(This instruction, in this language and except as given in charge, was refused, and defendant excepted. Fourth exception.)

9. If the jury believe that the plaintiff, after leaving the point where he first stopped, to wit, at the first track of the D. & N., then proceeded on his way and attempted to cross without further listening, the answer to the second issue should be "Yes."

(This instruction was refused except as modified and given in the charge, and defendant excepted. Fifth exception.)

11. If the plaintiff could have heard the approaching train, by stopping and listening carefully, immediately before entering upon the crossing, and failed to so stop and listen, the answer to the second issue should be "Yes."

Given by Court:

11a. The burden is upon the plaintiff to show that his injury was caused by the negligence of the defendant, and if he has failed to do this by a preponderance of the proof, the answer to the first issue should be "No."

This instruction was given by the Court.

12. If the jury believe the evidence, the plaintiff contributed by his own negligence to his injury, and the answer to the second issue should be "Yes."

(917) (This instruction was refused, except as given, in the charge and defendant excepted. Sixth exception.)

13. If the jury believe the evidence, other persons less favorably situated than the plaintiff heard the approach of the train, and these persons were put on the witness stand and their credibility vouched for by the plaintiff; there is no evidence that plaintiff's hearing is defective;

he himself testifies that his hearing was good, and what his witnesses could hear, he ought, in the exercise of the care required of him under the circumstances of this case, to have heard, and the answer to the second issue should be "Yes."

(This instruction was refused, except as given in the charge, and the defendant excepted. Seventh exception.)

14. The plaintiff swears that he has been a resident of Durham for ten years or over prior to the accident; that he had frequently crossed the railroad at this point before; that he knew the trains, both passenger and freight, were frequently passing on this and other parallel roads and that cars were frequently being shifted up and down on both roads at this point, and that the train which struck him was due to pass at about the time that he attempted to cross—it was therefore his duty to be extremely cautious in attempting to cross the track at this point, and to exercise his sense of sight and hearing all the time and all the way in crossing, and when he saw his view of the main line obstructed by the cars on the side-track, he should have been more vigilant in the exercise of his sense of hearing, and if at the time he was crossing he was engaged in conversation with his companion, and on that account was not so attentive to his surroundings, and this lack of attention caused his injury, the answer to the second issue should be "Yes."

(This instruction was refused, except as given in the charge, (918) and defendant excepted. Eighth exception.)

15. If the plaintiff did not know that the moving train was approaching the crossing, but by the exercise of ordinary care under the circumstances he could have done so, and thereby avoided the injury, then he took the risk of an accident upon himself, and the jury should answer to the second issue, "Yes."

(This instruction was given.)

16. The Court also charged the jury that if they should answer the first issue, "No," they need not consider the other issues at all, or if the jury should answer the first issue, "Yes," and the second issue "Yes," they need not consider the third issue at all.

JUDGE'S CHARGE.

This is an action brought by the plaintiff, C. H. Norton against the North Carolina Railroad Company for alleged damages by reason of injuries received on 2 May, 1896, upon the complaint that the said injuries were due to the negligence of the defendant's lessee, the Southern Railroad Company. The defendant denies that it was negligent, and says further, that, if it was so, the plaintiff contributed to his injuries by his own negligence; and if not, its lessee would be liable for damages.

Upon the pleadings and evidence the Court submits the following issues to the jury:

1. Was the plaintiff injured by the negligence of the lessee of the defendant, as alleged in the complaint?

2. Did the plaintiff by his own negligence contribute to the injury complained of?

3. What damage did plaintiff sustain?

The defendant offers no evidence, but relies upon the evidence of the plaintiff, which it may do.

(919) You should remember the contentions of the counsel and their arguments that are deducible from the evidence, You should not allow yourself to be prejudiced by remarks of counsel as to corporations. The defendant is entitled to as fair and impartial trial as any individual. The plaintiff contends, among other things, that the first issue should be answered, "Yes"; that the engineer did not ring the bell nor blow the whistle; that the train was running at a rapid speed; that the box-cars were so placed by the defendant lessee that he could not see the train coming, nor hear the train; that it had gotten at such a rapid rate of speed that it had ceased to make much noise. He further contends that he was not negligent at all; but that if he was so, notwithstanding such negligence, the defendant could have avoided the injury, and its negligence was the last and proximate cause of the injury, and that you should answer the first issue, "Yes," and the second issue "No."

The defendant says on the contrary, among other things, that it was not guilty of negligence, and that the plaintiff's injury is due to his own negligence; and, even if it was guilty of negligence, the plaintiff contributed to the negligence in such a way as not to make it liable for damages. The defendant further contends that the plaintiff did not exercise ordinary care; that he stopped too soon and did not stop long enough to inform himself; he was negligent in not listening sufficiently; that he drove recklessly across the track, and that if he had exercised proper care the injury would not have occurred, and that you should answer the first issue, "No"; or, if the first issue, "Yes," then the second issue, "Yes," also, and that it was not liable for damages.

The burden of proving the first and third issues by preponderance of evidence is upon the plaintiff, and if he has failed to do so,

(920) the first issue should be answered, "No."

The burden of proving the second issue is upon the defendant; and if it has failed to do so by a preponderance of the evidence, the answer to the second issue should be "No."

(*a*) It is the duty of an engineer in charge of a running train to give some signal of its approach to the crossing of a public street or highway over a railroad track; and when he fails to do so the railroad company is deemed negligent, and answerable for any injury due to such omission of duty (*b*).

[And to so much of the charge as is between (*a*) and (*b*) defendant excepted. Ninth exception.]

It is the duty of a person approaching the crossing of a railroad track to make reasonable and diligent use of his senses to discover if there is a reason to apprehend danger of a collision.

Upon the first issue the Court instructs you that by negligence is meant the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation—the omission to use means reasonably necessary to avoid injury to others.

Now, if from evidence in this case, you shall find that the defendant's lessee failed to blow the whistle or ring the bell at a public and much-used crossing (if you find that crossing where the injury occurred was such), and in consequence thereof the injury to the plaintiff was caused, you will answer the first issue "Yes," otherwise you will answer it "No." The rate of speed at which the train was moving would not be negligence or evidence of negligence, unless the jury believe that if the train had been running within the limits prescribed by the (921) town ordinance, to wit: not more than eight miles an hour, the injury would not have occurred.

If the jury believe that the lessee of the defendant was ringing its bell up to the crossing or to a point where it would have given the plaintiff warning of the approach of the train, if he had been exercising proper care, the answer to the first issue should be "No."

It was the duty of the plaintiff to look and listen carefully for the train as he approached the crossing; and if he failed to do either, and such failure was the proximate cause of his injury, the answer to the second issue should be "Yes."

When the plaintiff saw the cars on the side-track, obscuring his view of the main line of defendant's road, it was his duty to use his sense of hearing all the more diligently; and if he could have heard the approaching train by listening carefully in time to avoid the accident, the answer to the second issue should be "Yes." But if the box-cars on defendant's side-track were so standing as to obscure plaintiff's vision of the approaching train, and no bell was rung and no whistle blew, and plaintiff could not by such use of his senses of hearing and seeing tell that the train was approaching, and he attempted to cross and was injured; and you find that such failure to ring the bell or blow the whistle was the proximate cause of the injury, then you should answer the second issue, "No."

If the jury believe that the train was running beyond the rate of eight miles an hour, that no bell was ringing or other signal given of the approach of the train to the crossing, still this or any other negligence of the defendant did not excuse plaintiff from the use of the proper care

for his safety. It was his duty to have looked and listened all the time until he reached the crossing; and if his failure to do so was the
(922) proximate cause of his injury, the answer to the second issue should be "Yes."

(*c*) It was the duty of the defendant's lessee to use signals in approaching the crossing; and if the jury believe from the evidence that defendant's lessee was running its train at a greater rate of speed than eight miles an hour, and failed to ring its bell or blow its whistle as it approached the crossing, and a line of box-cars was standing on the side-track so as to obstruct the sight and interfere with the hearing; and that its failure to give the signals under the circumstances was the proximate cause of the injury, then you should answer the second issue, "No." (*d*).

[And to so much of the charge as is between the letters (*c*) and (*d*) defendants excepted. Tenth exception.]

There is evidence that plaintiff stopped at the first track of the D. and N. road to look and listen; if so, and he did not exercise such care and diligence in the selection of the proper place to stop and listen, under all the circumstances as were reasonable, and a failure to do so was the proximate cause of his injury, then you should answer the second issue, "Yes."

(*e*) If, however, you find that this was not her best place to have stopped; but that if a better place had been selected, and by reason of defendant's failure to ring the bell or blow the whistle and the obstruction of the box-cars plaintiff could not have seen or heard from such better position and such negligence of the defendants, if you find that there was such, was the proximate cause of the injury to the plaintiff, you should answer the second issue "No." (*f*).

(923) [And to so much of the charge as is between (*e*) and (*f*) the defendant excepted. Eleventh exception.]

When the plaintiff saw the freight cars on the siding cut off his view of the main line of the defendant's road, it was his duty to stop and listen carefully immediately before entering upon the crossing of the defendant's road, and if he failed to do so, and that was the proximate cause of the injury, the answer to the second issue should be "Yes."

In considering plaintiff's carefulness you will consider the evidence of the other witnesses who saw and heard the approach of the train and you will consider their positions and the position of the plaintiff, the opportunities of all to see and hear, and if from such evidence you find that plaintiff, whose hearing was good, was negligent, and could have seen or heard the approaching train and his negligence was the proximate cause of the injury, you should answer the second issue "No."

If the plaintiff had long been a resident of Durham and had frequently crossed the railroad at this point and knew the trains, both passenger and freight, were frequently passing on this and other parallel roads, and that cars were frequently being shifted on this and other roads, and that the train which struck him was due about that time, and attempted to cross, it was his duty to be very cautious in attempting to cross at this point then and to exercise his senses of sight and hearing all the time and all the way across, and when he saw his view of the main line obstructed by the cars on the side track, he should have been the more diligent, and if he was negligent in these particulars, and by reason thereof he was injured, and that negligence was the proximate cause of the injury, you should answer the second issue "Yes."

If the jury believe plaintiff contributed by his own negligence (924) to his injury, then the answer to the second issue should be "Yes."

The foregoing instructions that bear upon the second issue are subject to the following further instructions.

Contributory negligence is "Such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, concurring or co-operating with the negligent act or omission of the defendant, is the proximate cause or occasion of the injury complained of."

(*g*) And the Court further charges you, that even if plaintiff contributed to his own injury by his negligence, if you find that he was negligent, and if you further find that such injury was caused by the negligence of the defendant, still, if this negligence of the defendant was the proximate, that is the immediate cause of the injury, you should answer the second issue "No." (*h*).

[And to so much of the charge as is between (*g*) and (*h*) defendant excepted. Twelfth exception.]

(*i*) Could the defendant by the exercise of reasonable care and prudence have avoided the injury, notwithstanding the negligence of the plaintiff, if he was negligent? If he could, then the answer to the second issue should be "No." (*j*).

[And to so much of the charge as is between (*i*) and (*j*) defendant excepted. Thirteenth exception.]

If it could not, it should be "Yes"; if the jury answer the first issue "No," they need not consider the other issues at all; if the jury answer the first issue "Yes," and the second issue "Yes," they need not consider the third issue as to damages.

But if the jury answer the first issue "Yes," and the second issue "No," they will proceed to consider the question of damages.

If the jury reach the issue of damages you can take into con- (925) sideration plaintiff's loss of time from business or employment, his condition before the injury and since, and any loss of capacity you

may find reasonable, whether temporary or permanent disability. All necessary expenses of himself and necessary attendants, mental and physical suffering undergone in consequence of the injury. You may consider and answer what would be a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would probably have lasted, and all the reasonable contingencies to which it was liable; also for injuries to horse and buggy.

You can allow as compensatory damages what in your judgment, upon the evidence, is a reasonable amount, but this is not a case for punitive damages.

And after giving all these matters a fair and reasonable consideration, say what damage the plaintiff is entitled to recover, not the equivalent for the loss, but some reasonable sum in compensation.

The burden is on the plaintiff to show that he is damaged by a preponderance of the evidence."

The jury found all the issues in favor of the plaintiff and rendered a verdict for $20,000, as appears from the record proper, and then there was a motion by the defendant for a new trial on the grounds, as it appears from the assignment of errors, that the Court refused to give the jury in charge the instructions asked for by the defendant, and erred in his charge as set out in the case on appeal and assignment of error. The defendant also asked that the verdict be set aside, for the reason that the damages assessed by the jury were excessive. Motion refused and the defendant excepted. [Fourteenth exception.]

(926) The defendant's counsel then moved in arrest of judgment upon the grounds that the verdict upon the issues was not responsive to the allegations contained in the complaint.

Motion that the judgment be arrested was overruled and judgment rendered for the plaintiff according to the verdict. From this judgment the defendant appealed. Notice waived.

The length of the charge and the numerous and lengthy prayers of the defendant, render it impracticable to discuss each one fully in detail. In our opinion none of the exceptions can be sustained. The prayers refused were either essentially erroneous or contained expressions which were misleading and properly excluded. In the latter case, the substance of the prayers was given in the charge as far as it was proper to do so.

The first and twelfth prayers were to the effect that, if the jury believed the evidence, the plaintiff's injury was not caused by the defendant's negligence and that, the plaintiff was guilty of contributory negligence. In view of the evidence, either could possibly have been given. There was undisputed testimony tending to show that the crossing where

the plaintiff was injured was a public street, much used and in a populous part of the city; that the plaintiff's view of the track and the approaching train was cut off by a long line of box-cars, 25 or 30 in number; that the train approached the crossing at a rate of speed approximating 20 miles an hour, without ringing its bell or sounding its whistle, or giving any other signal whatever; and that the ordinances of the city prohibited a greater rate of speed than eight miles an hour.

This, in our opinion, constituted negligence *per se,* in its nature gross and continuing to the moment of the injury. The (927) injury occurred at a public crossing where the rights of the plaintiff and the defendant were equal and their duties mutual. Both were bound to obey the law and both were liable for any failure to observe that degree of care which the peculiar circumstances of the case required. It is not denied that the train was running at an unlawful speed—that is, at a rate of speed forbidden by the town ordinances. Such ordinances are presumably passed for the protection of the people, and when within the scope of its charter have the force and effect of law. An ordinance regulating the rate of speed of a railroad train or any vehicle is based upon the assumption, derived from experience, that a greater rate of speed is dangerous to the life and limb of the citizen, which are entitled to the highest protection of the law. The citizen, himself subject to the law, has a right to assume that the corporation will render an equal obedience. While such excessive speed will not relieve the plaintiff from the necessity of observing ordinary care, if it misleads him or deprives the defendant of its last clear chance to avoid the accident, it may properly go to the jury both on the issues of negligence and contributory negligence. In a certain sense the train has the right of way—that is, it was the duty of the plaintiff to stop until the train had passed if he knew it was immediately coming, or could have known it by due care. But it was equally the duty of the defendant, claiming the right of way, to give the plaintiff suitable notice of its coming either by ringing a bell or sounding a whistle, or both, so as to give the plaintiff a reasonable opportunity of avoiding the collision. The plaintiff had a right to expect such notice. The failure to give such notice would materially affect the issue of contributory (928) negligence, as the plaintiff cannot be held to a higher degree of care on account of the unexpected negligence or breach of duty of the defendant. It is true that the obstruction of view by the line of box cars demanded greater care on the part of the plaintiff, but it also demanded equal care on the part of the defendant. To permit the defendant to increase the danger by its own deliberate act and then to avoid all liability for its own negligence on account of the increased degree of care it had forced upon the plaintiff, cannot be permitted. The highway be-

longs to the traveling public fully as much as the track does to the railroad company; and for the company to block up the highway without absolute necessity or to render its use so dangerous as to deter the traveling public, or keep them in constant fear of life and limb, would be a material and unlawful interference with vested rights. The time honored maxim, *sic utere tuo ut alienum non laedas,* is still the law of the land, applicable equally to the corporation and to the citizen. In fact, the rights, duties and liabilities of the corporation and of the citizen are similar under similar circumstances and are equal before the law. Whatever difference there may be is such only as arises of necessity from the bodily humanity of the one and the intangible entity of the other.

The evidence tended to show that the plaintiff stopped, looked and listened when sixty feet from where he was struck. There is never any presumption of contributory negligence, as self-preservation is the first instinct of humanity. Where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of any statute, like our own, making it a matter of affirmative defense.
(929) *R. R. v. Gentry,* 163 U. S., 353, 366; *R. R. v. Griffith,* 159 U. S., 603, 609.

In *R. R. v. Ives,* 144 U. S., 408, 417, the Court says: "What may be deemed ordinary care in one case may, under different surroundings and circumstances, be *gross negligence.* The policy of the law has relegated the determination of such questions to the jury under proper instructions from the Court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the Court." Cited, quoted and approved in *R. R. v. Gentry, supra; Warner v. R. R.,* 168 U. S., 339, 348.

The settled rule of the Federal Courts as to the relative rights, duties and responsibilities of a railroad company and a traveler crossing its track on a highway is that expounded in *Improvement Co. v. Stead,* 95 U. S., 161. That was the case of a collision of a railroad train with a wagon. There was evidence tending to show that the plaintiff, who was driving the wagon, looked to the southward, from which direction the next regular train was to come, and did not look northwardly, from which this train came; that his wagon produced much noise as it

moved over the frozen ground; that his hearing was somewhat im- (930)
paired; and that he *did not stop* before attempting to cross the track. The evidence was conflicting as to whether the customary and proper signals were given by those in charge of the locomotive, and as to the rate of speed at which the train was running at the time. The counsel for the railroad company requested the Court to give certain specific instructions to the general effect that the plaintiff should have looked out for the train and was chargeable with negligence in not having done so, and that it is the duty of those crossing a railroad to listen and look both ways along the railroad before going on it, and to ascertain whether a train is approaching or not. The trial judge refused to adopt the instructions framed by counsel, and charged in substance that both parties were bound to exercise such care as under ordinary circumstances would avoid danger— such care as men of common prudence and intelligence would ordinarily use under like circumstances; that the amount of care required depended upon the risk of danger; and explained the circumstances which bore on that question. He charged, in short, that the obligations, rights and duties of railroads and travelers upon highways crossing them are mutual and reciprocal, and no greater degree of care is required of the one than of the other. The plaintiff recovered. In affirming the judgment, *Mr. Justice Bradley,* speaking for the entire Court, said: "If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be ex- (931)
pected that it will stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend upon many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot, but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell, and this caution is especially applicable when their sound is obstructed by wind and other noises, and when intervening objects prevent those who

are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossings.

"On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. . . . We think the judge was perfectly right, therefore, in holding that the obligations, rights and duties of railroads and travelers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. For, conceding that the railway train has the right of precedence in crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of
(932) precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. *It is unaccompanied with, and conditioned upon the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition.* Both parties are charged with a mutual duty of keeping a careful lookout for danger, and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. . . . The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways as the railway companies have to run trains on the railroads."

The case was reaffirmed, quoted from and followed in *R. R. v. Griffith, supra,* and in *R. R. v. Cody,* 116 U. S., 606, 614. In the latter opinion it is said to be the *settled rule* of the Court. For this reason we have quoted from it so extensively, and may add that it not only commands respect from the high source from which it comes and the ability with which it is written, but that the principles therein so clearly enunciated commend themselves to our legal judgment and common sense. They seem peculiarly to fit the facts of the case at bar, and aid us materially in its determination, not only in reviewing the charge of his Honor, but also in passing upon his refusal to give the special instructions asked by the defendant. Some of those instructions refused may have con-
(933) tained legal principles correct in the abstract, but, based upon a partial statement of selected facts without reference to other qualifying circumstances, presented too strained an application of the law for a just determination of the questions at issue. They were given to a large extent in the charge, fully as much so as the defendant could

rightfully ask. In fact it is questionable whether some parts that were given could stand the test of exception, but that is not now before us. It is a well settled rule of this Court that the Court below is not required to give special instructions in *ipsissimis verbis,* even if otherwise unobjectionable; and is not required to give them at all in a separate and distinct form if they are substantially included in the charge as given. In addition to our own numerous authorities, we are sustained in this view by the same precedent above referred to (*Improvement Co. v. Stead,* 95 U. S., 161), where the court on p. 165, commenting upon the prayers of defendant railroad (plaintiff in error) says: "Perhaps some of the abstract propositions of the defendant's counsel contained in the instructions asked for, based on the facts assumed therein, if such facts were conceded, or found in a special verdict, would be technically correct. But the judge was not bound to charge upon the assumed facts in the *ipsissima verba* of counsel, nor to give categorical answers to a juridical catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts." And again on p. 168: "Here is no assumption of facts, as in the previous instruction, but it states the duty of persons approaching a railroad with wagons and (934) teams in a more absolute and qualified form than we think admissible.

"It states such duty with the rigidity of a statute, making no allowance for modifying circumstances or for accidental diversion of the attention, to which the most prudent and careful are sometimes subject; and assuming in effect that the duty of avoiding collision lies wholly, or nearly so, on one side."

That the Court is not required to give the special instructions as asked, even when unobjectionable, was decided at the last term of this Court in *Edwards v. Phifer,* 121 N. C., 388, 391; citing *Patterson v. McIver,* 90 N. C., 493; *Brink v. Black,* 77 N. C., 59; *S. v. Hargrave,* 103 N. C., 328. This Court has repeatedly held that it is not error in the trial judge to refuse an instruction upon an issue directed to the ascertainment of a fact that in a certain event the plaintiff could not recover. *McDonald v. Carson,* 94 N. C., 497; *Farrell v. R. R.,* 102 N. C., 390; *Baker v. Brem,* 103 N. C., 72; *Alexander v. R. R.,* 112 N. C., 720, 732. The second exception was properly overruled, as the prayer was objectionable as a whole, and the substance thereof given in the charge to the fullest extent that the defendant could properly ask. *Myers v. R. R.,* 87 N. C., 345; *Harrell v. R. R.,* 110 N. C., 215; *Alex-*

ander v. R. R., 112 N. C., 720, 733; *Ward v. R. R.*, 109 N. C., 358; *Hinkle v. R. R.*, 109 N. C., 472; *Borden v. R. R.*, 113 N. C., 570. The 9th, 10th and 11th exceptions are equally untenable.

In *Hinkle v. R. R., supra,* this Court says: "It is *negligence, per se,*
because of the peril both to passengers on trains and people using
(935) highways, to omit to give in reasonable time some signal from a
train moving, whether at the rate of 20 or 40 miles an hour, when it is hidden from the view of travelers who may be approaching and in danger of coming in collision with it, by the cars of the company left standing on its track, or by an embankment, a cut, or a sharp curve in its line, or by any other obstruction allowed to be placed or placed in any way by the company," citing numerous cases on page 473. See also *Gilmore v. R. R.*, 115 N. C., 657. In *Hinkle's case* it was also held that if the plaintiff would not have ventured upon the track but for the failure of the defendant to give timely warning, the corporation is liable to answer in damages, though the plaintiff may have been careless in exposing himself to danger, citing *Deans v. R. R.*, 107 N. C., 686, and cases therein cited. This principle was re-affirmed in *Russell v. R. R.*, 118 N. C., 1098, and in *Mesic v. R. R.*, 120 N. C., 489. That a failure to give reasonable warning by bell or whistle on approaching a highway, or even a place where the public have been permitted habitually to cross, is always evidence of negligence to be submitted to the jury, and in case of peculiar danger may be negligence *per se,* is well settled in other jurisdictions. Shearman & Redfield on Negligence, sections 463, 464; 2 Wood Railways, 1292, 1302; 3 Rapalje & Mack Digest R. L., p. 493, sections 92, 93, 94, 95, 96 and 97; A. & E. Enc., of Law, pp. 910, 911, and 912.

The 13th and 14th exceptions were strenuously urged by the defendant's counsel as being erroneous in themselves, contradictory to other portions of the charge, and evidently applying to the doctrine of the last clear chance when there is no issue presented upon that question and no evidence to support such an issue. This portion of the charge can
scarcely be objected to as intrinsically erroneous as an abstract
(936) principle of law, and hence we must consider its application to the
facts of the case now under consideration. In this view it seems to us to refer, not to the last clear chance, but to the continuing negligence of the defendant, which, by virtue of its continuation up to the moment of the accident, is of itself the proximate cause of the injury.

Such negligent omission of duty was not only the *causa causans* of the injury, but to a certain extent relieved the plaintiff of liability for the want of such care as he would otherwise have taken had he not been thrown off his guard by the negligent act or omission of the defendant. This Court has said in *Hinkle's case, supra,* that the plaintiff "is only

bound to look when to do so would aid him in determining whether a train is approaching." In *Lloyd's case,* 118 N. C., 1012, that "every person that used the track as a foot way, under the implied license of the defendant, had reasonable ground to expect that such care would be exercised, and to feel secure in acting upon that supposition"; and in *Stanley v. R. R.,* 120 N. C., 514, that "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." These cases recognize the continuing negligent omission of duty as the proximate cause of the injury, as also in *Myers v. R. R.,* 119 N. C., 758; *Mesic v. R. R., supra,* and *Alexander v. R. R.,* 112 N. C., 720.

The motion in arrest of judgment for the reason that it was not responsive to the allegations in the complaint cannot be allowed. We presume this refers to the allegation as a question of law (937) that the defendant railroad is not liable for the negligence of its lessee; but this is settled in *Aycock v. R. R.,* 89 N. C., 321, 330, and *Logan v. R. R.,* 116 N. C., 940.

The refusal of the Court below to set aside the verdict on account of excessive damages cannot be reviewed here. *Goodson v. Mullen,* 92 N. C., 211; *Whitehurst v. Pettipher,* 105 N. C., 40; *Edwards v. Phifer,* 120 N. C., 405.

The exceptions not specifically alluded to are without merit and cannot be sustained in any reasonable view of the case. The judgment is

Affirmed.

Cited: McLamb v. R. R., ante, 876; *Kinney v. R. R., post,* 966; *Benton v. R. R., post,* 1009; *S. v. Booker,* 123 N. C., 725; *Pierce v. R. R.,* 124 N. C., 93; *Troxler v. R. R., ib.,* 191; *Cox v. R. R.,* 126 N. C., 107; *Bradley v. R. R., ib.,* 741; *Perry v. R. R.,* 128 N. C., 473; *Edwards v. R. R.,* 129 N. C., 82; *Perry v. R. R., ib.,* 335; *Harden v. R. R., ib.,* 359; *Cogdell v. R. R.,* 130 N. C., 328; *Phillips v. Tel. Co., ib.,* 528; *Smith v. R. R.,* 131 N. C., 622; *Harris v. R. R.,* 132 N. C., 163; *Orr v. Telephone Co., ib.,* 693; *Butts v. R. R.,* 133 N. C., 83; *Holland v. R. R.,* 137 N. C., 376; *Edwards v. R. R.,* 140 N. C., 51; *Cooper v. R. R., ib.,* 220, 227; *Rolin v. Tobacco Co.,* 141 N. C., 304; *Carleton v. R. R.,* 143 N. C., 47; *Hodgin v. R. R., ib.,* 97; *Boney v. R. R.,* 145 N. C., 250; *Stewart v. Lumber Co.,* 146 N. C., 62; *Dermid v. R. R.,* 148 N. C., 195; *Inman v. R. R.,* 149 N. C., 127; *Harvey v. R. R.,* 153 N. C., 574; *Harvell v. Lumber Co.,* 154 N. C., 262; *Boney v. R. R.,* 155 N. C., 120; *Fann v. R. R., ib.,* 143, 144; *Osborne v. R. R.,* 160 N. C., 312; *Sanders v. R. R., ib.,* 528; *Johnson v. R. R.,* 163 N. C., 447; *Cook v. Hospital,* 168 N. C., 256; *Penninger v. R. R.,* 170 N. C., 475, 476.

J. J. E. LUCAS AND WIFE v. CAROLINA CENTRAL RAILWAY COMPANY.

(Decided 29 March, 1898.)

Action for Damages for Breach of Contract—Compromise Judgment—Injuries to Real Estate—Variance—Venue.

1. An error as to the venue of an action is not now, as formerly, a defect affecting jurisdiction, but only ground for a motion to remove, which is waived unless the motion is made "in writing" and "before the time for answering expires."

2. In an action for breach of a compromise judgment entered in an action for damages to real estate in one county, there can be no recovery for damages to a different tract of land lying in an adjoining county which was not within the contemplation of the parties when the compromise was made.

(938) PETITION by defendant to rehear case between same parties, decided at September Term, 1897, of this Court 121 N. C., 506.

J. D. Shaw and MacRae & Day for defendant (petitioner).
C. C. Lyon and Jones & Boykin, contra.

CLARK, J. In 1887 the plaintiffs brought an action against the defendant to recover damages for overflowing and impairing the value of the plaintiff's land in Bladen County. In 1889 a compromise judgment was entered by which it was agreed that the defendant should pay the costs (including $100 to plaintiff's attorney) which was done, and should widen and deepen a certain ditch within 6 months, and the plaintiffs agreed to accept the same in full satisfaction. This action was brought for a breach of the said contract, or consent judgment, in that the aforesaid ditch had not been widened and deepened. At the close of the plaintiff's evidence the defendant moved to remove the cause to Columbus County because it had been shown that the land alleged to have been damaged lay in that county. On the former argument (*Lucas v. R. R.*, 121 N. C., 506) this question of *venue* was pressed, and the Court held that the objection was taken too late, and besides was invalid because not made in writing, the Court adding "the other exceptions, though not abandoned, were neither insisted upon nor argued in this Court." We then understand that the tract of land damaged was the same as that mentioned in the original action, which, probably by a better ascertainment since of the location of the county line, had proved to be in Columbus instead of Bladen County; indeed, the counsel
(939) for the plaintiff was understood to so state.

The proposition presented on this hearing is that the exception raised by the refusal of a prayer for instructions and not by the motion

to remove, is not merely as to *venue*—as to which we reaffirm the former ruling—but of *variance,* in that, this action being for a breach of a consent judgment in an action for damages to the plaintiff's home tract in Bladen County, the plaintiffs cannot recover damages in this action by reason of the overflowing of another and entirely different tract of land. This point is well taken. If the plaintiff's 60-acre tract in Columbus County has been damaged by the wrongful act of the defendant, they can maintain their action in *tort* therefor, but they cannot recover such damages in an action brought upon the alleged breach of a compromise judgment entered in an action brought for damages to an entirely different tract of land in Bladen County. The objection now argued is not to the *venue* (though that might have availed if made below in apt time), but that damages to the 60-acre tract were not in the purview of the parties when the compromise was entered as to the damages claimed as to the home tract. There was error in the Court below for whicch a new trial must be granted.

Petition allowed.

(940)

A. A. PHIFER v. CAROLINA CENTRAL RAILWAY COMPANY.

(Decided 29 March, 1898.)

Action for Damages—Contributory Negligence—Evidence—Expert Testimony—Opinion—Evidence.

1. In the trial of an action for damages for injuries caused by the alleged negligence of the defendant and in which contributory negligence was relied upon as a defense, it was error to permit the plaintiff to testify that he was "careful" at the time of the accident, that being a mere opinion of the witness on a matter which was a question for the jury to determine from the manner in which the plaintiff conducted himself at the time of the injury.

2. The fact that incompetent testimony has been drawn from a witness on cross-examination, without objection, does not make the same testimony competent on reëxamination of the witness.

ACTION, tried before *Coble, J.,* and a jury, at Spring Term, 1897, of ANSON. The plaintiff was injured while working on a trestle for the defendant company. On the trial the plaintiff was asked whether he was "careful" while at work on the trestle, and under objection was allowed to answer that he was. The jury rendered a verdict for the plaintiff, assessing his damages at $5,000, and from the judgment thereon the defendant appealed.

Shepherd & Busbee and Covington & Redwine for plaintiff.
John D. Shaw and MacRae & Day for defendant.

MONTGOMERY, J. This action was for damages on account of injuries which the plaintiff alleged that he had sustained by the negligence of the defendant while he was at work in building a trestle on its track. On his reëxamination, as a witness for himself, the plaintiff was asked
(941) *"Were you careful?"* Over the objection of the defendant the witness was allowed to answer the question, and he said that he *was careful.* Whether or not the testimony was competent raises a most important question of evidence, and we have given to it the consideration it deserves.

It seems to us that whether the plaintiff was careful was the very question which the jury were empaneled to determine, the defendant having pleaded contributory negligence and introduced testimony tending to prove it. The answer to the question was one of opinion merely, and whether the plaintiff was careful while engaged in his work upon the trestle was not a matter of expert testimony but of judgment and common experience, to be passed upon by the jury upon a detailed statement to them of the facts and circumstances connected with his conduct on that occasion. It was not shown that the witness had any special knowledge concerning what would be careful conduct in connection with the work in which he was engaged, and expert testimony cannot be allowed about matters which do not require some special training to enable one to understand them. The jury was just as competent to form a correct conclusion in regard to the plaintiff's conduct on the occasion of his injury upon a relation to them of the facts and circumstances connected with it as was the plaintiff himself, and therefore the testimony could not be that of an expert. The opinion of a witness ought not to be given in evidence upon an occurrence when from its nature the whole can be described in such language as will enable persons who were not present and witnessing it to come to a proper conclusion concerning it.

We have no direct authority in our own reports on the question
(942) raised here, but we have found decisions from the courts of other States on the subject which are in line with the views we have here expressed. In *McCarraghen v. Rogers,* 120 N. Y., page 526, a witness on the trial was asked whether or not the plaintiff, when he was injured, was acting in a careful or careless manner while sitting at the press. The evidence was excluded, and on appeal the Court of Appeals affirmed the ruling of the trial judge, saying in the opinion: "Whether the plaintiff was careless depended upon the manner he conducted himself, and when that appeared, the conclusion whether the accident or injury was to any extent attributable to his want of care was for the

jury, and that was a question upon the determination of which the result of the action was dependent. It was not one for expert evidence resting in opinions of witnesses. The fact of care or carelessness of the plaintiff was not one involving any question of skill or science to determine, nor was it founded upon any knowledge peculiar to any class of persons. His conduct as bearing upon the question of care or want of care was susceptible of such description as to convey information of it to common understanding and to enable the jury intelligently to determine it and the relation it had to the accident. In such case the evidence of witnesses must be confined to a statement of facts and their opinions or conclusions derived from them are not competent."

In *Mayfield v. R. R.*, 87 Ga., page 374, the plaintiff on the trial testified that at the time he was injured he got upon the pilot of the engine very cautiously. The defendant's counsel moved to strike out witness's answer. The motion was allowed, and on appeal the Supreme Court said: "There was no error in ruling out plaintiff's answer (943) that he got on the pilot very cautiously. A witness may state facts but not his own conclusion from those facts. This was a conclusion of the witness and was the very question which the jury was to decide, whether he got on the pilot cautiously or carelessly. It was the same as if he had said that he was not negligent in getting upon the pilot. He might have stated whether he attempted to mount hurriedly or slowly, how far he was from the engine when he raised his foot to make the attempt, where he placed his foot, and things of that sort, leaving the jury to say from these facts whether it was done cautiously or carelessly."

The plaintiff's counsel in their brief insist, however, that the testimony was not objectionable in that the defendant had drawn precisely the same evidence from the same witness (on cross-examination), and this was a mere repetition. That is, that because incompetent testimony may have gotten into the trial by one side without objection, therefore the other side can introduce incompetent testimony when it is objected to. Such practice is not now permissible. *Edwards v. Phifer,* 121 N. C., 388. There was error in the admission of the testimony for which there must be a

New trial.

Cited: Brown v. Miensset, 123 N. C., 378; *Raymond v. R. R.,* 129 N. C., 199; *Cogdell v. R. R.,* 130 N. C., 325; *Seawell v. R. R.,* 133 N. C., 525; *Steeley v. Lumber Co.,* 165 N. C., 30; *Renn v. R. R.,* 170 N. C., 141.

(944)

FANNIE E. HOWARD, ADMINISTRATRIX OF J. H. A. HOWARD, v. SOUTHERN RAILWAY COMPANY.

(Decided 5 April, 1898.)

Action for Damages—Removal of Cause to Federal Court—Application for Removal, Time of—Extension of Time by Consent.

1. The Federal court acquires no jurisdiction of a case pending in the State court and sought to be removed to the former, where the petition and bond for removal are filed in the office of the clerk of the Superior Court, where the case is pending, during vacation instead of being presented to the judge of the court at term.
2. The time for filing an answer expires when it is actually filed, so far as it affects the defendant's right to apply for a removal of the cause to the Federal court.
3. The requirement of the Removal Act of 1888, that the defendant must file his petition for removal before the time for answering expires, is imperative that it shall be filed when the plea is due, and no order of the court or stipulation of the parties allowing an extension of time to plead can extend the time for filing the petition.
4. The filing of a petition in a State court for the removal of a cause pending therein to the Federal court does not *ipso facto* deprive the former of its jurisdiction or effect a removal of the cause.

ACTION for damages pending in ROWAN. From an order denying the defendant's petition for a removal of the cause to the Circuit Court of the United States the defendant appealed. The facts in relation to the filing of the petition appear in the opinion.

A. C. Avery, Long & Long, and Lee S. Overman for plaintiff.
Charles Price and George F. Bason for defendant.

CLARK, J. The summons in this action was returnable to (945) August Term, 1897, of the Superior Court of Rowan, at which term, by the laws of this State (The Code, secs. 206 and 207) the complaint and answer were required to be filed. At that term neither was filed, but an entry was made on the minutes which on its face does not purport to be by order of the court, and, indeed, which is admitted to have been by consent, "plaintiff has thirty days to file complaint and the defendant sixty days thereafter to file answer." The complaint was filed 7 September, 1897, and the answer on 11 October. On 6 October the defendant filed in the office of the clerk of said Superior Court (no term being then held) a petition for removal of said cause to the U. S. Circuit Court on the ground of diverse citizenship. It does not appear when the bond was filed but it was subsequently, for it was not

justified by the surety thereto till 8 October, in Raleigh. The next term of the U. S. Circuit Court to which the cause was removable was held at Statesville, 18 October. The transcript of the record was not filed at said term. At the November term of said Superior Court the cause was continued without objection. Subsequent to said term, application was made to the clerk of the Superior Court to send the transcript to the U. S. Circuit Court, which was declined because no order of removal had been made by the judge of the Superior Court. At the February Term, 1898, the defendant moved the Superior Court to sign the order of removal. This being refused, the defendant excepted and appealed to this Court.

It was held by the United States Circuit Court for the Western District of North Carolina, *Dick, J.,* presiding, that the Federal Court could acquire no jurisdiction if the petition and bond are filed in the office of the clerk of the Superior Court in vacation instead of (946) presenting them to the judge thereof. *Fox v. R. R.,* 80 Fed., 945 (1897). That decision is on "all fours" with this. In delivering the opinion in that case, his Honor, *Judge Dick,* says: "A sufficient petition and bond to have the legal force and effect of removal must be actually or impliedly presented to a State Court in session, with power to hear and consider the application. The removal statute imposes a duty on the State Court to accept a sufficient petition and bond, and proceed no further in the cause against the petitioner. It is certainly courteous, reasonable, just, and lawful that such court should have opportunity of performing its duty by considering and acting upon the application before it surrenders its original and concurrent jurisdiction, or before it is deprived of jurisdiction by the operation of paramount laws of the United States. A wise and just public policy requires Federal Courts in the exercise of their rightful jurisdiction to accord to State Courts the most liberal and cordial comity that is consistent with their legal duty in the enforcement of paramount national laws." To the same tenor *Shedd v. Fuller,* 36 Fed., 609; *Roberts v. Chicago,* 45 Fed., 433; *Williams v. Massachusetts,* 47 Fed., 533; *LaPage v. Day,* 74 Fed., 977; Black's Dil. on Rem., sec. 189.

If such filing is not sufficient it is clear that the defendant is not entitled to remove, for he has not made his application in time, even if the extension of time to file pleadings extended the time to ask for removal. The leave to "file complaint in thirty days and answer in sixty days *thereafter*" has been construed in this Court. *Mitchell v. Haggard,* 105 N. C., 173. Under that construction, the complaint having been filed 7 September, the sixty days allowed defendant to file answer thereafter was after filing complaint, and would have expired 6 (947) November; indeed, however, it expired in fact 11 October, when

the answer was filed, for "the time for answering expired when the answer was filed," as was held in *County Board v. State Board,* 106 N. C., 81. Thus, in any aspect, the time for answering had expired when the Superior Court met at its regular term, 22 November, and no petition for removal was filed even at that term, and the cause was recognized as being in the State Court by the order of continuance made at that term without objection. The petition was not presented to a judge of the State Court till February Term, 1898.

But if it were held that filing the petition 6 October in the clerk's office was not before the judge (the bond being filed at some time not shown, but thereafter) was a sufficient compliance with the act of Congress, still it was too late and ineffective. The delay in filing the bond is also held a material defect. *Austin v. Gagan,* 39 Fed., 626. In *Viele v. Accident Co.,* 40 Fed., 545, Judge Jenkins, in the U. S. Circuit Court for Wisconsin, summed up his reasoning as to the time when the petition is required to be filed by the act of Congress of 1888, thus: "It is a cardinal principle of construction that statutes should be intended to suppress the mischief and advance the remedy. Looking, then, to the clear design of Congress to abate the abuses that had arisen under the Acts of 1866 and 1867, and to further restrict the time allowed by the act of 1875, it is apparent that Congress intended that the right should be exercised at the earliest period possible. That period was designated to be at or before the time prescribed by law for answering, not the time
(948) when the cause, by reason of dilatory proceedings, might be ripe for answer; not the time enlarged by stipulation of parties or by the order of the court, but the determinate time specified in the statute or in the rule of Court. The statute or the general rule of Court speaks that time, not the order or stipulation in the particular case. If this is the law, it settles this controversy as to the right of removal, for by the statute the time for answering was during the August Term of the Court which expired 4 September, and the leave to file pleadings thereafter was simply "an order or stipulation in the particular case" and could not change the time fixed by the act of Congress within which the petition must be filed to be available. Judge Jenkins cites the fact that under the act of 1875, when the petition was required to be filed "before or at the term at which the cause could be first tried," it was held in *Car Co. v. Speck,* 113 U. S., 84, that this time could not be extended by the agreement of parties or the order of the court, giving time to file pleadings. The opinion is by that eminent jurist, the late *Justice Miller,* and to same effect is *Gregory v. Hartley,* 113 U. S., 746. The sole difference in this regard between the two acts is as to the term at which the petition is required to be filed. The construction given by *Judge Jenkins* to the act of 1888, as to time of filing the petition to remove, seems to be the

accepted construction of this act as it had been of the act of 1875. In *Austin v. Gagan,* 39 Fed., 721, *Judge Sawyer,* in the U. S. Circuit Court for California (1889), held: "The party must make his election and file his petition at or before the time when his pleading is first due under the law or rules as they exist when service of summons is made, or he waives his right to a removal. This must be the rule, or the parties by stipulation, or the court, by special orders on their application, (949) may extend the time to apply for a removal indefinitely and the policy of the law be thereby defeated." In *Delbanco v. Singletary,* 40 Fed., 177 (1889), *Sabin, J.,* in U. S. Circuit Court for Nevada, says: "In *Wedekind v. Pacific Co.* (36 Fed., 279), decided by this Court, an inference might arise that possibly an order of the State Court extending defendant's time to plead might be construed as extending his time within which to file his petition and bond for removal of the cause. If such inference fairly arises in that case, we wish here to correct it, as under the authorities (above) cited it seems clear that such an order of the State Court could not have such effect. The State Court could not, by order or otherwise, enlarge or modify the terms and provisions of an act of Congress, nor confer jurisdiction upon this Court which otherwise it would not have."

In *Kaitel v. Wylic,* 38 Fed., 865, *Judge Blodgett* expressly declares the statute to be imperative that the petition for removal must be made when the plea is due, and that it comes too late when after the time to plead designated by law.

In *Spangler v. R. R.,* 42 Fed., 305, *Phillips, J.,* in the U. S. Circuit Court for Missouri, says: "If the time for removal can be made to depend upon action, capricious or otherwise, of the State judge in extending it (time for pleading) for a month or six months, there would be no uniformity, no certainty in the law of removal. . . . The evident policy of Congress was to make certain, fixed, and definite the time of such removal and to hasten trials, and not permit hurtful delays by removals," and he remanded the case to the State Court. This is cited with approval by *Knowles, J.,* in U. S. Circuit Court for Montana in *McDonald v. Hope Min. Co.,* 48 Fed., 593 (1891), (950) and by same judge in *Martin v. Carter, id.,* 596.

In *Bank v. Keator,* 52 Fed., 897 (1892), in the Circuit Court of United States, for Illinois, *Judge Blodgett* held "a petition for removal filed after the statutory period has expired comes too late, even though filed within the time allowed for answering by order of the Court, where such order is based on the stipulation of the parties." The cases cited in opposition, *Wilcox v. Ins. Co.,* 60 Fed., 929, and *Schipper v. Cordage Co.,* 72 Fed., 803, both expressly state that if the extension of time is by stipulation of the parties and not by order of the Court, the right to remove is

lost. In the present case the entry on the records of the Court does not state that it was made by order of the Court, and it was either the express agreement of the parties or was assented to by them, for there is no exception entered on record. *Fox v. R. R.,* 80 Fed., 945 (1897), is the latest case. There *Judge Dick,* in the U. S. Circuit Court for the Western District of North Carolina, held "That the petition and bond for removal shall be filed at or before the time the defendant is required by the State law or rules of Court to plead, is an imperative limitation which cannot be extended by the stipulation of the parties or by the discretionary action of the judge in extending the time to file pleadings in that particular case." The same construction was put upon the act by this Court, also, in *Williams v. Telephone Co.,* 116 N. C., 558, so that the State and Federal courts have here concurred in their construction.

The decisions of the highest Federal Court are in the same line. In *Martin v. R. R.,* 151 U. S., 673, *Mr. Justice Bray* says (at page 686) the petition to remove "was filed at or before the time at which the defendant was required by the laws of the State to answer or plead
(951) to the merits of the case, but after the time at which he was required to plead to the jurisdiction of the Court or in abatement of the writ. Was this a compliance with the provision of the act of Congress of 1887, which defines the time of filing a petition for removal to the State Court? We think not, for more than one reason." Continuing, the opinion reviews the acts of Congress and the decisions thereon showing that congressional action has been to restrict the right of removal, and adds (page 687), "the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the State Court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the U. S. Circuit Court." That is, that his answer should be filed there and not in the State Court. The above is quoted at length and approved in *R. R. v. Brown,* 116 U. S., 271 (at page 277). In *R. R. v. Daughtry,* 138 U. S., 298, 303, *Chief Justice Fuller* says: "The statute is imperative that the application to remove must be made when the *plea is due.*"

Upon the authorities we must hold that the defendant has not the right to remove the cause under the act of Congress for two reasons, each of which is fatal to his claim:

1. Because the defendant did not present his petition and bond to the judge of the Superior Court at some term thereof, but merely filed it in the office of the clerk of the court in vacation.

2. Because he did not file his petition at the August Term, which was "the time prescribed by law for him to answer." Its agreement
(952) with the other party for an extension of time to file pleadings did

not change the time prescribed by law. If (as is extremely improbable) its counsel did not know the nature of the plaintiff's action, it is his own fault that he agreed to an extension of time beyond the date at which he could file a petition to remove. The defendant could have dismissed the plaintiff's action if no complaint was filed. The extension of time was upon consent of parties, but if it had not been there was no motion to dismiss the plaintiff's action for failure to file a complaint, nor any exception to the extension of time allowed. If the defendant had excepted to an extension of time to file pleadings, then he would not have lost his right to remove, of course. He can lose it only when the extension of time is by his assent, either express, as in an agreement, or tacit, as in not excepting to an order of extension.

Even if the petition was valid when filed before the clerk, and was in apt time when filed (6 October), after the time prescribed by law, the defendant recognized that the case was in the State Court both by filing his answer in the State Court (11 October) and by assenting to the continuance at November Term; he also failed to comply with the statute in that he did not file his transcript of the record in the U. S. Circuit Court at Statesville "at the next succeeding term thereof," held 18 October. But these are possibly grounds merely remanding the case if it were in the Circuit Court. *Steamship Co. v. Tugman,* 106 U. S., 118.

When a petition to remove a cause to the Federal Court is filed in the State Court the latter does not *ipso facto* lose its jurisdiction. *Stone v. South Carolina,* 117 U. S., 430, cited with approval in *Crehore v. Ohio,* 131 U. S., 240, 243. The right of removal is purely statutory, and it must appear that the cause is one which the defendant has (953) a right to remove and that the petition is filed within the required time. If the State Court holds that it retains jurisdiction, an appeal lies to this Court and a writ of error lies from this Court to the United States Supreme Court from the final judgment. *Stone's case, supra.* The defendant does not lose his right to remove (if he has it) by contesting the litigation in the State courts. Removal Cases, 100 U. S., 457; Black's Dillon Removal, sec. 193. On the other hand, if the defendant on the face of his petition has the right to remove, and the application for removal is in apt time, *eo instanti* the cause is removed, *R. R. v. Mississippi,* 102 U. S., 135, and other cases cited in *Crehore's case, supra,* and that court can send its *certiorari* to the State Court for the transcript of the record, which the clerk of the State Court must obey. Removal Acts of Congress, 3 March, 1875, sec. 7, which section is not repealed by the act of 1887. *Baird v. R. R.,* 113 N. C., 603.

Thus the strange spectacle may be presented of the same cause between the same parties being tried at the same time in the State Court and in the Federal Court, and finally going up to the United States Supreme

Court by different routes. Upon the final decision of that tribunal the proceedings in the court which is held not to have had jurisdiction are simply a nullity. Such unseemly cases have occurred, but rarely (*Carson v. Hyatt,* 118 U. S., 279; *R. R. v. Koontz,* 104 U. S., 5) owing both to the comity of the courts of the two jurisdictions to each other and the unwillingness of counsel to subject themselves to double labor and their client to double costs. In *Springer v. Howes,* 69 Fed., 849, *Judge Seymour,* of honored memory, sitting in the United States Circuit Court (954) for the Eastern District of North Carolina, held that the State Court, in which an action has been commenced, and the Federal Court, to which it is sought to remove it, have an equal right to determine whether a proper case for removal is made out, and hence, when the State Court refused to grant the order of removal and on appeal the Supreme Court of the State had affirmed that ruling, the Federal Court under these circumstances would leave the defendants to their writ of error to the United States Supreme Court, and in the meantime would remand the case, the transcript of the record having been filed in the United States Circuit Court.

In *Stone v. South Carolina,* 117 U. S., 430, *Chief Justice Waite* says: "The State Court is at liberty to determine for itself whether on the face of the record a removal had been effected." If so, it is clear that the petition must be presented to the judge thereof, and it is not sufficient to file it in the office of the clerk in vacation. He then goes on to say: "If it decides against removal and proceeds with the cause, notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes (citing several cases). If the State Court proceeds after a petition for removal it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction."

As we view the decisions and the acts of Congress, it is our duty to direct the court below to proceed regularly in the trial of the cause. *Tucker v. Life Asso.,* 112 N. C., 796; *Bradley v. R. R.,* 119 N. C., 744; *Lawson v. R. R.,* 102 N. C., 390. As was said in the last named (955) case, "The Constitution and statutes made in pursuance thereof fix the bounds of the concurrent jurisdiction of the Federal courts, and provide the machinery for a transfer where it is lawful to remove, but no judicial officer has the power to invest his own court with a jurisdiction not recognized by law, or suspend the legal authority which another court is rightfully exercising."

Affirmed.

Cited: Presnell v. Garrison, ante, 597; *Mecke v. Mineral Co., ante,* 797; *Debnam v. Telephone Co.,* 126 N. C., 837; *Beach v. R. R.,* 131 N. C.,

399; *Lewis v. Steamship Co., ibid.*, 653; *Riley v. Pelletier*, 134 N. C., 318; *Bryson v. R. R.*, 141 N. C., 596; *Garrett v. Bear*, 144 N. C., 26; *Higson v. Ins. Co.*, 153 N. C., 38, 42; *Pruitt v. Power Co.*, 165 N. C., 418, 420; *S. c.*, 167 N. C., 599; *Oettinger v. Live-stock Co.*, 170 N. C., 153; *Brown v. R. R.*, 172 N. C., 607; *Patterson v. Lumber Co.*, 175 N. C., 92.

THOMAS JOHNSON v. THE SOUTHERN RAILWAY COMPANY.

(Decided 5 April, 1898.)

Action for Damages—Master and Servant—Vice-Principal—Injury to Employee of Railroad Company—Negligence—Motion to Dismiss—Hinsdale's Act.

1. A section master of a railroad company, having the right to employ and discharge employees, sustains the relation of vice-principal to a hand employed by him and working under his orders.

2. When a motion is made to dismiss an action, as upon judgment of nonsuit, upon the conclusion of a plaintiff's evidence, as provided for by chapter 109, Laws 1897, the evidence must be taken most strongly against the defendant, and every fact that it reasonably tends to prove must be taken as proved.

3. Where, in the trial of an action for damages for personal injuries resulting from the alleged negligence of the defendant, the plaintiff's evidence was that he, as a section hand employed by a section master of defendant, went, while off duty, to a station on defendant's line three miles west of the section-house to get his wages; that the section master, who was there with the hand-car, and the other men, ordered him to help run the car back to the section-house, to do what would require about twenty minutes; that the section master was informed that the fast mail train, then due, was behind time and had not passed, but he nevertheless ordered the hand-car to be put on the track, saying they would have time; that the plaintiff assisted in running the car with his back to an approaching train, and when they had gone about 100 yards the section master cried out, "Look, men, there comes the engine! Get the car off!" that when the hands got one end of the hand car off the track and plaintiff and another were trying to get the other end off, the other hand fell, jerking plaintiff down, and plaintiff was struck by the engine of the approaching train: *Held*, that the question of defendant's negligence should have been submitted to the jury, and the dismissal of the action, as upon judgment of nonsuit, was error.

ACTION for damages, tried at February Term, 1898, of ROWAN, (956) before *McIver, J.*, and a jury. The material facts appearing from the plaintiff's testimony are set out in the opinion. At the conclusion

of the plaintiff's evidence his Honor granted the defendant's motion to dismiss the action, as upon judgment of nonsuit, under chapter 209, Acts of 1897, and plaintiff appealed.

Lee S. Overman and Long & Long for plaintiff.
Charles Price and George F. Bason for defendant.

FURCHES, J. On 21 December, 1895, one Adams, a section master on the defendant's road, with his crew, went to Salisbury to get pay for their services as employees of the defendant. Adams and the other members of the crew, except the plaintiff, went on a hand-car, but the plaintiff walked; that while the plaintiff was in the employ of the defendant as section hand, and had been for some three years, he was not on duty that day; that they were delayed in getting their pay and did not get away from Salisbury until 9 o'clock or later; that their section quarters was some three miles east of Salisbury, and it would take them about twenty minutes to make the trip on the hand-car. Adams told the plaintiff that evening that he wanted him to go back with them that night, as he wanted the plaintiff to help run the car. A little while before they left home the plaintiff went down to where the hand-car was and
(957) found the other hands there, but Adams, the "boss," was not there.

In a short time Adams came and one of the hands told him the fast mail train, then past due, was behind time and had not passed. Adams said: "Put the hand-car on the track"; that they would have time to get out, and he would keep a lookout for the expected train. They put the hand-car on the track, Adams and the crew got on, the plaintiff working at the "pump" with his back towards the approaching train. They had gone about 100 yards when Adams said, "Look, men, there comes the engine; get the car off." They all got off, and the hands on the rear end got off the track, and the plaintiff and Lee Kerr, another hand, were trying to get the front end off, when Lee Kerr fell; this jerked the plaintiff down, and he was struck by the engine of the approaching train and badly injured. It was in evidence that there were several crossings not far from the place of the injury, but the defendant failed to sound the whistle.

It was in evidence that Adams had the right to employ and discharge the hands who worked under him, and did hire and discharge such hands. The plaintiff offered evidence of his injuries and closed, and the defendant moved to dismiss the plaintiff's action under the Acts of 1897, ch. 109.

The plaintiff was an employee of the defendant, although he had not been at work on the day of the injury. He was so regarded by Adams, the boss, who told him that he wanted him to go back with them to help work the hand-car. While in the broad and catholic meaning of the

word, Adams and the plaintiff were fellow-servants (*Pleasants v. R. R.*, 121 N. C., 492; *Oakes v. Mase*, 165 U. S., 363; *R. R. v.* (958) *Pendleton*, 156 U. S., 667), still Adams was the vice-principal of the plaintiff, and the defendant is liable for his negligence. *Logan v. R. R.*, 116 N. C., 940, a case in which the facts are very much the same as in this case. *Logan v. R. R.* has been cited in *Williams v. R. R.*, 119 N. C., 746; *Turner v. Lumber Co., ibid.*, 387; *Barcello v. Hapgood*, 118 N. C., 712, at page 730; *Tillett v. R. R., ibid.*, 1043, and *Styles v. R. R., ibid.*, 1090.

In cases of demurrer and motions to dismiss under the act of 1897, the evidence must be taken most strongly against the defendant. Every fact that it reasonably tends to prove must be taken as proved, as the jury might so find. *Bazemore v. Mountain*, 121 N. C., 59; *Spruill v. Ins. Co.*, 120 N. C., 141; *Mfg. Co. v. R. R., ante*, 881, and *Whitley v. R. R., post*, 987, and cases there cited.

Under this rule of construction it seems to us that there was sufficient evidence of negligence on the part of Adams in starting when he did, and under the circumstances he did, in the night-time, upon a curve in the road, so that the approach of the expected train could not be seen, and in his ordering the crew to remove the hand-car from the track, to entitle the plaintiff to have a jury pass upon the question as to the defendant's negligence. *Hinshaw v. R. R.*, 118 N. C., 1047; *Ice. Co. v. R. R.* and *Whitley v. R. R., supra.*

If there was negligence of the plaintiff, it was not of such a character as the court should have passed upon, but it should have been submitted to the jury. *Hinshaw v. R. R., White v. R. R., Ice Co. v. R. R.*, and *Whitley v. R. R., supra.*

And, as the learned counsel for the defendant digressed in his argument to animadvert upon what the court said in the case of the *Ice Co. v. R. R., ante*, 881, in reference to the act of 1897, we take (959) occasion to commend that opinion to his favorable consideration.

The case should have been submitted to the jury under proper instructions from the court, and there was error in dismissing it.

New trial.

Cited: Willis v. R. R., ante, 908; *Cox v. R. R.*, 123 N. C., 613; *Gates v. Max*, 125 N. C., 140; *Meekins v. R. R.*, 127 N. C., 36; *Moore v. R. R.*, 128 N. C., 157; *Kelly v. Power Co.*, 160 N. C., 285.

R. L. WRIGHT, ADMINISTRATOR OF WILSON WILLIAMS, DECEASED, v. THE SOUTHERN RAILWAY COMPANY.

(Decided 24 May, 1898.)

Action for Damages—Master and Servant—Injury to Employee—Negligence—Condition of Railroad Track—Question for Jury—Trial.

Where, in the trial of an action for damages for injury resulting in the death of plaintiff's intestate and alleged to have been caused by defendant's negligence, it appeared that a tender was detached at a point where the roadbed was in good condition but was dragged along until it struck some rotten crossties, breaking off the ends and spreading the track, which caused the tender to be detached and the intestate to be killed: *Held*, that the question of negligence was one for the jury.

ACTION for damages for injuries resulting in the death of plaintiff's intestate, a brakeman on defendant company's train, tried before *Starbuck, J.*, and a jury, at February Term, 1897, of ROWAN. The necessary facts appear in the opinion. Under an intimation from his Honor that he could not recover, the plaintiff submitted to a nonsuit and appealed.

L. S. Overman and A. C. Avery for plaintiff.

Charles Price, G. F. Bason, and A. B. Andrews, Jr., for de-
(960) *fendant.*

CLARK, J. This is an action for damages for the death of a brakeman, caused by the derailment of a train. The facts are thus stated in the defendant's brief: "About sixty feet east of the end of the curve the tender jumped the track. At the point where the tender was derailed, and for fifty to two hundred feet beyond, going west, the track was perfect; then some fifty to two hundred feet beyond the point where the tender was derailed there were rotten cross-ties for some distance. The train ran for some distance after it passed the point where it was derailed, and after it struck the rotten cross-ties it broke off the ends of them and spread the track, and the tender and eight cars were finally thrown down the bank some twelve feet. Neither the engine in front nor the cab in the rear of the train was derailed." The court held that, there being "no evidence that at the place where the cars left the track the condition of the roadbed or track was defective, in no reasonable view of the evidence was the plaintiff entitled to recover." Upon which intimation of opinion the plaintiff submitted to a nonsuit and appealed.

In this ruling there was error. If it be conceded that the cross-ties were sound where the tender jumped the track, still, but for the rotten cross-ties further on and the consequent spreading of the track, it may

be that by the use of air-brakes the train could have been stopped and kept on the line, and the cars would not have rolled down the embankment. The destruction of the train and the injury of the intestate may not have been the unavoidable and necessary consequence of the tender's jumping the track. We do not know how the fact was, but the evidence should have been submitted to the jury under proper instructions from the court. If, notwithstanding the tender's jumping (961) the track should be found to have been an accident not caused by any fault of the defendant, yet if the defendant, by having proper appliances and a good roadbed, could have avoided the injury to the intestate, it is liable.

As the facts may be more fully or differently developed on another trial, it can serve no purpose to discuss them here more at length.

New trial.

Cited: S. c., 123 N. C., 280; *Hancock v. R. R.*, 124 N. C., 224; *Troxler v. R. R., ibid.*, 191; *Wright v. R. R.*, 128 N. C., 79.

J. C KINNEY v. THE NORTH CAROLINA RAILROAD COMPANY.

(Decided 28 May, 1898.)

Action for Damages—Master and Servant—Injury to Employee—Negligence—Evidence—Instructions—Fellow-servant.

1. The collision of two passenger trains in the daytime, and on the same track and with terrific force, is in itself evidence of negligence, *res ipsa loquitur*.
2. Where the evidence on a trial is essentially conflicting it is not error to refuse to charge that, if the jury believe the evidence, they should find for the party making the request.
3. An instruction charging the jury that if they believed the evidence they should find certain evidential facts to be true, and that thereupon certain other facts must be true, was properly refused as it is beyond the power of the court to express an opinion on the evidence. (Section 413 of The Code.)
4. Where, in the trial of an action for damages for injuries to the plaintiff, an engineer of a train, resulting from the alleged negligence of the defendant company, the jury found that the plaintiff did not contribute to his own hurt, it was immaterial under the act abolishing the doctrine of "fellow-servant." Chapter 56 (Private) Acts of 1897, which servant of the defendant was guilty of the negligence.
5. A lessor railroad company is liable for the negligent acts of its lessee while operating its own trains over the leased track.

(962) ACTION for damages for personal injuries to the plaintiff resulting from the alleged negligence of lessee of defendant company, tried before *McIver, J.*, and a jury at March Term, 1898, of DAVIDSON. The facts appear in the opinion. There was a verdict for the plaintiff awarding him $20,000 damages, and from the judgment thereon the defendant appealed.

F. C. Robbins and Long & Long for plaintiff.
George F. Bason and Charles Price for defendant.

DOUGLAS, J. This is an action brought by the plaintiff to recover damages for personal injuries received in a collision at Harrisburg, N. C., on 11 April, 1896.

The plaintiff was engineer of train No. 11, which was the local passenger train going south. He started from Danville on the morning of the 11th for Charlotte, leaving Danville some forty minutes late. When he reached Salisbury he received the following telegraphic order from the office of W. B. Ryder, superintendent, at Charlotte, viz.:

SUPERINTENDENT'S OFFICE,
11 April, 1897.

For Salisbury, C. & E., No. 11.

No. 36, engine 319, will wait at Concord until 11:20 a. m. for No. 11, engine 840. No. 11 will run by and back in. W. B. R.

Time received—10:22 a. m.

(963) O. K.—Given at 10:24 a. m.

Conductor Lovel, Engineer J. C. Kinney, train No. 11. Made complete at 10:24 a. m. Received by Crawford. W. B. R.

When he reached Concord he received the following order:

SUPERINTENDENT'S OFFICE,
11 April, 1897.

For Concord, C. & E., No. 11.

No. 36, engine 319, will wait at Harrisburg until 11:15 a. m. for No. 11, engine 480. W. B. R.

Time received—10:47 a. m.

O. K.—Given at 10:48 a. m.

Conductor Lovel, Engineer J. C. Kinney, train No. 11. Made complete at 11:02 a. m. Young—W. B. R.

Exact copies of the above orders were given to Tunstall, engineer, and Gentry, conductor of northbound train No. 56, both orders being delivered at the same time, viz., 10:48 on the same day.

The issues submitted with the answers thereto are as follows:

1. Was plaintiff injured by the negligence of defendant's lessee? "Yes."

2. Did plaintiff by his negligence contribute to his injury? "No."

3. Notwithstanding the contributory negligence of plaintiff, might the injury have been avoided by reasonable care on the part of defendant's lessee? ———.

4. What damages has plaintiff sustained by reason of such injury? $20,000.

5. Is defendant company answerable for the negligence of the lessee company in this action? Yes.

There was judgment accordingly.

The plaintiff testified in part that he arrived with his train at (964) the north switch at Harrisburg at 11:13½ a. m. by his watch; that he had sufficient time to have gotten on the switch before 11:15, and would have done so if the collision had not occurred; that when at the whistle post, one-half mile from the station, he shut off his engine and blew the station blow and slowed up so as to stop at the switch; that he looked up and saw train No. 36 about a third of a mile from him coming towards him; that he could see only the top of the train on account of one or more box cars, and could not then tell how fast it was running; that when No. 36 was within about 1,200 feet of him he saw that it was coming at the rate of 60 miles an hour; that he then saw there would be a collision; that he put on the air-brakes to the full pressure, so as to make his train as steady as possible to resist the shock, fastened the throttle, shut and fastened the furnace door, and stepped off the engine, when he was immediately struck. There was much testimony on both sides, aggregating 159 printed pages besides the exhibits, which it is unnecessary and impracticable to recapitulate here. It is sufficient to say that there was, in many respects, a serious conflict of testimony, and that that conflict has been settled by the jury. In fact there is scarcely a naked question of law presented in the entire case. That two passenger trains in open daylight should come together with such terrific force is evidence of negligence. If the doctrine of *res ipsa loquitur* ever applies, it would certainly do so in such a case. If the plaintiff has not been guilty of negligence, somebody else must have been, and for that negligence he would be entitled to recover. This was peculiarly a case for the jury, and their verdict, rendered under proper instructions, must be permitted to stand.

We see no substantial error in the charge of the court or in the refusal to charge. The charge, with the special instructions (965) given, sufficiently and fairly presented the case and the law relating thereto. Several of the instructions refused, such as numbers,

2, 3, and 5, though slightly different in form, amounted simply to telling the jury that if they believed the evidence they should find for the defendant. As the evidence was essentially conflicting it was, of course, impossible for the jury to believe all of it, and therefore such instructions could not be given.

Other prayers, such as numbers 4, 9, and 11, in effect, instructed the jury that if they believed the evidence they would find certain evidential facts to be true, and that therefore other facts must be true, which is equally beyond the province of the court. For instance, prayer No. 4 requests the court to charge that "the *evidence shows* that nobody was misled or confused by the orders themselves nor by the manner of their delivery to the conductors and engineers of the two trains. The evidence further *shows* that the orders were perfectly safe if they had been properly executed." In this connection the word "shows" is equivalent to the word "proves," and such an instruction would be clearly in violation of section 413 of The Code.

This is essentially different from the court's instructing the jury that if they believe the evidence they will find a certain issue "Yes" or "No," because such an instruction, which can be given only where there is no conflict in the testimony, leaves entirely to the jury the credibility of the witnesses, and simply says to them in effect that if they believed the facts testified to by the witnesses without contradiction, such facts would in law constitute negligence, or contributory negligence, as the case might be. The court cannot charge that a certain fact is proved
(966) or, if proved, that it proves another fact. Compound and argumentative instructions are not favored by the courts, and no exception can be sustained to a refusal to charge where any part of the prayer is erroneous.

There was no error in charging that the defendant would be responsible for the negligence of the engineer on train No. 36, as the act of 23 February, 1897, printed as chapter 56 of the Private Laws 1897, abolishes the doctrine of fellow-servant as far as railroads are concerned. Why this act, which is essentially public in its nature, should have been printed among the Private Laws we cannot say.

Whether the telegrams in question did actually deceive or confuse the engineer, Tunstall, was a question for the jury. That they were calculated to confuse appears to us upon their face. But as the jury has found that the plaintiff was not guilty of contributory negligence, it makes no difference whether the negligence proximately causing the injury was that of Tunstall, the engineer, or Ryder, the superintendent.

The exception of the defendant as to the refusal to submit its issues cannot be sustained. The only real difference between the issues tendered and submitted was in the first issue, as the third issue was not

answered by the jury and the fifth issue was a conclusion of law. As to the first issue, that tendered by the defendant was as to its own negligence, while that of the plaintiff was as to the negligence of the defendant's lessee. The issue as submitted expressed the true contention, as the defendant is responsible for the acts of its lessee. *Norton v. R. R., ante,* 910, and cases there cited. The judgment is

Affirmed.

Cited: Hancock v. R. R., 124 N. C., 225; *Wright v. R. R.,* 127 N. C., 229; *Coley v. R. R.,* 129 N. C., 409; *Stewart v. R. R.,* 137 N. C., 689; *Hemphill v. Lumber Co.,* 141 N. C., 489; *Winslow v. Hardwood Co.,* 147 N. C., 279; *Adams v. R. R.,* 156 N. C., 175; *Skipper v. Lumber Co.,* 158 N. C., 324.

(967)

W. P. WILLIAMS v. JOHN GILL, RECEIVER OF THE CAPE FEAR AND YADKIN VALLEY RAILROAD COMPANY.

(Decided 12 April, 1898.)

Action for Damages—Issues—Practice—Trial—Common Carriers—Assault on Passenger by Employee—Evidence—Insolvency of Railroad Company.

1. The framing of issues being a matter within the sound discretion of the court, a party excepting thereto must show that the exercise of such discretion has operated to his injury.

2. In the trial of an action for an assault on a passenger by an employee on defendant's railroad train, where the complaint alleged that plaintiff was assaulted by the conductor and another person in defendant's employment, it was not prejudicial to the defendant to change an issue at first framed and submitted as follows: "Did the defendant, through the conductor and other agents or servants, unlawfully assault," etc., by substituting the disjunctive "or" for the conjunction "and."

3. The fact that the brakeman on a railroad train struck a passenger instantaneously upon the latter's using a vile epithet to him, and before the conductor could interfere, will not relieve the railroad company from its liability for the assault.

4. Where the relation of carrier and passenger exists, the conduct of an employee of the carrier in inflicting violence on a passenger, though the act be outside of the scope of his authority or even willful and malicious, subjects the carrier to liability in damages just as fully as if the carrier had encouraged the commission of the act. (FAIRCLOTH, C. J., dissents, *arguendo.*)

5. Where, upon the trial of an action, no part of the plaintiff's testimony was favorable to the defendant and several of the latter's witnesses testified

to the fact alleged in the complaint as the cause of action, it was not error to instruct the jury that if they believed the defendant's testimony they should find for the plaintiff.

6. The fact that a railroad corporation is in the hands of a receiver is no evidence of its insolvency.

ACTION for damages for an assault upon the plaintiff, while a passenger on the Cape Fear and Yadkin Valley Railroad, by the servants and agents of the defendant, who is receiver of the company, tried
(968) before *Starbuck, J.*, at Fall Term, 1897, of ROCKINGHAM. The facts appear in the opinion. There was a verdict for the plaintiff, fixing the damages at $500, and from the judgment thereon the defendant appealed.

C. O. McMichael and Scott & Reid for plaintiff.
J. T. Morehead for defendant.

MONTGOMERY, J. The plaintiff in his complaint alleged that while he was a passenger on the defendant's train he was assaulted by the conductor and another person who was in the employment of the company in the conducting of the train. He also alleged that after the assault he was ejected from the train by the conductor and other of the agents and employees of the company. These allegations were denied in the answer. At the conclusion of the evidence, in which it was disclosed that the assault was made by a brakeman of the company, the conductor having taken no part in it, the court changed the first issue by substituting the disjunctive *"or"* for the conjunction *"and"* as between the conductor and servants of the company. The first issue as originally framed was in the following language: "Did the defendant, through the conductor *and* other agents or servants, unlawfully assault and beat the plaintiff?" The defendant made his first exception to the change in the issue. His Honor committed no error in making the change. The framing of the issues is a matter within the sound discretion of the court, and in cases where exceptions are made to the issues the party excepting must show that the exercise of that discretion operated to his injury. *Pickett v. R. R.*, 117 N. C., 616. The rule presupposes that such issues as are submitted to the jury are raised by the pleadings. *Emery*
(969) *v. R. R.*, 102 N. C., 209. The issue, in the form in which it was framed, was raised by the pleadings. It was not necessary to make the company liable that the assault upon the plaintiff should have been a *joint* assault by the conductor and brakeman. The assault of either, as alleged in the complaint and denied in the answer, raised the issue in the disjunctive form in which it was framed.

The defendant asked the court to instruct the jury that, as the uncontradicted testimony of the plaintiff showed that the brakeman struck the plaintiff instantaneously with the applying to the brakeman by the plaintiff of a vile epithet, the brakeman was therefore not acting within the scope of his authority, and the defendant would not be held responsible for the brakeman's act, and that the blow was so sudden that the conductor could not have prevented it, and the defendant would not be responsible. His Honor was right in declining to give the instruction. The brakeman was engaged in the service of the company on the occasion and the company was bound in duty to protect the plaintiff, a passenger, against the assault or rude treatment of its employee, the brakeman. *Daniel v. R. R.*, 117 N. C., 592; 42 Penn. State Rep., 365; 103 Ill., 546; 57 Me., 202. Indeed, where the relation of carrier and passenger exists, the conduct of an employee of the carrier in inflicting violence on the passenger, though the act be outside of the scope of his authority or even wilful and malicious, subjects the carrier to liability in damages just as fully as if the carrier had encouraged the commission of the act. See authorities cited in the concurring opinion of *Avery, J.*, in *Daniel v. R. R., supra.* In the same case, *Faircloth, C. J.*, delivering the opinion of the Court, says to the same effect: (970) "Passengers are entitled to protection from the carrier's agent against assaults or insults from their own employees, from other passengers or persons on the train whether such persons are rightfully on the train or not. The reason of the above rigid rule is that the passenger and his baggage, during the transit, are in the possession of and under the immediate supervision and control of the carrier's agents, as the conductor and baggage master, and, hence, the difference in degree of the liability of the defendant as a carrier and a warehouseman." Of course, if an assault should be made by a passenger upon the employee of the carrier, the carrier would have the same right as any other person would have to defend himself. Insulting language does not justify an assault, and certainly an employee of a common carrier on duty upon the carrier's train ought to be the last to make an assault for insulting language used to him, for he stands in relation to a passenger as a protector and a guard. The court charged the jury that if they believed the defendant's own testimony they should answer the first issue "Yes." There was no error in this charge upon a consideration of all the evidence. Each of the plaintiff's witnesses testified to the assault by the brakeman upon the plaintiff, and the defendant therefore could have derived no benefit from the plaintiff's testimony if the jury had heard it. None of it was favorable to him. If any part of the plaintiff's testimony had been favorable to the defendant, then the instructions would have been wrong. The defendant and his witnesses, all, likewise testified to the assault of the

brakeman upon the plaintiff, and his Honor committed no error
(971) in instructing the jury that, if they believed the defendant's own testimony, they should answer the first issue "Yes."

This was not the case of singling out one witness from the others, where the evidence is contradictory, and instructing the jury that, if they believed one witness, they should make a finding upon his testimony.

The last exception of the defendant was to that part of his Honor's charge in which he said there was no evidence as to the defendant's insolvency. The contention of the counsel was that the fact that the summons was issued against the receiver of the company, and the further fact that it was alleged in the complaint that the defendant company was in the hands of a receiver furnished some evidence of insolvency. We think the contention was unfounded, for receivers may be appointed for other reasons than insolvency, and there was no proof on the trial to the causes for the appointment of a receiver. His Honor's instruction was correct.

Affirmed.

FAIRCLOTH, C. J., concurring. I concur in the legal conclusion of the opinion but I do not agree with the proposition announced that, "Indeed, where the relation of carrier and passenger exists, the conductor or an employee of the carrier, in inflicting violence on the passenger, though the act be outside of the scope of his authority or even wilful and malicious, subjects the carrier to liability in damages just as fully as if the carrier had encouraged the commission of the act." That proposition has not yet been adopted by this Court, but was rejected in *Daniel v. R. R.*, 117 N. C., 592. The facts in this case do not authorize or call for such an expression. Too much *dicta* leads to confusion, and requires too much subsequent explanation. The proposition would certainly
(972) require very serious consideration.

Cited: McArter v. Rhea, post, 617; *Strother v. R. R.,* 123 N. C., 198; *Bradley v. R. R.,* 126 N. C., 739; *Palmer v. R. R.,* 131 N. C., 251; *Seawell v. R. R.,* 132 N. C., 859; *Jackson v. Tel. Co.,* 139 N. C., 354; *Hutchinson v. R. R.,* 140 N. C., 126; *Lewis v. Fountain,* 168 N. C., 279.

J. S. BRADLEY, ADMINISTRATOR OF SARAH J. KANIPE, v. THE OHIO RIVER AND CHARLESTON RAILROAD COMPANY.

(Decided 26 April, 1898.)

Action for Damages for Injury Resulting in Death—Measure of Damages—Trial.

Since, by The Code (sections 1499 and 1500), only such damages are allowed "as are fair and just compensation for the pecuniary injury resulting from the death" of a person killed by the wrongful act of another, the measure of damages for the wrongful killing of a mother of children is the value of her labor or the amount of her earnings if she had lived out her expectancy, without regard to the number of her children and the intellectual and moral training she might have given them.

ACTION to recover damages for the negligent killing of the plaintiff's intestate, tried before *Hoke, J.*, and a jury, at Spring Term, 1897, of MCDOWELL. Among many other exceptions taken on the trial, the defendant excepted to the admission of evidence as to the number and ages of the children of the deceased and to the instruction of his Honor in relation to the measure of damages. The jury rendered a verdict for the plaintiff, fixing the damages at $10,000, and from the judgment thereon the defendant appealed.

E. J. Justice and S. J. Ervin for plaintiff.
B. J. Sinclair and Locke Craig for defendant.

FAIRCLOTH, C. J. This is an action for damages in killing plaintiff's intestate by the alleged negligence of the defendant. The evidence discloses that the defendant was backing its train onto a crossing at the speed of three or four miles an hour, and that the hack driver, (973) carrying plaintiff's intestate, came in view of the backing train in time to have stopped and avoided the collision, but, thinking and saying he could "make it," he rushed his horse to a high speed but failed to make it, and the intestate was killed.

The action was against the driver and the defendant company. The jury brought in a verdict finding the company guilty of negligence, but the driver not guilty of negligence.

We have examined the record of this case and find that we must order a new trial for error in the admission of evidence of the number and age of intestate's children, etc. This is the defendant's third exception and relates to the measure of damages. No damages could be recovered at common law for killing another, because it was a personal injury and the remedy was lost by the death, and the remedy did not survive. The remedy in England and in this country is given by statute. In the

former, the rule of damages was "the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased." The English statute required the jury to apportion the damages among the beneficiaries as therein provided, and that made it necessary to take proof of the number, names, ages, etc., of the children. Our statute (Code, sec. 1499) allows only such damages as "are a fair and just compensation for the *pecuniary* injury resulting from the death," and the amount recovered is distributed in the same manner as personal property in case of intestacy. Code, sec. 1500. It will be noted that under our statute the *pecuniary injury* is the measure. That means the value of the labor or the amount of the earnings of the deceased if he had lived, without regard to the number of the recipients of his labor, and the jury (974) in arriving at such value are allowed to know by proofs whether he was an industrious or an idle man—honest or dishonest—drinking or sober man, and the like; and in that way the jury worked out the pecuniary damages sustained by the family. Nothing is allowed as a punishment to the defendant, nor as a solace to the plaintiff. The few decisions in our State will be found in *Collier v. Arrington,* 61 N. C., 356; *Kesler v. Smith,* 66 N. C., 154; *Burton v. R. R.,* 82 N. C., 504.

His Honor instructed the jury: "You can consider the number of her infant children and their ages, only so far as that shows the jury her opportunity for effort, and helps them to put a pecuniary value on the intellectual and moral training that she might be able to give them while they were infants and under her care. You will not allow anything to console these children for the great grief that they suffer in the loss of their mother." This would be so if the necessities of the family and not the value of the life of the deceased were the rule. See cases *supra.* Besides, that view would tend to violate the rule above stated, *i. e.,* it would furnish a motive to the jury to allow damages beyond the value of the decedent's life as an industrious or idle parent.

We must therefore order another trial, and we think this a proper case to allow the whole matter to be retried.

New trial.

DOUGLAS, J., concurring. While I concur in the judgment of the Court that there must be a new trial for the misdirection of his Honor on the issue of damages, I do not see why the testimony as to the number (975) of the children of the deceased might not be competent in one respect, to show the value of her material service. His Honor instructed the jury: "You can consider the number of her infant children and their ages only so far as that shows the jury her opportunity for effort, and helps them to put a pecuniary value on the *intellectual* and *moral training* that she might be able to give them while they were in-

fants and under her care." This was clearly error, on account of the impossibility of adopting any adequate standard for the measurement of the *pecuniary* value of such training.

If by intellectual training was meant her capacity to impart to them the ordinary instruction given to children, and thus save the expense of sending them to school, it might be competent under the proper restriction, but it is entirely too general as given. *Moral* training is still further beyond the reach of human calculations, as it is infinite in its tendencies and may be so in its results. The law will not attempt to give compensation for such a loss, not because it is not real and substantial, but because it is irreparable and incalculable. We have no scales by which to measure the value of a pure Christian mother and the moral influence she may have upon her children. But her capacity to minister to their material wants can be determined, and adequate compensation given in pecuniary damages. If she was able to feed, clothe, and shelter a large family of children by her own industry, to cook and wash for them and make their garments, I do not see why these facts, if they are facts, would not be competent evidence of her earning capacity: If she did that for which she would otherwise have been compelled to pay, she earned that money by saving it just as much as she would have done had it been paid her. The compensation of all employees is graded by the amount and value of the services they render. A seamstress who can make (976) two garments in a day is worth twice as much as she who can make but one; and the cook who can properly prepare meals for a large family is worth much more than one who is never ready, and whose work is never finished. What a woman has done is the best criterion of what she can do. This is not upon the theory that the value of her services is multiplied by the wants of her children, but upon the idea that, if she could supply the temporal wants of six children, she could provide twice as well for three. What might support six lives would be abundance for them, and give them perhaps some little luxuries. In such cases the court should carefully instruct the jury for what purpose this evidence was admitted, and that it could be considered only in determining the net pecuniary value of the services of the deceased, irrespective of the number of the beneficiaries among whom such services might have been divided.

It is urged in behalf of the defendant that such evidence might prejudice the jury and cause them to render a verdict in accordance with their sympathies and contrary to their judgment and their oath. I can only say that the jury are an inherent part of the court, to whose honesty and intelligence is committed the determination of such questions of immemorial usage and express constitutional mandate. Peculiarly representing the body of the people—the country—they surely would have

sense enough to know that their duty was to measure out equal and exact justice and not generosity, and integrity enough to feel that they could put their hands in their own pockets to relieve the wants of the poor, but must not touch with an unlawful hand what belonged to another. (977) If they should render a dishonest verdict surely the court could be trusted to set it aside. I think that the error consisted not in the mere admission of the evidence, but in the erroneous instruction of his Honor as to the purpose for which it might be considered.

Cited: Lynch v. Mfg. Co., 167 N. C., 102.

STEVE GREENLEE v. SOUTHERN RAILWAY COMPANY.

(Decided 26 May, 1898.)

Action for Damages—Railroads—Master and Servant—Negligence—Self-coupling Devices.

1. The failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence *per se*, continuing up to the time of an injury received by an employee in coupling the cars by hand, for which the company is liable whether such employee contributed to such injury by his own negligence or not.

2. The former decisions of this Court touching upon the duties of railroads to provide modern appliances for coupling cars otherwise than by hand, and foreshadowing the early holding that the failure to do so would be negligence *per se*, and the act of Congress (27 U. S. Statutes at Large, p. 531), requiring self-couplers to be placed on all cars by 1 January, 1898, and the general adoption by railroads of such self-couplers, made it the duty of defendant to adopt such devices, and its failure to do so, whereby an employee was injured, was negligence *per se*.

3. The fact that an employee remains in the service of a railroad company, knowing that its freight cars are not equipped with self-couplers, does not excuse the railroad from liability to such employee if injured while coupling its cars by hand, the doctrine of "assumption of risk" having no application where the law requires the use of new appliances to secure the safety of employees, and the employee, being ignorant of the law's requirement or expecting daily compliance with it, continues in the service with the old appliances.

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

(978) ACTION for damages, tried before *Greene, J.*, and a jury, at Fall Term, 1897, of MCDOWELL. The plaintiff, through the alleged negligence of the defendant company, his employer, was injured while

coupling freight cars by hand at Asheville and suffered the loss of an arm. The cars were not equipped with self-couplers. The facts are fully stated in the dissenting opinion of *Associate Justice Furches.* There was a verdict for the plaintiff awarding him $1,500 damages, and from the judgment thereon the defendant appealed.

E. J. Justice and John T. Perkins for plaintiff.
G. F. Bason, Charles Price, and A. B. Andrews, Jr., for defendant.

CLARK, J. In any aspect of this case the defendant is liable, whether the plaintiff was or was not guilty of contributory negligence, for the negligence of the defendant in not having self-couplers, and in sending a man to couple cars at all was a continuing negligence which existed subsequent to the contributory negligence, if there had been any, of the plaintiff, and was the proximate cause, the *causa causans* of the injury.

Six years ago (1892) in *Mason v. R. R.,* 111 N. C., 482, at page 487, the Court, in considering "whether the defendant company was negligent in failing to provide what is known as the 'Janney,' or some other improved coupler, which would obviate the necessity under any circumstances of going between the ends of the cars in order to fasten one to another," said: "We think that the time has arrived when railroad companies should be required to attach such couplers. . . . on all passenger cars; . . . and the new couplers have now be- (979) come so cheap, as compared to the value of the lives and limbs of servants and passengers, that it is not unreasonable to require that they provide them on peril of answering for any damage which might have been obviated by their use." While the Court declined on account of the expense to hold that the same was true at that time as to freight cars, it added, "Doubtless the day will soon come" when it would be negligence not to attach them to freight as well as passenger cars. Congress so thought, and in 1893 passed an act (27 U. S. Statutes at Large, p. 531) requiring self-couplers and air-brakes to be placed on all cars, freight as well as passenger, by 1 January, 1898, and this had been complied with as to "over 60 per cent of the freight cars" besides nearly all passenger cars, operating in interstate commerce, by that date. In *Witsell v. R. R.,* 120 N. C., 557, the above citation from *Mason v. R. R.* was approved, and the Court held that, while it was not negligence to fail to provide the latest improved appliances, a railroad company was liable for any injury caused by the failure to use approved appliances that are in general use.

The railroad companies have of late procured from the Interstate Commerce Commission an extension, till 1 January, 1900, of the time by which self-couplers must be placed upon all freight cars used in interstate service, but this was for their accommodation and did not and

could not relieve them from the legal liability incurred for injuries caused by their failure to provide "suitable appliances in general use" where the use of such would have prevented the injury. It only relieved them from the penalty provided in the act of Congress.

The Eleventh Annual Report (1897) of the Interstate Com-
(980) merce Commission, issued by authority of the United States Government, and based upon the reports of the railroad companies themselves, shows (p. 80) that of railroad employees (leaving out passengers altogether) 1,861 were killed and 29,969 were wounded in the year ending 30 June, 1896, being greater loss than in many a battle of historic importance. Of the trainmen, this report (p. 130) shows that nearly one in nine had been killed or wounded that year—a total of over 17,000. Of these casualties it is officially stated, 229 were killed and 8,457 were wounded in this single particular of coupling and uncoupling cars. As these figures are reported by the corporations themselves, it is not probable that they are overstated. If the railroads not reporting to the Interstate Commerce Commission (because not engaged in interstate carrying) should be added, the figures of killed and wounded from this cause would doubtless be largely increased. By these figures, for the last year reported, nearly 9,000 men had been killed and wounded in coupling and uncoupling cars. As the corporations on their own motion or under compulsion of congressional action and judicial decision have adopted self-couplers on the passenger cars and on "over 60 per cent" of the freight cars, it will be seen how many thousands of lives and bodies have been saved thereby, but that nearly 9,000 men should in one year be killed or wounded "coupling and uncoupling cars" on the freight cars which, up to 30 June, 1896, still lacked self-couplers, is the highest proof of the duty of the courts to enforce liability for failure to provide self-couplers in every case where an injury occurs from that cause. That nearly 9,000 men should still be killed and wounded in one year for failure to furnish appliances which are so widely in use and which
(981) would entirely prevent such accidents, points out the duty of the courts.

In *Witsell's case, supra,* at page 562, this Court says: "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 in fact this defendant reports that it has issued bonds and stocks to the amount of $76,557 per mile (N. C. R. R. Com. Report, 1896, at page 246). This is presumed to have been paid in by its issuing them, and hence it should be able to furnish appliances which will protect its employees from such injuries as this, and should be held liable for failure to do so, especially as the Interstate Commerce Commission report shows that the self-couplers can be put on at the cost of $18 per car.

In a large majority of the States, as well as by the Federal Government, railroad commissions have been created to supervise and regulate the charges and the conduct of these corporations. The courts will be very derelict in their duty if they do not force justice in favor of employees as well as the public. Six years ago this Court said it would soon be negligence *per se* whenever an accident happened for lack of a self-coupler. Congress has enacted that self-couplers should be used. For their lack this plaintiff was injured. It is true the defendant replies that the plaintiff remained in its service, knowing it did not have self-couplers. If that were a defense, no railroad company would ever be liable for failure to put life-saving devices, and the need of bread would force employees to continue this annual sacrifice of thousands of men.

But such is not the doctrine of "assumption of risk." That is a more reasonable doctrine and is merely that when a particular machine is defective or injured, and the employee, knowing it, continues to use it, he assumes the risk. That doctrine has no application (982) where the law requires the adoption of new devices to save life or limb (as self-couplers) and the employee, either ignorant of that fact or expecting daily compliance with the law, continues in service with the appliances formerly in use.

The defendant, after notice of six years from this Court, and with notice of the act of Congress, and also from the general adoption of self-couplers that it should use them, was guilty of negligence in failing to do so. The injury to the plaintiff could not have occurred save for the failure of the defendant to comply with its duty in this regard, and the court below should have held it liable to the plaintiff upon the defendant's own evidence. Hence, if there was error, which we do not admit, it was necessarily harmless error. There was plainly no error upon the issue as to the amount of damages.

Affirmed.

FURCHES, J., dissenting. The plaintiff was an employee of the defendant company as a laborer on its yard, at its station in Asheville, and while so employed was injured by defendant, for which he brings this action. The yard was under the management and control of one Adams, under whom the plaintiff worked, and Adams had the right to discharge the plaintiff for disobedience of his orders. A part of the business of the plaintiff was to couple and uncouple cars, and when he was employed he was told he must not couple with his hands, but with a stick. At the time of the injury Adams and his force, among whom was the plaintiff, were engaged in making up a train on a side track by taking cars off the main track and putting them on the side track. This was done by what is called "kicking the cars," that is by pushing a

(983) car with the engine, at the start, and then letting the car run by its own momentum. There had been two cars kicked down the track and they had become stationary, and the plaintiff was injured when the third car was "kicked" down. The plaintiff contends that he was injured between the first and second cars "kicked" down, and the defendant contends that he was hurt between the second and third cars "kicked" down.

The plaintiff contends that he was injured in attempting to put in a coupling link, which could only be done with the hand; and the defendant contends that the plaintiff was hurt in attempting to make a coupling with his hand instead of with a stick, as he was directed to do, and in this way contributed to his injury, and that this negligence was the proximate cause of the injury, and plaintiff cannot recover on that account.

It was in the night (dark) when all this occurred, and the plaintiff had a lantern, and his theory is that the second car being between him and the engine, he could not see the engine and the third car; that it was this third and last car kicked down the track, striking the second car, which caused it suddenly and violently to crash against the first car, that caused the injury; that Adams knew he was between these cars—that he had just before the injury told the plaintiff to "hurry up with coupling the cars on the side track, as train No. 44 was coming, and he wanted to get out of the way." Then plaintiff offered other evidence besides his own, tending to sustain his contention, and the defendant offered evidence to contradict the plaintiff—to show that the injury of plaintiff was received between the second and third cars while attempting to effect a coupling with his hand, contrary to orders. And

(984) among other evidence introduced for this purpose was the testimony of Dr. Hilliard, who testified that he was the surgeon of the defendant and was *required by the company to examine—to poll—the plaintiff* as to how he got hurt. And if he got anything favorable to the company, we suppose he was to become a witness for it. This evidence was objected to by the plaintiff, but we think it competent as declarations of the plaintiff, to be taken by the jury for what it was worth, considering the circumstances under which it was taken. The defendant contended that it was competent as a part of the *res gestæ,* and cited *Southerland v. R. R.,* 106 N. C., 100, as authority for this position. *Southerland v. R. R.,* is based upon entirely different principles. In that case, it was as to what the engineer—a third person—said, and of course it was hearsay, unless it was a part of the *res gestæ.*

This appeal depends upon the charge of the Court—upon prayers given and prayers refused, as there seems to have been no charge except what is contained in the prayers for instruction. It was important to

determine the question whether the injury was received between the second and third cars as plaintiff contended, or between the second car kicked down and the last car as defendant contended. If between the two cars, as contended by plaintiff, his theory is consistent, whether correct or not; while if it occurred between the two last cars kicked down, his theory would appear to be inconsistent with his contention that he could not see the approaching car, as there would be no intervening car to prevent his seeing the approach of the last car, if he was hurt between the two last cars kicked down. It does not seem to us that the jury were sufficiently instructed as to this; and it also seems to us that there is too much said in plaintiff's prayers for instruction (which were given) about the pin not being in its proper place, and having to be hunted by the plaintiff, this not being supported by (985) evidence in the case.

There was no *written* contract between plaintiff and defendant that plaintiff should not couple cars with his hands. But it was in evidence and admitted by the plaintiff that when he hired to the defendant he was instructed never to couple cars with his hands.

But the Court was asked by the plaintiff to charge the jury that plaintiff had signed no written contract not to couple with his hands and, this being so, the rule of the prudent man applies, that is, did the plaintiff act with ordinary prudence and care in attempting to make this coupling, if he was making a coupling, and if he did he would not be guilty of negligence. The Court gave this instruction and defendant excepted. In this there was error. There is no special virtue in contracts of this kind being in writing. There is no statute requiring them to be in writing, and it does not appear to us that this was a contract, but an instruction from Adams, the man who employed the plaintiff.

But the plaintiff contends that whether it was a contract or an intruction, it was abrogated by Adams' saying to the plaintiff "Hurry up with your coupling, No. 44 is coming and I want to get out of the way." If Adams said this, it does not revoke or tend to revoke the instruction before given "not to couple with his hands." *Mason v. R. R.*, 114 N. C., 718, on page 723. There is no evidence showing or tending to show that Adams knew or had reason to know that the plaintiff could not effect a coupling as quickly with his stick as with his hand. If plaintiff's contention were correct, it would be dangerous for a railroad "boss" to hurry up his hands, lest he abrogated all former orders and directions. This order was not inconsistent with the previous instruction and does not fall within *Shadd v. R. R.*, 116 N. C., 968; (986) *Patton v. R. R.*, 96 N. C., 455.

There were other exceptions discussed by counsel but they will probably not arise on a new trial, and we do not discuss them.

The plaintiff by accepting service under the defendant to work on its yard in shifting and coupling cars accepted all the ordinary risks of this service, without the special instruction not to couple with his hands. But it seems to us that, as a matter of economy, to say nothing of the suffering and loss of human life, railroads would be induced to get and use the more modern and safer appliances. They will have to do this soon, or answer for damages caused by the lack of them. This was written as the opinion of the Court; but since it was written the Court has changed its opinion, and I file it as my dissenting opinion.

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

Cited: Troxler v. R. R., 124 N. C., 191; *Lloyd v. Hanes,* 126 N. C., 362; *Coley v. R. R.,* 128 N. C., 537; *Harden v. R. R.,* 129 N. C., 355; *Coley v. R. R., ib.,* 415; *Ausley v. Tobacco Co.,* 130 N. C., 40; *Elmore v. R. R., ib.,* 506; *Fleming v. R. R.,* 131 N. C., 479; *Elmore v. R. R., ib.,* 572; *Orr v. Telephone Co.,* 132 N. C., 693; *Elmore v. R. R., ib.,* 866, 875; *Walker v. R. R.,* 135 N. C., 741; *Bottoms v. R. R.,* 136 N. C., 473; *Stewart v. R. R.,* 137 N. C., 694; *Hicks v. Mfg. Co.,* 138 N. C., 330; *Pressley v. Yarn Mills, ib.,* 423, 431; *Biles v. R. R.,* 139 N. C., 532; *Stewart v. R. R.,* 141 N. C., 275; *Rolin v. Tobacco Co., ib.,* 314; *Harton v. Telephone Co., ib.,* 468; *Liles v. Lumber Co.,* 142 N. C., 42; *Ruffin v. R. R., ib.,* 126; *Hairston v. Leather Co.,* 143 N. C., 515; *Britt v. R. R.,* 144 N. C., 256; *Gerringer v. R. R.,* 146 N. C., 36; *Phillps v. Iron Works, ib.,* 217; *Dermid v. R. R.,* 148 N. C., 193; *Montgomery v. R. R.,* 163 N. C., 600; *McNeill v. R. R.,* 167 N. C., 398; *Horne v. R. R.,* 170 N. C., 650, 651, 653; *McMillan v. R. R.,* 172 N. C., 858; *Smith v. Electric R. R.,* 173 N. C., 494; *Hines v. Lumber Co.,* 174 N. C., 296; *Parks v. Tanning Co.,* 175 N. C., 30.

NOTE.—Where there is failure to comply with any statutory requirement for safety of employees, neither contributory negligence nor assumption of risk can be pleaded as a defense. Laws 1913, ch. 5.

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(987)

WILLIAM WHITLEY v. SOUTHERN RAILWAY COMPANY.

(Decided 5 April, 1898.)

Action for Damages—Common Carriers—Injury to a Person not a Passenger—Negligence—Question for Jury—Dismissal of Action as on Judgment of Nonsuit—Hinsdale's Act.

1. In the trial of an action for damages for injuries resulting to the plaintiff through the alleged negligence of the defendant railroad, it appeared that plaintiff, with notice to the conductor of his intention and without objec-

tion by the latter, assisted his daughter and her small children to seats on the train and immediately started out, but by the time he reached the platform the train had started; that when he stepped on the top step the train gave a sudden jerk which caused him to lose his balance and he had to jump to keep himself from falling, and thereby broke his leg. The daughter's evidence was that just after the plaintiff left her the train gave two jerks, one of which was very violent: *Held*, (1) That the plaintiff was not, under the circumstances, a trespasser on the train, but was entitled to protection from the defendant. (2) That the evidence of defendant's negligence was sufficient to take the case to the jury, and the action should not have been dismissed at the close of plaintiff's evidence.

2. When, at the close of plaintiff's evidence, a motion is made under chapter 109, Acts of 1897, to dismiss the action as upon judgment of nonsuit, which is substantially a demurrer to the evidence, the evidence must be considered in its strongest light for the plaintiff, since the jury might take that view of it.

ACTION for damages tried before *McIver, J.*, and a jury, at January Term, 1898, of CABARRUS. The facts appear in the opinion. At the close of the plaintiff's testimony his Honor allowed the defendant's motion to dismiss the action under the act of 1897, and plaintiff appealed.

W. G. Means for plaintiff.
Charles Price and G. F. Bason for defendant.

FURCHES, J. The plaintiff resides in Concord, and his (988) daughter, Mrs. Deaton, resides in Charlotte. On the day the matter complained of took place, the plaintiff accompanied Mrs. Deaton, with her three small children to the station in Concord and purchased a ticket for them from that place to Charlotte. When defendant's train arrived at the station the plaintiff, with his daughter and her children, went to the defendant's passenger coach, the plaintiff carrying one of the children and the valise of the daughter; the daughter carrying one of the children and leading the other child. In this manner they approached the steps of the passenger coach of the train going to Charlotte, where they found the defendant's conductor standing. Plaintiff said to him that he wished to help the lady and children on the train and that then he would get off. The conductor made no reply to what the plaintiff said, and plaintiff, his daughter and her children got on the train. Plaintiff procured a seat for his daughter about three seats from the door where they entered the coach. When he did this he at once turned back for the purpose of getting off the train and when he got to the door he discovered that the train had commenced to move and when he stepped on the top step the train gave a sudden jerk which caused him to lose his equilibrium and he had to jump to keep from falling. In this

way he received the injury complained of—a broken leg. Mrs. Deaton testified that her father, the plaintiff, left as soon as he got a seat for her and the children and before she sat down; that just after he left her the train gave two jerks, one was very violent.

The plaintiff was not a passenger on defendant's road, but it was contended for him that he was a licensee and under the circumstances entitled to the consideration, care and protection of the defendant. And we do not understand this to be denied by the defendant, though
(989) it was contended for the defendant that he was not entitled to the same degree of protection as he would have been had he been a passenger. We do not propose to discuss this question further than to say that, under the circumstances disclosed by the evidence, the plaintiff was not a trespasser and was entitled to protection from the defendant. It was so held by this Court when this case was here before, 119 N. C., 724, citing *Daniel v. R. R.,* 117 N. C., 592, besides a number of cases cited in the brief of the plaintiff.

Upon this motion to dismiss under the statute of 1897 (ch. 109), which is substantially a demurrer to the evidence, we are bound to take the evidence in the *strongest view it presents for the plaintiff,* as a jury might take that view of the evidence. *Gibbs v. Lyon,* 95 N. C., 146; *Bond v. Wool,* 107 N. C., 139; *Mfg. Co. v. R. R., ante,* 881. Thus considering the evidence, it would seem that the defendant was guilty of negligence. *Deans v. R. R.,* 107 N. C., 686. Indeed, the case was argued for the defendant upon the ground that the plaintiff was guilty of *contributory* negligence. This argument necessarily presupposes that the defendant was guilty of *negligence.* The affirmance of the issue of *contributory* negligence is upon the defendant and ordinarily cannot be found by the Court. *White v. R. R.,* 121 N. C., 484; *Spruill v. Ins. Co.,* 120 N. C., 141; *Ice Co. v. R. R., supra.*

The learned counsel who argued the case for the defendant contended that the Court, in considering a case like this upon a motion to dismiss under the statute of 1897, should not consider alone the evidence most favorable for the plaintiff, but should consider all the evidence in the case, and see whether it made out a case or not. This would put upon the Court the work of a jury, to weigh and consider the weight of the evidence, in violation of reason and all authority, as we hardly
(990) think the counsel can find a single authority for this position in our reports.

In *Ice Co. v. R. R., supra,* it is supposed that there may be an exception to the rule announced in *White v. R. R., supra, Spruill v. Ins. Co., supra,* and *Bazemore v. Mountain,* 121 N. C., 59. That is, where all the evidence introduced is by the plaintiff, and fair-minded men could draw but one conclusion from the evidence, then it would become a

question of law for the Court. But we do not consider this such a case as that. Indeed, so far as we remember, every point in this case is considered in *Ice Co. v. R. R., supra,* and the ruling in that case must govern us in this.

There was error in taking the case from the jury upon the testimony before the Court. This is not deciding that the plaintiff was entitled to recover, but that he was entitled to have the jury pass upon his evidence.

New trial.

Cited: Willis v. R. R., ante, 908; *Johnson v. R. R., ante,* 958; *Cox v. R. R.,* 123 N. C., 607; *Roscoe v. Lumber Co.,* 124 N. C., 45; *Gates v. Max,* 125 N. C., 141; *Cowles v. McNeill, ib.,* 388; *Coley v. R. R.,* 129 N. C., 413; *Davis v. Ins. Co.,* 132 N. C., 292; *Gordon v. R. R., ib.,* 569; *Morrow v. R. R.,* 134 N. C., 95; *Graves v. R. R.,* 136 N. C., 4; *Fortune v. R. R.,* 150 N. C., 698; *Hamilton v. Lumber Co.,* 160 N. C., 52; *Carter v. R. R.,* 165 N. C., 254; *Ware v. R. R.,* 175 N. C., 505.

MAGGIE MEANS v. CAROLINA CENTRAL RAILWAY COMPANY.

(Decided 26 April, 1898.)

Action for Damages—Negligent Killing—Common Carriers—Operation of Mixed Passenger and Freight Trains—Negligence.

It is not negligence *per se* for a railroad company, operating a freight train with a passenger coach attached for the accommodation of the public, to have no conductor except the engineer, who acts in both capacities.

ACTION, tried before *Greene, J.,* and a jury, at January Term, (991) 1898, of MECKLENBURG. There was a verdict for the plaintiff who was awarded $750 damages for the negligent killing of her intestate and husband who was a brakeman on defendant's road. Defendant appealed.

Osborne, Maxwell & Keerans for plaintiff.
Burwell, Walker & Cansler for defendant.

MONTGOMERY, J. The plaintiff's intestate was killed while in the employment of the defendant company upon one of its trains. He was a brakeman and the train was a freight train consisting of an engine, nine box cars, two flat cars, a conductor's cab and passenger coach. The engineer was acting also as conductor, and the plaintiff alleges that her

intestate was killed through the negligence of the defendant while he was obeying the instructions of the engineer, as conductor, to take up and bring to him the tickets of passengers. There are several important questions raised by the defendant upon exceptions to the charge of the Court, but as it clearly appears that a new trial must be had for one of the instructions of the Court, we will not discuss them now.

His Honor instructed the jury that it was the duty of a railroad company to have a conductor when there are passengers and it is negligence not to have one. That we think was erroneous. The rule would apply where the trains are passenger trains, or where a considerable part of the train was for the accommodation of passengers and the passenger fare would be a considerable part of the inducement to run the train.

But, where the train is a freight train with a passenger car (992) attached, it is a fair presumption that the passenger coach is purely for the accommodation of the public, and we cannot say as a matter of law that it would be negligence (nothing else appearing) in a railroad company not to furnish a conductor on such trains. The authorities from the courts of other States cited by the counsel of the plaintiff, upon examination by us, do not seem to support the correctness of the instruction of his Honor on this point. There is error.

New trial.

Cited: S. c., 124 N. C., 576; *S. c.,* 126 N. C., 425.

C. W. HODGES v. SOUTHERN RAILWAY COMPANY.

(Decided 26 April, 1898.)

Action for Damages for Personal Injuries—Common Carriers—Passenger Alighting from Moving Train—Negligence—Verdict.

1. When the court is asked to direct a verdict, the evidence must be construed most favorably towards the other party.
2. When the evidence is left to the jury, a mere preponderance will be sufficient to determine the verdict.
3. It is not negligence *per se* for a passenger to step off a car at night upon the invitation or direction of the porter, even if the car is moving, but the act may become negligent by being done in a negligent manner.

ACTION, tried before *Hoke, J.,* and a jury, at October Term, 1897, of MECKLENBURG, for damages for injuries alleged to have been caused by

the negligence of defendant. The facts sufficiently appear in the opinion. The jury found all issues in favor of the defendant and from the judgment rendered the plaintiff appealed. (993)

Burwell, Walker & Cansler for plaintiff.
Geo. F. Bason for defendant.

DOUGLAS, J. This is an action brought to recover damages for injuries received by the plaintiff through the alleged negligence of the defendant. The plaintiff was a passenger on the defendant's train, and upon arriving at its destination at night stepped off the car and was injured. There was conflicting testimony as to what was said by the porter, and also conflicting testimony as to the condition and conduct of the plaintiff. With the credibility and weight of this testimony we have nothing to do, as there was certainly more than a mere scintilla on either side of both issues, and therefore they were properly left to the jury. The defendant's exceptions relate exclusively to the charge, and refusal to charge, by the Court, and none of them can be sustained. All exceptions relating to the first issue, which was found for the plaintiff, have been cured by the verdict. This case was here before, *Hodges v. R. R.*, 120 N. C., 555. We then granted the plaintiff a new trial upon substantially the same grounds upon which we now affirm the judgment, that is, that there was conflicting evidence that should have been submitted to the jury. The principal exceptions now before us appear to be based upon a misconception of our former opinion. The plaintiff strenuously urged that under the circumstances of this case the Court should have instructed the jury that there could be no contributory negligence on the part of the plaintiff if they found that the defendant was negligent, and quoted from our former opinion in support of his contention. The case is now presented to us in an entirely different (994) light from what it was before. Then, the plaintiff had been nonsuited and we were compelled to consider his testimony alone, and that in the light most favorable to him. Now, the tables are turned and as the plaintiff is asking the Court to direct a verdict in its favor, we must consider the evidence, at least for the purposes of his contention, in the light most favorable for the defendant. In that light, we cannot say that there was no evidence of contributory negligence. The weight of that evidence is for the jury and not for us. When the evidence is left to the jury, a mere preponderance will be sufficient to determine the verdict. This is the general rule, subject to some exceptional cases. This preponderance does not mean the number of witnesses nor the mere volume of testimony, but refers to the reasonable impression made upon the minds of the jury by the entire evidence, taking into consideration the character and demeanor of the witnesses, their interest or bias and

means and knowledge, and other attending circumstances. It is not negligence *per se* for a passenger to step off a car at night upon the invitation or direction of the porter, even if the car is moving; but the act may become negligence by being done in a negligent manner.

This was evidently the view taken by the jury, and as the case was properly submitted to them under instructions in which we see no substantial error, we cannot disturb their verdict. The judgment is

Affirmed.

Cited: Embler v. Lumber Co., 167 N. C., 461.

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(995)

McILHANEY v. SOUTHERN RAILWAY COMPANY.

(Decided 17 May, 1898.)

Petition to Rehear—Action for Damages—Railroads—Injury to Person on Track—Continuing Negligence—Contributory Negligence.

1. While at a time or in a place of increased risk of accident to a person rightfully on a railroad track there is required of him an increased degree of care to avoid an accident, there is required of the railroad a proportionately greater degree of care in managing its train at such time and place than at others.

2. Where, in 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 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 Seaboard tracks, and seeing an engine just in front of him, he stepped on the defendant's track and was struck by a train moving backwards on the track, and although he saw the train he could not tell whether it was moving or not, as he saw no signal lights on the train and heard no ringing of a signal bell: *Held*, that it was not error to refuse an instruction that if the jury believed plaintiff would have been safe if, after stepping from the Seaboard track, he had stepped in the space between it and defendant's track, he was guilty of contributory negligence by getting upon defendant's track. (Overruling former decisions in same case, 120 N. C., 551.)

FAIRCLOTH, C. J., and CLARK, J., dissenting.

PETITION by plaintiff to rehear the case between the same parties decided at February Term, 1897, 120 N. C., 551.

Burwell, Walker & Cansler for petitioner.

G. F. Bason, J. W. Keerans and A. B. Andrews, Jr., contra.

MONTGOMERY, J. After hearing additional argument in this (996) case and after a more thorough investigation of the precedents, we feel satisfied that a new trial ought not to have been ordered when the case was first before the Court, reported 120 N. C., 551. The facts are set forth in detail in the reported case. The second issue was as to whether or not the plaintiff contributed to his own injury. His Honor refused to give an instruction on that issue, which was 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.'" For the refusal of his Honor to give that instruction this Court granted a new trial. His Honor's ruling ought to have been sustained.

If the plaintiff had been walking at night on the railroad track, on which persons were accustomed to walk at a place not used for such purposes as the railroad company was using the place where the plaintiff was injured, and the plaintiff had been hurt in a collision with a car which was being shoved backwards without a light on the car or without sufficient lights on the streets, or without ringing the bell of the engine propelling the car, he would have been entitled to recover for the injury unless he saw the car or could have seen it and failed to get off the track. The company's negligence in such a case would be continuing and the proximate cause of the injury. But at the place where the plaintiff was injured, a section of A Street, between Fifth and Trade, used by two railroad companies, with four tracks, for receiving their trains, shifting their cars and as a freight depot, the danger to all persons who might go to that point would be increased as a matter of course, and the effect of the former decision in this case was (997) to hold the plaintiff to a greater degree of care because of his presence there at that time. We failed, however, to require on the part of the company a greater and proportionate degree of care in managing its trains there than at other points. In the reported case the Court said: "The use to which the street was put was a standing warning to pedestrians to be most careful when they undertook to walk through it." While that was correct, yet the company ought to have been held responsible for a corresponding degree of increased care for the safety of those persons who might be and who had a right to be in that place of more than ordinary risk.

The trial was properly conducted in all respects below, and the order granting a new trial is revoked. The judgment of the Court below is

Affirmed.

DOUGLAS, J., concurring. As I concurred in the judgment of this Court, reported 120 N. C., 551, I think it proper to say that, after a more careful consideration of the principles involved, I fully concur in the present opinion of the Court, holding that there was no error in the trial below. As my opinion then was erroneous, I am glad to correct the error at the earliest possible moment, to prevent its becoming incorporated in the jurisprudence of our State. It is true that this Court will, on rehearing, reverse its deliberate judgment only for the gravest reasons, because it stands as a decided case; but, when the petition appeals to the conscience of the Court, while a rehearing is a matter of legal discretion, it is of moral right. As said by *Judge Pearson, flos judicum,* in his dissenting opinion in *Gaskill v. King,* 34 N. C., 211, "Let a case be taken, as settling the law, *prima facie;* but if it is shown not to
(998) be supported by principle and the 'reason of the thing,' let it be overruled—the sooner the better; for, if the error is allowed to spread, it may insinuate itself into so many parts and become so much ramified as to make it impossible to eradicate it, without doing more harm than good. But if the seed has not spread too much, pull it up and throw it away."

The two railway companies had taken possession of part of a public street, on which they had laid four tracks, not for the convenience of the public, but purely for their own benefit. The plaintiff was not a trespasser, nor even a licensee; he was there by right, fully as much so as the defendant. If the defendant had increased the danger of traveling a public highway by its own act, it had by that act imposed upon itself a greater degree of care. It cannot be heard to say that it has made the highway so dangerous as to impose upon the plaintiff so high a degree of care as practically to defeat his recovery no matter how great its own negligence. The plaintiff was between the tracks on the usual walk, and stepped upon the adjoining track to avoid the escaping steam of an engine, which of course drowned any ordinary sound. He testified that he saw the car that struck him, but did not think it was moving, as no bell was being rung and no light was on the car. The jury apparently believed him. Under these circumstances we must affirm the judgment below or overrule our own decisions in the cases of Hinkle, Lloyd, Stanley and Purnell. The charge of the Court was full and presented the case to the jury fairly and intelligibly. The facts were found by them under proper instructions, and I now see no reason to disturb their verdict.

(999) FAIRCLOTH, C. J., and CLARK, J., dissenting. We think the former opinion in this case (120 N. C., 551) was correct.

Cited: Reid v. R. R., 140 N. C., 150; *Morrow v. R. R.,* 147 N. C., 627.

S. D. DUNAVANT ET AL. v. CALDWELL AND NORTHERN RAILROAD COMPANY.

(Decided 19 April, 1898.)

Action on Contract and to Enforce Lien—Contractor's Bond—Forfeit—Railroads—Mechanic's Lien—Corporation Mortgage—Judgment for Work Done—Priority—Findings of Referee—Review of Findings of Fact.

1. A bond given by a contractor for the faithful performance of work is a penalty and not liquidated damages, and in the case of a default thereon the obligee can only recover by action or counterclaim the actual damages caused by such default.
2. Where a contractor stipulates to pay a forfeit of $50 per day for each day the completion of the work is delayed, and delay is caused by the conduct of the employer, the latter cannot recover the forfeit.
3. Under section 1781 of The Code a contractor for the construction of a railroad is entitled to a mechanic's lien against a railroad company for work on such construction and for laying crossties and rails thereon.
4. Under section 1789 of The Code a contractor or subcontractor who does work on or furnishes material for the construction of a railroad is entitled to file a lien on the property of the company within one year from the time of doing such work or furnishing such material, and when filed the lien has precedence over a mortgage registered after the work has been commenced.
5. A judgment against a corporation for work and labor done or materials furnished may be enforced against the property of the company in preference to a prior mortgage although no lien was filed.
6. The findings of fact by a referee are conclusive on appeal unless there is no evidence to support them and unless that ground is assigned in the exception.
7. Where the trial judge makes no specific finding of fact he will be deemed to have adopted the referee's findings.

ACTION to recover a balance due to the plaintiffs from the de- (1000) fendant railroad corporation and to enforce a contractor's lien, pending in CATAWBA and tried before *Greene, J.*, by consent, at chambers, on 2 January, 1898, on exceptions to the report of Mr. W. D. Turner, to whom the action had been referred. The facts can be gathered from the opinion. His Honor sustained the report in full and overruled all of defendant's exceptions thereto, and rendered judgment for $2,736.18, from which defendant appealed.

S. J. Ervin for plaintiffs.
Edmund Jones for defendant.

CLARK, J. As to the first and third grounds of counterclaim, the Court properly held that the $5,000 bond for the faithful performance

of the work was a penalty and not liquidated damages, and that the defendant was entitled only to the actual amount of damages which was found by the referee. As to the forfeit of $50 per day, stipulated for each day of delay to finish the work beyond the time specified in the contract, it is sufficient to say that the referee has found that such delay was caused by the conduct of the defendant, and of course it cannot recover therefor. As to the fourth ground of counterclaim, the referee finds that there was no default in that regard by the plaintiff.

The exception that the lien cannot be filed on the property of a railroad company under The Code, section 1781, was properly overruled. The section provides that "any kind of property, real or personal, not herein (before) enumerated shall be subject to a lien for the (1001) payment of all debts contracted for work done on the same, or material furnished." This is broad enough to confer upon the contractor the right to file a lien against the railroad company for the construction of the road bed and for laying cross-ties and rails thereon. As most commonly such corporations start business decorated with a mortgage, it would be difficult to procure contractors and laborers if they were not entitled to contractor's lien (Code, section 1781) and subcontractor's line (Code, section 1801) in preference to mortgages registered after the work was commenced. *Burr v. Maulsby,* 99 N. C., 263; *Lumber Co. v. Hotel Co.,* 109 N. C., 658; *Clark v. Edwards,* 119 N. C., 115. Judgments for labor performed and material furnished any corporation can be enforced against its property, though no lien is filed, in preference to prior mortgages. Code, section 1255; *Coal Co. v. Electric Co.,* 118 N. C., 232.

The other exceptions were all based upon exceptions to the judge's overruling exceptions to the findings of fact by the referee, and cannot be considered except where there is no evidence to sustain the findings, and unless the ground is assigned in the exception. *Cotton Mills v. Cotton Mills,* 115 N. C., 475; *Collins v. Young,* 118 N. C., 265. Where the judge makes no specific findings of fact he is taken to have adopted the findings of the referee. *McEwen v. Loucheim,* 115 N. C., 348; *Battle v. Mayo,* 102 N. C., 413.

The report of the referee is drawn with care and ability, and was properly sustained by the Court below in every particular.

No error.

Cited: Belvin v. Paper Co., 123 N. C., 151; *Henderson v. McLain,* 146 N. C., 333; *Fox v. Gray,* 148 N. C., 437; *Baggett v. Wilson,* 152 N. C., 182; *Williams v. Hyman,* 153 N. C., 167; *Riley v. Sears,* 156 N. C., 269; *S. v. Bailey,* 162 N. C., 585; *Lumber Co. v. Lumber Co.,* 169 N. C., 91.

(1002)

A. C. BERRY v. SOUTHERN RAILWAY COMPANY.

(Decided 3 May, 1898.)

Action for Damages—Common Carrier—Receipt of Goods—Liability of Carrier—Presumption.

1. A shipper of goods wrote to the freight agent of a railroad company, "Will you please . . . have these three pieces marked according to the address already tacked on and forward immediately to Newport, R. I.? Will you mark them prepaid? I will be at the depot tomorrow and get the bill of lading and pay the freight." *Held*, that such letter was a direction for immediate shipment and did not make the marking of the pieces as prepaid a condition precedent to the shipment.
2. The delivery of a bill of lading is not necessary to make a carrier liable as such goods sent to it for shipment.
3. When goods are delivered to a carrier for shipment, the presumption is that they are received for shipment and not for storage, and the burden is upon the company to show that it received the goods as a warehouseman and not as a carrier.

FAIRCLOTH, C. J., dissents.

ACTION, tried before *Timberlake, J.*, and a jury, at July Special Term, 1897, of BUNCOMBE. The facts appear in the opinion. There was a judgment of nonsuit, and plaintiff appealed.

Davidson & Jones and Bourne & Parker for plaintiff.
Tucker & Murphy for appellee.

CLARK, J. The plaintiff sent the goods to the defendant's station with the following note:

"Freight Agent. Dear Sir:—Will you be kind enough to have these pieces marked according to the address tacked on and forward as soon as possible to Newport, R. I.? Will you mark them prepaid? I will be at the depot tomorrow and get the bill of lading and pay the freight—and greatly oblige. MRS. BERRY." (1003)

This order was a direction for the immediate and earliest shipment of the goods. The request to mark them prepaid was not a condition precedent to the shipment but a collateral request that as a favor to her they might be so marked, as she would pay the agent the next day. Had the agent done so without payment he would have become responsible to the company for the amount, and he did nothing wrong in declining. He, however, received the goods, weighed them, and entered them on the

bill of lading. Delivery of a bill of lading is not necessary to fix liability upon the defendant. *Wells v. R. R.*, 51 N. C., 47.

The delivery of goods to a common carrier raises a presumption that it receives them as a common carrier, and the burden is upon the company to show that it received them only as a warehouseman, and that the shipper either assented to that arrangement as, for instance, by a request to hold the goods, or was notified by the company that it held them for further orders. It is certain that the plaintiff sent the goods to the defendant for immediate shipment and did not request nor desire them to be held. Why request to mark them prepaid if she expected him to hold them till she paid? It was his duty to mark them prepaid when the freight was paid, without any request. Upon her request to mark them prepaid, the agent might, after declining, have shipped them "collect," or he might have notified the shipper that he refused to receive them without prepayment, neither of which he did; or he might have notified her that the company would hold them till the freight was paid or till he had orders to ship "collect."

The plaintiff offered evidence that the agent promised to ship
(1004) at once, but if there was evidence to the contrary that the goods (and not merely the bill of lading) were to be held till the freight was paid, it should have been left to the jury, for the burden to show it was upon the defendant, and it was error to hold, as a matter of law, that "Upon the whole testimony the plaintiff could not recover." *Spruill v. Ins. Co.*, 120 N. C., 141; *Collins v. Swanson*, 121 N. C., 67.

The defendant might have demanded prepayment of the freight. *Allen v. R. R.*, 100 N. C., 397; Code, sec. 1963. This the agent did not do. He merely refused to mark the bill of lading prepaid unless payment was made. The case should have been submitted to the jury with the construction by the court of the note, as above, and with the instruction that, having received the goods, the burden was on the defendant to show that it received them as warehouseman, not as common carrier, and that the shipper had notice of that fact. If it received the goods as common carrier, it was liable for the value of the goods destroyed by fire while in its custody, whereas, if it held them as warehouseman, it was not liable unless negligence was shown.

Error.

FAIRCLOTH, C. J., dissents.

Cited: Smith v. R. R., 163 N. C., 145; *McConnell v. R. R., ibid.*, 507; *Lyon v. R. R.*, 165 N. C., 147; *Davis v. R. R.*, 172 N. C., 210.

(1005)

F. W. THOMAS v. SOUTHERN RAILWAY COMPANY.

(Decided 24 May, 1898.)

Action for Damages—Common Carriers—Railroads—Failure to Stop Train at Flag Station—Punitive Damages.

1. Where plaintiff went to a flag station on defendant's railroad a reasonable time before the arrival of a train on which he intended to take passage and, by reason of the absence of the agent and the failure of the engineer to see his signal, the train did not stop for him: *Held*, that defendant is liable for the actual damages sustained by the plaintiff.
2. In the trial of an action for damages for the failure of defendant to stop its railway train at a flag station in answer to plaintiff's signal, where there was no evidence that the engineer saw the plaintiff's signal and intentionally passed him by in violation of the defendant's duty to the public and of plaintiff's rights, it was not error to refuse to submit to the jury the question of punitive damages.
3. It is only when the railway engineer actually sees the signal of an intending passenger at a flag station and willfully passes him by that punitive damages will be allowed in an action for damages, and the burden of showing the reckless disregard of plaintiff's rights is upon the latter.

ACTION for damages, tried at July Special Term, 1897, of BUNCOMBE, before *Timberlake, J.*, and a jury. The facts appear in the opinion. His Honor instructed the jury that the plaintiff was entitled to only actual damages, to which the plaintiff excepted. The jury awarded damages to the amount of seventy-five cents, and from the judgment rendered the plaintiff appealed, assigning as error the refusal of his Honor to instruct the jury that he was entitled to punitive damages.

Bourne & Parker for plaintiff. (1006)
Tucker & Murphy and A. B. Andrews, Jr., for defendant.

CLARK, J. When the plaintiff presented himself at the flag station, a reasonable time before the arrival of the train, for the purpose of procuring passage, and, by reason of the absence of the agent and the failure of the engineer to see the plaintiff's signal, the train did not stop for him, he was entitled to the actual damages sustained (Code, sec. 1963) which were shown to be 75 cents, and the jury, under the instruction of the court, found a verdict for that sum.

If the engineer had seen the plaintiff's signal and had run by without stopping, this would have been a wilful and intentional violation of the plaintiff's rights, which have entitled him to recover exemplary or punitive damages. *Hansley v. R. R.*, 117 N. C., 565; *Purcell v. R. R.*, 108 N. C., 414; *Heirn v. McCaughan*, 32 Miss., 1; *R. R. v. Hurst*, 36 Miss.,

660; *Wilson v. R. R.*, 63 Miss., 352; *R. R. v. Sellers*, 93 Ala., 13; *Milwaukee v. Arms*, 91 U. S., 489; 2 Sutherland Damages, sec. 937. Against such gross disregard of its duty to the public and to the plaintiff by a common carrier, the power of punishment by a verdict for smart money may be invoked. But here there was no evidence to go to the jury to show such conduct, and his Honor properly refused to submit the question of punitive damages. The plaintiff's testimony was that it was after dark, about 8 o'clock p. m. in January, and that the only signal given was plaintiff's waving his handkerchief, and that it was a moonlight night, the track being straight for about two hundred yards. This was sufficient, at most, to create no more than a mere surmise (1007) that the engineer actually saw him. If the engineer with reasonable care ought to have seen but did not see him, this would entitle the plaintiff only to compensatory damages, which the jury gave him. It is only when it is shown that the engineer actually saw the intending passenger, or there is sufficient evidence to authorize a jury to find that the engineer saw him, that there can be such wilful disregard of the plaintiff's right, or such personal indignity to him, by rolling by without stopping, as would entitle the plaintiff to recover punitive damages. The burden to show this reckless disregard of plaintiff's rights, or indignity to him, was upon the plaintiff.

No error.

Cited: Williams v. R. R., 144 N. C., 503, 506; *Stewart v. Lumber Co.*, 146 N. C., 69; *Owens v. R. R.*, 147 N. C., 361.

DORA E. BENTON, ADMINISTRATRIX OF T. C. BENTON, v. THE NORTH CAROLINA RAILROAD COMPANY.

(Decided 24 May, 1898.)

Action for Damages—Venue—Refusal to Remove Action to Another County—Appeal—Measure of Damages—Railroads—Lessor Railroad Liable for Negligent Acts of Lessee—Negligence—Excessive Verdict.

1. It not being the duty of a judge (under sections 196, 197 of The Code) to remove a cause from one court to another "unless he should be satisfied that the ends of justice demand it," his refusal to so remove is not reviewable on appeal, when he is not satisfied by the affidavits filed that it is his duty to remove, and the fact that no counter-affidavits are presented is immaterial.

2. In the trial of an action for damages for the wrongful killing of plaintiff's intestate it was proper to instruct the jury on the issue as to the amount of damages that the measure of damages for the loss of life is the present value of the net income of the deceased, to be ascertained by deducting the cost of living and expenditures from his gross income and then estimating the present value of the accumulations from such net income based upon his expectation of life, and in making such estimate the jury should consider the age, habits, industry, means, business qualifications and skill of the deceased and his reasonable expectation of life.

3. A lessor railroad company is liable for the negligent acts of its lessee in operating the leased property.

4. A motion to set aside a verdict in an action for damages on the ground that the award is excessive and not warranted by the evidence, is addressed to the discretion of the trial judge, and the exercise of such discretion is not reviewable.

ACTION for damages for the alleged negligent killing of plain- (1008) tiff's intestate by the Southern Railway Company, the lessee of the defendant railroad company, tried before *Greene, J.,* and a jury, at January Term, 1898, of MECKLENBURG. The defendant filed affidavits in support of a motion to remove the trial of the action to another county on account of local prejudice. No counter-affidavits were filed. The motion was refused, and defendant excepted. The deceased was a postal route agent and was killed by the collision of trains operated by the defendant's lessee. There was a verdict for $12,000 for the plaintiff, and defendant appealed from the judgment thereon.

Jones & Tillett, Covington & Redwine, and Frank I. Osborne for plaintiff.

George F. Bason for defendant.

CLARK, J. All the exceptions have been recently passed upon in the decisions of this Court, and it is only necessary to refer to them.

1. The refusal of the judge to remove is not reviewable.

The present statute forbids the judge to remove a cause "unless he shall be satisfied that the ends of justice demand it," and when he is not so satisfied by the affidavits offered it is immaterial that counter-affidavits are not presented. *S. v. Smarr,* 121 N. C., 669; The (1009) Code, secs. 196, 197.

2. The court charged the jury as follows: "The measure of damages for loss of life of plaintiff's intestate is the present value of his net income, and this is to be ascertained by deducting the cost of living and expenditure from his net gross income and then estimating the present value of the accumulation from such net income, based upon his expectation in life.

"In applying this rule to the facts in this case, and to enable the jury to properly estimate the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, they should consider his age, habits, industry, means, business qualifications, skill, and his reasonable expectation of life."

These instructions follow the precedents in this Court. *Pickett v. R. R.,* 117 N. C., 616 (at page 638); *Burton v. R. R.,* 82 N. C., 504; *Kester v. Smith,* 66 N. C., 154.

3. The defendant moved for judgment against the plaintiff upon the pleadings and proof "for that the pleadings showed that the injury resulting in the death of the plaintiff's intestate was due to the negligence of the lessee of the defendant in the operation of the road of the defendant." The liability of the lessor company in such cases, decided *Aycock v. R. R.,* 89 N. C., 321, has been reaffirmed in the late cases of *Logan v. R. R.,* 116 N. C., 940; *Tillett v. R. R.,* 118 N. C., 1031; *Norton v. R. R., ante,* 910.

4. The motion to set aside the verdict because "excessive and not warranted by the evidence" rested in the discretion of the trial judge, and his discretion is not reviewable. *Norton v. R. R., supra; Edwards v. Phifer,* 120 N. C., 405, and cases there cited; *S. v. Kiger,* 115
(1010) N. C., 746; *Ferrell v. Thompson,* 107 N. C., 421; *Whitehurst v. Pettipher,* 105 N. C., 40; *Goodson v. Mullen,* 92 N. C., 211; *Brown v. Morris,* 20 N. C., 429; *Long v. Gautley, ibid.,* 313; *Young v. Hairston,* 14 N. C., 55.

No error.

Cited: Pierce v. R. R., 124 N. C., 93; *Burns v. R. R.,* 125 N. C., 304, 307; *Gray v. Little,* 126 N. C., 386; *S. c.,* 127 N. C., 306; *Perry v. R. R.,* 129 N. C., 335; *Harden v. R. R., ibid.,* 359, 362; *S. v. Rose, ibid.,* 578; *Brown v. R. R.,* 131 N. C., 458; *Watson v. R. R.,* 133 N. C., 190; *Meekins v. R. R.,* 134 N. C., 219; *Carter v. R. R.,* 139 N. C., 501; *Poe v. R. R.,* 141 N. C., 528; *Bouldin v. Daniel,* 151 N. C., 284; *Fry v. R. R.,* 159 N. C., 363; *Johnson v. R. R.,* 163 N. C., 451, 452; *Cook v. Hospital,* 168 N. C., 256; *Massey v. R. R.,* 169 N. C., 246.

J. H. EVERETT v. SAMUEL SPENCER ET AL., RECEIVERS OF WESTERN NORTH CAROLINA RAILROAD COMPANY.

(Decided 24 May, 1898.)

Petition to Rehear—Trial—Instructions—Jury, Duty of.

In the trial of an action it is the duty of the jury to take the whole of the charge of the court and construe it together, to ascertain the meaning of the judge in giving the charge.

PETITION to rehear the case between same parties decided at September Term, 1897, 121 N. C., 519.

A. B. Andrews, Jr., G. F. Bason, and F. H. Busbee for petitioner.
T. H. Cobb and G. S. Ferguson, contra.

DOUGLAS, J. This is the same case reported in 121 N. C., 519, and now before us on a petition to rehear. The certificate of disinterested counsel, upon which the case was ordered to be docketed, set out as the only ground of error "that the Court decided in effect that it was the duty of the jury to take the whole of the charge of the court and construe it together to ascertain the meaning of the judge in giving said charge." Can this be error? The charge and every part thereof is given to the jury for their instruction and guidance, and they *must* consider it as (1011) a whole. They have no right to select such parts as suit themselves and reject the remainder, nor can counsel be permitted to do so upon an appeal to this Court. Such a course would be grossly unfair to the trial judge and would make the ultimate determination of causes depend more upon the skillful fencing of legal swordsmen than upon the merits. It is entirely proper for the court to explain or even correct any preceding portion of its charge, if in its opinion it is necessary to present the case fairly and fully. This is so well settled as scarcely to require the citation of authority. *Cowles v. Hall,* 90 N. C., 330, 333; *Lewis v. R. R.,* 95 N. C., 179, 188; *S. v. Keen, ibid.,* 646, 648.

What would be the use of a judge explaining or correcting his charge if the jury were not required to construe the explanation together with the previous charge. It was held in *R. R. v. Gladmon,* 82 U. S., 401, that where the general scope and tendency of the charge is correct, and the jury could not have failed to understand it correctly, although detached *sentences* may be open to criticism, the judgment will not be reversed for that reason.

The citations of the defendant as to *inconsistent* and *repugnant* instructions by the court have no application to this case, as none such appear in the charge of his Honor. What this Court said in its former opinion

was that, after his Honor had charged in effect that the plaintiff could recover if his damage resulted from the negligence of the defendant, it was proper for the court to explain what would constitute negligence under the peculiar circumstances of the case; and that in determining that matter the jury should take into consideration the entire (1012) charge of the court. The elaborate brief of the learned counsel was somewhat circular in its reasoning, as it strenuously contended that the jury might have been misled by the use of the simple word "negligence," and then cited a vast array of authorities to show that in actions *ex delicto* there are no degrees of negligence. The effect of such reasoning would be to eliminate every degree of negligence and to free the defendant from all liability for its own negligence, no matter how gross or reckless. We cannot give our assent to any such contention, as it is opposed to the essential principles of justice as well as the better weight of authority. 4 Elliott, Railroads, sec. 1264, page 1987, and cases cited. The petition is

Dismissed.

Cited: Brendle v. R. R., 125 N. C., 478; *Edwards v. R. R.*, 129 N. C., 80; *Willeford v. Bailey*, 132 N. C., 406; *Chaffin v. Mfg. Co.*, 135 N. C., 99; *Stewart v. Lumber Co.*, 146 N. C., 60, 102; *S. v. Fowler*, 151 N. C., 733; *Speight v. R. R.*, 161 N. C., 85; *Lloyd v. Bowen*, 170 N. C., 220; *Champion v. Daniel, ibid.*, 334; *Witte v. R. R.*, 171 N. C., 311.

STATE v. SELLA FREEMAN AND JAMES LOWE.

(Decided 1 March, 1898.)

Indictment for Murder—Homicide—Aiding and Abetting—Trial—Sufficiency of Evidence—Verdict—Discretion of Jury as to Finding.

1. In the trial of an indictment for murder it was admitted that one J. killed the deceased, and it appeared in evidence that just prior to the killing the defendant went with J. to the house of the deceased where J., in the presence and hearing of the defendants, cursed and threatened the life of the deceased's wife; that then J. went into the house, got two guns of the deceased, carried them to the kitchen, met the deceased at the gate, and in the sight and hearing of the defendants shot and killed the deceased as the latter approached the gate; that the defendants made no attempt, by word or act, to prevent the killing; made no outcry, but without saying anything walked away with J.; that a short time before the killing a witness had a conversation with the defendants and one of them

said that J. had sent for deceased to come over and compromise a difficulty between the latter and J. and that J. had loaded his gun and was going to shoot deceased if he did not settle; that one of the defendants asked witness for cartridges for his pistol, saying, "I am afraid we are going to have trouble with J. today"; that on the day of the killing J. came to the house of defendant F. without a gun, and the two men then went away together (F. going voluntarily), and in twenty minutes witness heard two guns fired over at the deceased's house, and when they came back J. said he had killed the deceased, and witness remarked, "If the deceased is killed it will go hard with all of you": *Held*, that the evidence was sufficient to sustain not only a verdict of murder in the second degree, but if believed would have justified the jury in finding that the defendants were present, aiding and abetting J., and therefore guilty of murder in the first degree.

2. It is not in the discretion of the jury to render a verdict of murder in the first or second degree, since the degree depends upon the facts as the jury find them to be and applying thereto the law as laid down by the court.

3. The defendants cannot, on appeal from a conviction, complain of an erroneuos instruction which was not prejudicial to them but in their favor.

4. When, upon an indictment for murder, a conviction is had for a lesser offense, if upon appeal a new trial is granted, the case goes back for trial for the full offense charged in the indictment.

INDICTMENT for murder, tried before *Brown, J.*, and a jury, at (1013) Fall Term, 1897, of HERTFORD. The defendants were convicted of murder in the second degree and appealed. The facts appear in the opinion.

Zeb V. Walser, Attorney-General, and George Cowper and L. L. Smith for the State.

Winborne & Lawrence and Shepherd & Busbee for defendants.

CLARK, J. The prisoners in apt time requested the court in writing (Code, secs. 414 and 415) to charge that the evidence was not sufficient to establish the guilt of the accused for any offense; declined, and prisoners excepted. The court charged the jury among other things that "if they should find from the evidence that the prisoners at the bar and Prince Jernigan went to the house of the deceased in (1014) pursuance of a preconcerted arrangement to go together to the house of the deceased and pick a quarrel with him, and if he resisted that Jernigan should kill him, and if the jury should further find that the prisoners were present for the purpose of aiding and abetting Jernigan in carrying out any such preconcerted and prearranged agreement, if any was made, it would be murder in the first degree." Prisoners ex-

cepted. The proposition of law laid down is correct, and the exception can be based only on the ground taken in the first exception above, *i. e.*, that there was not sufficient evidence to submit the case to the jury as to the prisoners (Freeman and Lowe) so that in effect there is but this one exception, and all other exceptions were abandoned, and properly so, in this Court.

It was admitted that Prince Jernigan killed the deceased. It was in evidence that Jernigan and the prisoners Freeman and Lowe came to the house of the deceased together, that Jernigan (a colored man) cursed the wife of the deceased and threatened her life, and then went into his house, got the two guns of the deceased, carried them to the kitchen, met the deceased at the gate, and shot him as he came in. Freeman and Lowe were present and said nothing, and after the killing they walked off in company with the murderer; they came up in company with Jernigan when he said to the wife of the deceased that he was going to kill the whole family and burn the house, and they saw Jernigan go to the gate, gun in hand, to meet the husband, whom he had threatened to kill, but they said nothing. Jernigan had a gun in his hand when he came there with the prisoners, threatening to kill.

(1015) It was further in evidence by one Hoggard that the Sunday before the killing he had a conversation with Freeman and Lowe about some difficulty as to cattle of deceased breaking into a field, and Freeman said that Jernigan had sent for the deceased to come over and compromise the fuss about the cattle. Freeman further said that Jernigan had loaded his gun and was going over and shoot the deceased if he did not settle the fuss. Freeman pulled out his pistol and asking the witness if he had any cartridges to fit it, said "I am afraid we are going to have trouble with Jernigan today," and the witness suggested that Jernigan might kill, and Freeman had better have him arrested, but he declined to do so. The witness went to Freeman's house on the day of the killing. Jernigan came up without a gun, and he and Freeman went off together—Freeman to all appearances going voluntarily, and in twenty minutes the witness heard two guns fire over at the house of the deceased. Jernigan and Freeman came back together, and Jernigan said he had killed the deceased; witness said to Freeman, "if the deceased is killed it will go hard with all of you." Freeman made no reply. Freeman said that on the way to the house of the deceased Jernigan pulled his gun out of a treetop and called to the men to go with him to the deceased to compromise the trouble; and the witness testified that when Jernigan passed the corner of the house with two guns, and told deceased to "come into the yard and talk to his boss men or damned if he would not kill him," Freeman and Lowe were standing where they could see

Jernigan, but they did not attempt to stop him, and made no outcry. After the killing Jernigan said something to Freeman and Lowe, and the three went off together. Jernigan had two guns and shot the deceased. He carried away both guns. Freeman and Lowe made no attempt to stop or interfere with Jernigan. They saw Jerni- (1016) gan reload his gun.

The prisoners, who seem to be white men, rely upon the plea that they were afraid of Jernigan. What credence or effect should be given to such defense was for the jury. Certainly, taking the evidence in the aspect most favorable to the State, as must be done on a prayer to instruct the jury that there was no evidence, there was not only sufficient evidence to sustain the verdict, which was rendered, of murder in the second degree, but if believed it would have justified the jury in finding that Freeman and Lowe were present, aiding and abetting, and therefore guilty of murder in the first degree.

The Court further instructed the jury that it was "in their discretion under the statute, as construed by our Supreme Court, to render a verdict of murder in the second degree." This instruction was erroneous and not warranted by any decision of this Court, but it is an error in favor of the prisoners and cannot be complained of by them. It is probably due to it that they were not convicted of murder in the first degree, indeed they should congratulate themselves that we find no error committed prejudicial to them, since, if the case were sent back for a new trial, it would be had for the offense of murder in the first degree as charged in the indictment. *S. v. Groves,* 121 N. C., 563; *S. v. Craine,* 120 N. C., 601; *S. v. Grady,* 83 N. C., 643, 649; *S. v. Stanton,* 23 N. C., 424. His Honor's error was doubtless based upon a misconception of *S. v. Gadbury,* 117 N. C., 811, but that case does not hold that a jury has the discretion to render a verdict for murder in the (1017) first or second degree. Upon the authorities, the degree of murder depended upon the facts as the jury find them to be and applying the law laid down by the Court to that state of facts. *S. v. Fleming,* 107 N. C., 905; *S. v. McNight,* 111 N. C., 690; *S. v. Gilchrist,* 113 N. C., 673; *S. v. Covington,* 117 N. C., 834. In *S. v. Gadbury,* this principle was not overruled but the Court held that the killing with a deadly weapon being shown, the law did not now, as formerly, presume murder in the first degree but only murder in the second degree, and that the burden being upon the State to go further and show deliberation and forethought, the Court should not have instructed the jury that if they believed the evidence in that case they should find the prisoner guilty of murder in the first degree—that, as the jury is to determine the degree of murder, it was for the jury, not the Court, to find from

the evidence whether there was the premeditation which would raise the killing from murder in the second degree (presumed from the killing with a deadly weapon) to murder in the first degree.

Affirmed.

Cited: S. v. Gentry, 125 N. C., 737; *S. v. Daniels,* 134 N. C., 676; *S. v. Matthews,* 142 N. C., 622, 624; *S. v. Casey,* 159 N. C., 474; *S. v. Davis,* 175 N. C., 730.

(1018)

STATE v. HATTON PERRY.

(Decided 22 March, 1898.)

Indictment for Rape—Appeal—New Trial—Res Judicata—Trial—Practice—Findings of Jury—Grand Jurors—Minors—Verdict.

1. While an affirmance of a judgment on appeal is necessarily an adjudication upon every assignment of error and of every matter which might have been urged in arrest of judgment, yet where a new trial is granted the judgment is *res judicata* only upon the errors ruled upon in the opinion though other errors were assigned on the appeal.
2. Where two bills of indictment are found by a grand jury at the same term and a prisoner is tried upon both and found guilty, the two bills constitute, in effect, counts in the same bill, and if either is good it supports the verdict.
3. The regulations contained in sections 1722 and 1728 of The Code relative to the revision of the jury list are directory only, and while they should be observed, the failure to do so does not vitiate the *venire* in the absence of bad faith or corruption on the part of the county commissioners.
4. The competency of a grand juror depends upon his status at the time of service and not at the time when his name was put on the jury list; hence, the fact that a grand juror was a minor when his name was put on the jury list is immaterial if he was of age at the time he served.
5. Where a grand juror was of age when he served *as such* in February, 1897, but reached his majority in September, 1896, the fact that he had not paid his taxes for the preceding year (1895) is no tenable objection to his competency to serve, since he could not have been liable for a poll tax and may not have had any property liable for taxation, and especially where it was found as a fact that no taxes were assessed against him for 1895. Besides, grand jurors are not required to be freeholders.
6. The burden of showing a disqualification of a grand juror is upon the defendant.
7. An indictment found by a grand jury of twelve men is good, provided all of the twelve concur in finding the bill.
8. The presumption of law is that an indictment was properly found in the absence of a plea in abatement on that ground.

9. Where a case on appeal is not served until eleven days after the adjournment of the term of court at which judgment was rendered, all assignments of error, other than those to matters of record, will be considered as immaterial.

INDICTMENT for rape, tried at the Fall Term, 1897, of BEAU- (1019) FORT, before *Brown, J.*, and a jury. The facts necessary to an understanding of the opinion are stated therein. The defendant was found guilty and appealed from the judgment of the Court sentencing him to be hanged.

Zeb V. Walser, Attorney-General, and John H. Small for the State.
Charles F. Warren for defendant.

CLARK, J. This case was here at the last term (121 N. C., 533), and a new trial was then granted. The prisoner having been found guilty by a second jury again appeals. His first two exceptions are to the overruling the pleas of abatement as to the bill which were also presented as exceptions on the former appeal. The Attorney-General contends that those matters are *res judicata.* Where there is an affirmance of a judgment, this necessarily is an adjudication upon every assignment of error, and of any matter which might have been urged (whether it was or not) in arrest of judgment. *S. v. Speaks,* 95 N. C., 689. But here, there was a new trial granted upon another point, and the judgment was only *res judicata* upon the errors ruled upon in the opinion. Of course, errors assigned in the former trial as to matters occurring in the progress of that trial, as the admission of evidence, instructions to the jury and the like, have become immaterial now, whether we passed upon them or not, as the trial is *de novo.* But the exceptions to the overruling the pleas in abatement to the bill not having been passed upon on the former appeal were not *res judicata* and being again (1020) made before the judge below an exception lies to his overruling the same, unless the solicitor had made it immaterial, as he might have done, by sending a new bill.

There were two bills found at the February Term, 1897, and the prisoner having been tried upon both, they are in effect counts in the same bill (*S. v. McNeill,* 93 N. C., 552; *S. v. Johnson,* 50 N. C., 221), and if either is good, the good count supports the verdict. *S. v. Toole,* 106 N. C., 736 and numerous cases there cited.

The plea in abatement to the first bill is that one of the grand jurors who found the bill was not of age till 22 September, 1896, and consequently was not of age when the jury list was revised on the first Monday in September, 1896, and has not paid his taxes for the year previous (1895). But he was of age when he sat as grand juror at

February Term, 1897, and was of age when drawn as a juror in January, 1897. There was therefore no defect of which the prisoner could complain. *S. v. Smarr,* 121 N. C., 669. If competent when his name is put on the jury list but incompetent when he serves, it is ground of objection, as his competency depends upon his status at the time of service. *S. v. Wilcox,* 104 N. C., 847. It has always been held that the regulations in The Code, sections 1722 and 1728, are directory only to the board of county commissioners, and, while they should be observed, a failure to do so does not vitiate the *venire* in the absence of bad faith or corruption on the part of the county commissioners. If this were not so there has probably never been a valid *venire,* for it is almost impossible but that the county commis-
(1021) sioners, in revising the jury list should put in the jury box some names which should not be put therein, and should fail to put in some which should be placed therein. *S. v. Smarr, supra; S. v. Stanton,* 118 N. C., 1182; *S. v. Fertilizer Co.,* 111 N. C., 658; *S. v. Wilcox,* 104 N. C., 847; *S. v. Hensley,* 94 N. C., 1021; *S. v. Martin,* 82 N. C., 672; *S. v. Griffice,* 74 N. C., 316; *S. v. Haywood,* 73 N. C., 437.

Consequently the test is not whether the name of a juror was properly or improperly placed on the jury list by the commissioners, but the objection is to him when he serves. The judge, before the grand jury is empaneled, always asks (or should do so), "if any of them had failed to pay their taxes for the preceding year, or have a suit pending and at issue at that term." If any respond affirmatively, they are stood aside. And as to the petit jury, unless challenge on such ground is made in apt time, it is not ground of exception. Our statute does not expressly require that a juror should be 21 years of age, but we take it that if one presents himself as a petit juror, who is a minor, he would be rejected upon challenge, and if a minor serves as a grand juror it would be a good plea in abatement to all bills in whose finding he took part (*S. v. Griffice, supra*); but the mere fact that such a one was drawn by the county commissioners as a juror would not vitiate the whole *venire* and all bills and verdicts found at that term; much less would the putting the name of a minor in the jury box vitiate the *venire* when, as here, he was of age when he was drawn out. Neither can it be any objection that he had not paid his taxes for the preceding year (1895) when he was not of age till 22 September, 1896. If this were not so,
(1022) men would not be competent for jurors till after they were 22 years of age. Besides, grand jurors are not required to be freeholders (*S. v. Wincroft,* 76 N. C., 38), and this juror may have had no property for his guardian (if he had one) to pay taxes upon, even if that could disqualify the juror, and, indeed, it is found as a fact that no tax was assessed against him for 1895, and of course he could be liable

for no poll tax for 1895. The burden is upon the prisoner to show the disqualification. *S. v. Seaborn,* 15 N. C., 305. We are constrained to hold that he has not done so as to the juror. The bill was found by a grand jury, all of whom were *legales homines.*

The foreman of the grand jury out of abundant caution afterwards discharged the aforesaid grand juror, and thereafter at the same term a second indictment was returned against the prisoner. To this he pleaded in abatement because it was found by only 17 grand jurors.

This objection to the second bill is untenable. The judge or the foreman had the right to excuse the juror. *S. v. Barber,* 113 N. C., 711; Thompson & Meriam on Juries, section 580. An indictment is valid if there are only 12 grand jurors (*S. v. Davis,* 24 N. C., 153; *S. v. Barker,* 107 N. C., 913), provided all 12 concur in finding the bill, as must be the case even when 18 grand jurors are present, and the presumption of law is that the indictment was properly found in the absence of a plea in abatement on the ground, and proof. *S. v. McNeill,* 93 N. C., 552.

The other objection to the second bill that it charges the word "feloniously" only as to the assault and does not repeat it before the allegation of rape (*i. e.,* the bill charges that the prisoner feloniously assaulted the prosecutrix, and did carnally know and ravish her forcibly and against her will) raises a nice question under the statute curing (1023) refinements and informalities (Code, section 1183) upon which we are not called to pass, as the form of the first count is unquestionably good, and the law applies the verdict to that count. *S. v. Toole, supra.* We repeat, however, as was said in *S. v. Barnes, post,* 1031, that solicitors should observe the approved forms and not incur the risk of a miscarriage of justice by inadvertent omissions of this kind.

Court adjourned on Saturday, 11 December, and the case on appeal was not served till 22 December. This makes immaterial all assignments of error, other than those to the matters of record above discussed, but owing to the importance of the case we have carefully considered them, the Attorney-General upon intimation from the Court having properly withdrawn objections on that score, and doubtless would have done so of his own motion. We find, however, the exceptions in the case proper without merit, indeed several of them were not urged by the defendant's counsel on the argument.

No error.

Cited: S. v. Robbins, 123 N. C., 736; *S. v. R. R.,* 125 N. C., 670; *Moore v. Guano Co.,* 130 N. C., 232; *S. v. Dixon,* 131 N. C., 810; *S. v. Parker,* 132 N. C., 1015; *S. v. Holder,* 133 N. C., 711; *S. v. Banner,* 149 N. C., 521; *S. v. R. R.,* 152 N. C., 786; *S. v. Stephens,* 170 N. C., 746.

(1024)

STATE AND ESTHER GILLS v. EDWARD BALLARD.

(Decided 3 May, 1898.)

Bastardy Proceedings—Criminal Action—Appeal—Practice.

1. Neither the State nor the prosecutrix is entitled to appeal in a criminal action from a verdict or finding of "not guilty."
2. The General Assembly having, by sections 35 and 38 of The Code, superadded to the civil penalties attaching to bastardy the legal consequences of a crime, the proceeding is criminal in its nature.

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

PROCEEDING in bastardy heard before *Bryan, J.*, at Fall Term, 1897, of BERTIE, on appeal from judgment of a justice of the peace adjudging the defendant to be not guilty. His Honor being of opinion that no appeal, under the law, accrued to the prosecutrix or to the State, dismissed the action at the cost of the prosecutrix, who appealed.

Zeb V. Walser, Attorney-General, for the State.
No counsel, contra.

DOUGLAS, J. This was a proceeding in bastardy begun before a justice of the peace, who held that the defendant was not guilty and was not the father of the bastard child. The State and the prosecutrix appealed from the judgment to the Superior Court, where the appeal was dismissed. In this there was no error, as neither the State nor the prosecutrix is entitled to appeal in a criminal action from a verdict or finding of not guilty. That bastardy proceedings, under the law as it now exists, are criminal in their nature has been repeatedly held by this Court, and we see no reason to disturb its settled ruling. A mere change in the personnel in the members of the Court affords no reason for a change in its interpretation of the law. An individual judge,
(1025) even if he might lean otherwise were it still an open question, would hesitate to overrule such repeated adjudications unless forced by the firm conviction that they violate some essential principle of substantial justice, or lead in their consequences to absurd or dangerous results. In the case at bar, no such facts appeal to the conscience or the judgment of the Court. That bastardy proceedings may be civil in their nature, when stripped of all punitive features, and intended solely to provide for the support of the child, we are not disposed to deny; but when the Legislature sees fit to superadd all the legal consequences of a crime, the proceeding itself necessarily becomes criminal. The mere

fact that a fine is small in amount, does not affect the principle, as the fine might be enlarged to any degree that did not violate the prohibition of Article 1, section 14, of the Constitution.

Section 38 of The Code, provides that if the defendant fails to pay the fine and allowance, "It shall be competent for the Court to *sentence* such putative father to the house of correction for such time not exceeding twelve months, as the Court may deem proper." A "sentence" is the judgment of the Court upon conviction for crime, and any proceeding that may end in a sentence is substantially criminal in its nature. It must therefore give to the defendant all the legal and constitutional safeguards thrown around such actions. To say that a man may be fined and sentenced to twelve months imprisonment at hard labor, on a purely *civil* proceeding, on the assumed ground that it is simply an exercise of the *police power* of the State, is too dangerous a doctrine to meet our approval. Where would it lead, or rather, where would it stop? If applicable to bastardy, why not equally so to other petty misdemeanors, or even to crimes of a graver nature (1026) and heavier punishment?

The legislature has the power to make bastardy a crime, and as such to provide for its punishment, and this it appears to have done.

Section 35 of The Code provides that the defendant *shall* be fined, and in default of the payment thereof *shall* be committed to prison. Under that section the Court is required to make an allowance to the woman; but it *shall* also punish the crime. Therefore, we cannot accept the suggestion that the fine is merely incidental to the proceeding, and may be eliminated therefrom without interfering with the nature of the action. Neither can we adopt the ingenius suggestion of counsel that the fine, being small, is in the nature of a tax. A tax upon what? All taxes must be levied upon the poll or upon property; or, in the nature of license, upon "trades, professions, franchises and incomes." Constitution, Article V, sections 1 and 2. Its location within any of these provisions is beyond the *astutia* of the Court.

It is needless to cite authorities, as this question has been so recently considered by this Court in *S. v. Ostwalt,* 118 N. C., 1208, cited in *McDonald v. Morrow,* 119 N. C., 666, 675, and *S. v. Nelson, ib.,* 797, 799.

The judgment is affirmed.

CLARK, J., dissenting: It is true that by a divided Court in *S. v. Ostwalt,* 118 N. C., 1208, it was held that bastardy had been turned into a criminal offense because the legislature of 1897 had interpolated the provision now embraced in section 35 of The Code that a fine "not exceeding ten dollars" may be imposed for the benefit of the school fund. But the decision is so contrary to decisions on similar mat-

(1027) ters, so opposed to the intent and spirit of the entire chapter upon bastardy, and has been so destructive of the efficiency of the statute, and has overruled so long a line of decisions, that the Court might well return to the ancient landmarks. There are so many reasons for this that it is only necessary to point out a few of them:

1. The "repeal of statutes by implication is not favored." This is a well-settled rule of law, yet if a mere insertion of a "fine of $10 for the benefit of the school fund" has turned bastardy into a misdemeanor, there has been a repeal by implication of at least a dozen statutory provisions. First, there is the implied repeal of section 36, making the limitation three years. Also, an implied repeal of section 32, which gives the woman the right of appeal, an implied repeal of the provision that the woman's affidavit is evidence (since, if it is a criminal action, the defendant must be faced with his accuser) and in short a radical modification of the entire proceeding provided by chap. 5, Vol. 1, of The Code, entitled "Bastardy," including among other things the doctrine of reasonable doubt, disparity in number of challenges and liability of the county for fees of the solicitor.

2. In *S. v. Crouse,* 86 N. C., 617, the point was expressly taken that the addition of the ten dollars fine had changed the proceeding into a criminal action, and it was held that it had not, and the many subsequent legislatures have therefore permitted the $10 fine to stand. *S. v. Giles.* Since the decision in *Oswalt's case,* only one legislature has met and its attention was probably not called to that decision. In *S. v. Edwards,* 110 N. C., 511, the Court reviewed and affirmed the un-

(1028) broken line of decisions which up to that time had uniformly held bastardy to be not a criminal action, but a civil proceeding in the nature of a police regulation to protect the public from the expense of maintaining the child. This is besides the patent meaning on its face of the chapter devoted to bastardy, which it may be noted has its special mode of proceeding, and it is not placed in the chapter on "Crimes." And there are many other decisions, not enumerated in *S. v. Edwards, supra,* but all to the same effect, that bastardy is a civil remedy, among them *S. v. Hickerson,* 72 N. C., 421, and *S. v. McIntosh,* 64 N. C., 607; *S. v. Waldrop,* 63 N. C., 507, and *S. v. Thompson,* 84 N. C., 365.

3. But it is contended that the mere insertion of the words "ten dollars fine for benefit of public schools" revolutionized the whole proceeding and made it a criminal action. This had already been held otherwise in *S. v. Crouse, supra.* But, if it had not, the courts must be consistent. The Code, section 615, provides that in a *quo warranto* proceeding, the Court may impose a "fine not exceeding $2,000," on the defendant. Has it ever been thought that this made *quo warranto*

a criminal action? If not, by what process of reasoning does the insertion of the "fine not exceeding ten dollars" turn the proceedings in bastardy into a criminal action? The Code, section 2075, regulating proceedings against county commissioners for losses in collection of taxes adds a fine of "not less than $500," yet it has not been held that in such cases the defendants are entitled to the protection of the doctrine of reasonable doubt, and disparity in challenges because it is a criminal action. The Code, section 2703, renders the sheriff liable to forfeit $2,000 to any one who shall sue for the same, and also punishable by imprisonment in the penitentiary, but it has never been deemed that the action authorized by the first part of this sec- (1029) tion was thereby made a criminal proceeding. If, therefore, the ten dollar fine in bastardy permitted by section 35 is considered as a separate matter, it should be held on independent action as in cases under section 2703, and not an implied repeal of sections 32 and 36, or, if it is merely collateral and incidental, it should be so treated as in *quo warranto* proceedings and in proceedings against the sheriff to recover for failure to pay over taxes, in which last the $2,000 fine is simply added to the judgment (*Davenport v. McKee,* 98 N. C., 500) as heretofore the "ten dollar fine" has been always added to the $50 allowance to the woman, the latter being the kernel and object in bastardy proceedings.

There are many other sections besides those above enumerated in which a fine has been superadded to the main object of the proceedings, and in none of them has it ever been suggested even that the addition of the fine turned the action into a criminal proceeding. Upon what principle can it be held in bastardy proceedings, to the patent destruction of that remedy.

4. There is less occasion to do this as to bastardy than in any of the other cases, not only because a long line of decisions, both before and since the ten dollar fine was superadded, has uniformly held it to be a civil proceeding, but because changing it into a criminal action virtually destroys its efficiency. There is no need of it as a criminal statute, for we already have the criminal offense of fornication and adultery. It must also be noted that if bastardy is thus, by judicial construction, made a criminal offense, the woman is equally indictable as an accessory, being present, aiding and abetting, and can no longer be prosecutrix, as the act contemplates she shall be.

By the weight of authority elsewhere, bastardy has been (1030) recognized as a civil proceeding to enforce a police regulation (Bishop's Stat. Crimes, section 691; 3 A. & E. Enc., of Law, 2d Ed., 874; 3 Ency. Pleading & Practice, 277; 2 McClain Crim. Law, section 1186) as was uniformly the case in our own courts till the late radical

departure from the recognized and well beaten track. With this experience of the danger of departing from it, we should return to the ancient landmark till it is removed by legislative enactment. Bastardy was held in civil proceeding in *S. v. Edwards,* 110 N. C., 511; *S. v. Peebles,* 108 N. C., 768; *S. v. Crouse,* 86 N. C., 617; *S. v. Bryan,* 83 N. C., 611; *S. v. Wilkie,* 85 N. C., 513 (all these cases being subsequent to the act of 1897); *S. v. Higgins,* 72 N. C., 226; *S. v. Hickerson,* 72 N. C., 421; *S. v. Waldrop,* 63 N. C., 507; *Ward v. Bell,* 52 N. C., 79; *S. v. Thompson,* 48 N. C., 365; *S. v. Brown,* 46 N. C., 129; *S. v. Pate,* 44 N. C., 244; *S. v. McIntosh,* 64 N. C., 607; *S. v. Carson,* 19 N. C., 368, and "there are others."

MONTGOMERY, J. I concur in the dissenting opinion.

Cited: S. v. Bruce, post, 1041; *S. v. Pierce,* 123 N. C., 748; *S. v. White,* 125 N. C., 687; *S. v. Savery,* 126 N. C., 1088; *S. v. Bowman,* 145 N. C., 455.

Overruled: S. v. Liles, 134 N. C., 737.

(1031)

STATE v. J. B. BARNES.

(Decided 22 March, 1898.)

Indictment for Assault with Intent to Commit Rape—Indictment, Sufficiency of—Motion to Arrest—Verdict.

1. The act of 1811 (Code, sec. 1183) was intended to uphold the execution of public justice by freeing the courts from the fetters of form, technicality, and refinement which do not concern the substance of the charge and the proof to support it.
2. An indictment charging that defendant "unlawfully and feloniously did make an assault, and her, the said C., then and there forcibly, violently, and against her will, then and there feloniously to abuse, ravish, and carnally know," constitutes a plan charge of assault with intent to rape; and where defendant asks for instructions to the jury pertinent to that crime and makes no objection to the evidence or the charge of the court thereon, the omission of the words "with intent" from the indictment is not ground for arrest of judgment, since section 1183 of The Code forbids arrest of judgment by "reason of any informality or refinement."
3. While chapter 68, Acts of 1885, permits a verdict for an assault when it is embraced in the charge of a greater offense, as rape or other felony, a verdict simply of "guilty," and not specifying a lower offense, is a verdict of guilty of the offense charged in the indictment.

FAIRCLOTH, C. J., dissents.

STATE *v.* BARNES.

INDICTMENT for assault with intent to commit rape tried before *Timberlake, J.*, and a jury, at Fall Term, 1897, of NASH.

The defendant was indicted, in the following bill, for an assault to commit rape: "The jurors for the State, upon their oath, present that J. B. Barnes, late of the county of Nash, on 6 October, 1897, with force and arms, at and in the county aforesaid in and upon one Cora Yarboro, then and there being, unlawfully, and feloniously did make an assault, and her the said Cora Yarboro then and there forcibly, violently, and against her will, then and there feloniously to abuse, ravish and carnally know; and other wrongs to the said Cora Yarboro (1032) then and there did, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The prosecutrix testified that she was living with the defendant and his wife, who stood to her in *loco parentis*, her father and mother being dead; that the defendant took her to church in the buggy, and returning took an unfrequented road on the excuse that it was not so dusty; that when they got to an unfrequented spot he attempted to kiss her and put his arm around her, she struggled from him and got out of the buggy; he got out, caught her, threw her down, threatened to kill her if she did not yield; that she screamed and tried to get away, and her dress was torn, but he got on her, when two men, Harris and Epps, rode up, whereupon he desisted; that she refused to go with defendant but got in the buggy with Harris, with whom she went home; that the next day (Monday) she took out the warrant; that she has now no home.

Harris testified that he and Epps were in their buggy and when in about 40 or 50 yards saw a man and a woman tusseling and Epps said to him "Some one is fighting." They trotted on and when in about 15 or 20 yards saw a lady's limbs fly up and her underclothing showing; that when they got to Barnes he was on top of the prosecutrix whom he had down on the ground; he got up and the prosecutrix also, and she applied to him (Harris) to ride in his buggy; then defendant said she should go in his buggy, the prosecutrix said "she would die first." Barnes plead with her in vain to go home with him, and again at the stock-law gate Barnes said, "Miss Cora get in my buggy and let us stop this thing." She said she would never do it, and that Barnes and his wife had promised he would act as a father to her. He said he would be a father to her now if she would get in the (1033) buggy, and asked, "What can I say to my wife?" He renewed the effort two or three times but she refused and went on with Harris to his house. After supper Barnes came over with his wife, who went in to see the prosecutrix, that the defendant said to him that if the prosecutrix did not stop the matter "it would ruin him." "He said that

he tried to kiss her and when his passions got up he could not control himself; that if we (Harris and Epps) had been five or six minutes later he would have done what he wanted to do. He said that Epps had sworn not to tell and he wanted me to do the same thing." He said, "Mr. Harris, I confess I am guilty, but when my passions get up, I cannot control myself." Epps testified to being with Harris on that occasion, their finding the defendant in that position and his efforts to get the prosecutrix in his buggy and her refusal. The evidence was more in detail but this is the substance of it. The defendant neither testified himself nor introduced any evidence in defense, nor to attack the character of the witnesses for the prosecution.

The Court instructed the jury fully and correctly as to an assault with intent to commit rape, and then gave the following special instructions asked for by the defendant: "Before the jury can convict, they must be satisfied the defendant intended to gratify his passions on the person of the prosecutrix at all events and notwithstanding any resistance she might make. If the jury believe the prosecutrix made no outcry, that she was not bruised, that her clothes were not torn, that her hat was not off, these are all circumstances which the jury may consider in determining whether the prosecutrix resisted or
(1034) consented." The Court closed the charge as follows: "If you shall believe that defendant put his hands on the prosecutrix against her will and consent and tried to kiss her, but did not intend to ravish her and carnally know her at all hazards and despite any resistance on her part, the defendant would not be guilty of assault with intent to commit rape, but would be guilty of a simple assault only."

The defendant was convicted and sentenced to imprisonment for seven years in the State penitentiary, and appealed.

Zeb V. Walser, Attorney-General for the State.
Aycock & Daniels, Battle & Thorne and J. E. Woodard for defendant.

CLARK, J. (after stating the facts as above): There is no exception to the evidence and none to the charge. After verdict the defendant moved in arrest of judgment on the ground that the words "with intent" were left out of the indictment. He cannot say that he has been in the slightest degree misled or prejudiced in his defense thereby. If he had thought the indictment ambiguous as to the offense with which he was charged, he should have moved to quash for the informality and the solicitor would doubtless have accomodated him by sending a new bill. But he understood the charge perfectly by asking instructions upon the offense of assault with intent to commit rape, which was given; he heard the judge's charge fully and explicitly upon that offense

and made no exception thereto. He sat in the dock and heard the overwhelming evidence that he had assaulted the prosecutrix with intent to commit rape upon her, and made no exception that he was not charged in the indictment with that offense; he heard his admissions of guilt given in evidence and his statement that if (1035) the witnesses had been five or six minutes later he would have succeeded—a crime which would have put a halter around his neck; he offered no evidence to contradict the evidence given of his acts and of his admission of guilt. There could not be found a case more strongly justifying the wisdom of the statute (Code, section 1183) which forbids judgment to be arrested "by reason of any informality or refinement." In *S. v. Moses,* 13 N. C., 452 (at page 464) *Judge Ruffin* says of this statute: "This law was certainly designed to uphold the execution of public justice by freeing the courts from those fetters of *form, technically* and *refinement* which do not concern the substance of the charge and the proof to support it. Many sages of the law had before called nice objections of this sort a disease of the law and a reproach to the bench, and lamented that they were bound down to strict and precise precedents. . . . We think the legislature meant to disallow the whole of them and only require the *substance,* that is a direct averment of *those facts* and *circumstances* which *constitute* the crime to be set forth." In *S. v. Smith,* 63 N. C., 234, the Court says: "The act of 1811 (now Code, section 1183) has the almost universal approval of the bench and bar. It needs no higher endorsement than that of the late *Chief Justice Ruffin* in *S. v. Moses* (cited *supra*) . . . The act has received a very liberal construction and its efficacy has reached and healed numerous defects in the substance as well as the form of indictments. . . . It is evident that the courts have looked with no favor on technical objections, and the legislature has been moving in the same direction. The current is all one way, sweeping off (1036) by degrees 'informalities and refinements' until indeed a plain, intelligible and explicit charge is all that is now required." That this was a plain and intelligible charge is shown by the fact that the defendant did understand it as a charge for an assault with intent to commit rape, he heard evidence given to prove that charge, and the Court instructed upon it, without objection, and himself asked an instruction upon that offense, which was given. He was tried for that offense and he made no objection. In *S. v. Parker,* 81 N. C., 531, *Ashe, J.,* says: "Ever since 1811, it has been the evident tendency of our courts as well as our law-makers to strip criminal actions of the many refinements and useless technicalities with which they have been fettered by the common law, the adherence to which often resulted in obstruction of justice and the escape of malefactors from merited pun-

ishment." To same purport are numerous other cases, some of which are cited and reviewed in *S. v. Hester, post,* 1047.

The defendant earnestly insists that the omission of the words "with intent" are fatal and that though in fact he did understand with what offense he was charged, he ought not to be taken to have comprehended it. The words "feloniously," "burglariously" and "malice aforethought" have been held indispensable because they have no synonyms and their place cannot be supplied, and hence are "sacramental words," as they have been styled. *S. v. Arnold,* 107 N. C., 861. It is not so with the words "with intent" in an indictment for an assault with intent to commit rape (*S. v. Tom,* 47 N. C., 414), in which it is said that other words (in that case the word "intention" was used) are sufficient if they make the charge of a felonious assault "with the design or
(1037) purpose to commit rape." In the present case the allegation is that the defendant "unlawfully and feloniously" assaulted Cora Yarboro, "then and there forcibly, violently and against her will then and there feloniously to abuse, ravish and carnally know." It would be the height of "refinement" to say that this does not charge that he assaulted her with intent to rape her. To say that "A feloniously assaulted B to kill him" means that he made the assault with intent to kill him. So here, the charge that the defendant "feloniously assaulted" the prosecutrix "forcibly and violently and against her will then and there feloniously to abuse, ravish and carnally know" means, and can mean, only one thing—that he assaulted her with intent to ravish her. *S. v. Martin,* 14 N. C., 329, holds that a charge of an *attempt* to ravish is not sufficient because *attempt* is not the synonym of *intent.* This is approved in *S. v. Goldston,* 103 N. C., 323 on the ground that allegation of an attempt is the allegation of an act which may be evidence of intent but is not an allegation itself of intent. That decision, however, further says that the word "intent" is not indispensable, other words may suffice, and those used in the present case fully express the charge of an assault with the purpose, intent or design to ravish. In *S. v. Powell,* 106 N. C., 635, relied on by the defendant, the material words "forcibly and against her will" were omitted and "no words of equivalent import were used."

We do not, however, approve of the departure here made from the customary form of words used for charging this offense, though we hold that it does not vitiate the bill. It is passing strange that any prosecuting officer should by negligence or inadvertence depart, especially in so important a case, from the forms so long used, and run the risk
(1038) of a grave miscarriage of justice and the throwing a heavy bill of cost upon the public by such carelessness. The accustomed and approved forms are accessible and should be followed by solicitors,

till (as with murder, perjury and in some other instances) they are modified and simplified by statute. The Code, section 1183, was enacted to prevent miscarriage of justice, but not to encourage prosecuting officers to try experiments with new forms, or to excuse them from the duty of ascertaining and following those which have been approved by long use or by statute. The object of the statute in disregarding refinements and informalities is to secure trials upon the merits, and solicitors will best serve that end by observing approved forms so as not to raise unnecessary questions as to what are refinements and informalities and what are indispensable allegations.

There is only one count in the indictment, and it is unnecessary to notice the authorities cited as to general verdicts rendered on a bill charging offenses punishable differently.

While the statute (Laws 1885, ch. 68) permits a verdict for an assault when it is embraced in the charge of a greater offense, as rape or other felony, a verdict simply of guilty and not specifying a lower offense is a verdict of guilty of the offense charged in the indictment.

No error.

FAIRCLOTH, C. J., dissents.

Cited: S. v. Perry, ante, 1023; *Bank v. Hunt,* 124 N. C., 175; *S. v. Ridge,* 125 N. C., 657; *S. v. McBroom,* 127 N. C., 534; *S. v. Peak,* 130 N. C., 715; *S. v. Marsh,* 132 N. C., 1001; *S. v. Mitchell, ib.,* 1035; *S. v. Leeper,* 146 N. C., 659; *S. v. Whedbee,* 152 N. C., 781; *S. v. Hewitt,* 158 N. C., 628; *S. v. Ratliff,* 170 N. C., 709; *S. v. Carpenter,* 173 N. C., 769.

(1039)

STATE AND HETTIE KING v. STEPHEN HEDGEPETH.

(Decided 3 May, 1898.)

Bastardy Proceeding—Criminal Action—Statute of Limitations.

Bastardy proceedings are not subject to the limitation prescribed in section 1177 of The Code (two years), but are controlled by section 36 of The Code, which provides that they shall be commenced within three years from the birth of the child.

PROCEEDINGS in bastardy, tried before *Bryan, J.,* and a jury, at January Term, 1898, of FRANKLIN, on appeal by the defendant from the judgment of a justice of the peace. The defendant pleaded not guilty

and contended that the prosecution was barred by a lapse of time, the Superior Court having held that a proceeding in bastardy is a criminal action. It appeared from the evidence that more than two years, but not three years, had elapsed since the birth of the child. The defendant asked the Court to charge that the proceeding was barred, which request was refused and defendant excepted, and, upon conviction, appealed.

Zeb V. Walser, Attorney-General, for State.
W. M. Pearson for defendant.

DOUGLAS, J. This is an appeal in bastardy proceedings, wherein the defendant was convicted. The only question brought before us is the statute of limitations, the defendant contending that, as more than two years had elapsed since the birth of the child before the bringing of this action, its prosecution was barred under section 1177 of The Code. We do not think so. Whatever may be the nature of the proceedings, section 36 of The Code specifically provides that: "All examina-
(1040) tions upon oath to charge any man with being the father of a bastard child, shall be taken within three years next after the birth of the child."

We think that this section controls the period of limitation for reasons more fully set forth in *S. v. Perry, post,* 1043. This being the only exception, and no error appearing upon the face of the record, the judgment is

Affirmed.

STATE AND SALLY COLLINS v. HOWARD BRUCE.

(Decided 11 May, 1898.)

Bastardy Proceedings — Right of Appeal by State or Prosecution — Special Finding of Magistrate in Nature of Special Verdict.

1. Bastardy being a criminal offense neither the State nor the prosecutrix has a right to appeal from a judgment in favor of the defendant.

2. Where, in a bastardy proceeding, the justice of the peace found that as the result of illicit intercourse between the defendant and prosecutrix the latter was delivered of a child eight months thereafter which was living at the time of the trial, and that he, the trial justice, did not believe an eight months child could live, and on these findings adjudged the defendant to be not guilty: *Held*, that such findings did not constitute a special verdict, and, however inconsistent the findings were and however much bad learning and worse reasoning they showed, they did not present a question of law so as to permit an appeal by the State as from an erroneous judgment on a special verdict.

STATE *v.* BRUCE.

PROCEEDING in bastardy, heard before *Bryan, J.,* at February Term, 1898, of VANCE, on appeal by the prosecutrix from a judgment of a justice of the peace acquitting the defendant. His Honor dismissed the appeal and the State appealed to this Court. The facts appear in the opinion. (1041)

Zeb V. Walser, Attorney-General, and Shepherd & Busbee for the State (appellant).

T. M. Pittman for defendant.

FURCHES, J. This is a proceeding in bastardy commenced before S. P. Kearney, a justice of the peace, tried by him on 8 February, 1898, when the defendant was acquitted, and the State appealed. In the Superior Court, the defendant moved to dismiss the appeal upon the ground that he was acquitted of the charge before the justice; that this is a criminal action and the State had no right to appeal from the judgment of the justice of the peace to this Court. The defendant's motion to dismiss was allowed, and from the judgment of the Superior Court, dismissing the appeal, the State appealed to this Court.

It has been decided by this Court that bastardy is a criminal offense and the State has no right to appeal from a judgment in favor of the defendant. *S. v. Ostwalt,* 118 N. C., 1208, and cases there cited, where the matter is discussed at length; see also *S. v. Ballard, ante,* 1024.

But the State undertakes to distinguish his case from those of *Ostwalt* and *Ballard, supra,* upon the ground that the finding of the justice who tried the case is in effect a special verdict, and the judgment of acquittal was an erroneous judgment of law pronounced by the justice upon the "special verdict"—the facts found.

We do not deem it necessary for us to decide in this case whether a justice of the peace can find a special verdict, when any trial resulting from an appeal from him must be *de novo.* We say (1042) it is not necessary for us to pass upon this question, as we are of the opinion that the findings in this case do not amount to a "special verdict." The justice says he finds that the defendant had intercourse with the prosecutrix on 15 April, 1897, and on 15 December, 1897, she was delivered of a bastard child, the result of this intercourse on 15 April; and as the child is living, and as he does not believe an eight months' child *could live,* he found that the defendant was not the father and so adjudged.

It will be seen that the findings of the justice are singularly inconsistent with each other, as might be expected where justices attempt to find "special verdicts." He finds that the defendant had intercourse with the prosecutrix on 15 April, 1897, and on 15 December, 1897, she had a bastard child which was the result of this intercourse.

This finding seems to make him say that the defendant was the father of the child. Then he finds from the argument of counsel (as he says from his knowledge of such matters) that an eight months' child could not live, and as this child did live, and is still living, that the defendant was not the father of the child. However inconsistent these findings may be, they do not present a question of law, but some very bad learning and worse reasoning which resulted in the acquittal of the defendant. Under the authorities cited, the State cannot appeal.

Affirmed.

(1043)

STATE AND JANE JONES v. GUION PERRY, JR.

(Decided 3 May, 1898.)

Bastardy Proceedings—Criminal Action—Statute of Limitations.

Bastardy proceedings, although in their nature criminal, are not governed by the period of limitations prescribed in section 1177 of The Code but are controlled entirely by section 36 of The Code, and may be brought at any time within three years next after the birth of the child.

PROCEEDING in bastardy, heard before *Robinson, J.*, at September Term, 1897, of WAKE. The facts appear in the opinion. The warrant was quashed and the State appealed.

Zeb V. Walser, Attorney-General, for the State (appellant).
No counsel contra.

DOUGLAS, J. This is a proceeding in bastardy begun before a justice of the peace. The justice quashed the warrant "for that the misdemeanor therein charged was committed more than two years prior to the taking out of the warrant." The State appealed, and in the Superior Court the proceedings were quashed "because it appears on the face of the warrant that the bastard child at the date of issuing the warrant was more than two years old and under three years of age." The State appealed to this Court. This brings before us the single question of the statute of limitations, which is in no way dependent upon the civil or criminal nature of the proceedings, but is controlled entirely by section 36 of The Code. This section reads as follows: "All examinations upon oath to charge any man with being the father of a bastard
(1044) child shall be taken within three years next after the birth of the child." The meaning of this statute is plain upon its face, and we see no reason to question its constitutionality. It is urged that

the act of 1879, now section 35 of The Code, imposing a fine upon the finding or admission of paternity, gave a criminal character to bastardy proceedings which brings the offense within the limitations of section 1177. Admitting the premises, the conclusion does not necessarily follow. It is true that the act of 1879 was subsequent to the act of 1826, but both were prior to The Code in which they appear as section 35 and 1177, respectively. They must therefore be construed together along with section 36 and, as the last named section applies exclusively to bastardy proceedings, it must be taken as an exception to the general provisions of the general section, where many other exceptions also appear. These exceptions show that the limitation of two years was not intended to apply absolutely to all misdemeanors, while one of them recognizes a principle not dissimilar to bastardy proceedings; to wit: "Provided, that in case any of the said misdemeanors, hereby required to be prosecuted within two years, shall have been committed in a secret manner, the same may be prosecuted within two years after the discovery of the offender."

We are of opinion that bastardy proceedings may, under the authority of section 36 of The Code, be begun at any time within three years next after the birth of the child. Therefore, there was error in the ruling of his Honor in quashing the proceedings.

Error.

Cited: S. v. Hedgepeth, ante, 1040.

(1045)

STATE v. HENRY ROBERTSON.

(Decided 8 March, 1898.)

Bastardy Proceedings—Pleading—Former Judgment.

Where the defendant in a warrant for bastardy, having agreed upon terms of settlement with the prosecutrix, paid the costs and the justice of the peace who issued the warrant burned the papers and did not docket the warrant or other proceedings or render any judgment, and defendant was discharged: *Held*, that such facts did not establish a case of "former trial and conviction" and bar a subsequent prosecution of the defendant for the same offense.

PROSECUTION for bastardy, tried before *Robinson, J.*, and a jury, at September Term, 1897, of WAKE, on appeal from a judgment of F. M. Ferrell, justice of the peace, directing the defendant to pay a fine, etc.

The defendant pleaded "once in jeopardy, former judgment and not guilty," all of which issues were tried together by consent. The State put in evidence the written oath of the prosecutrix and rested and did not subsequently introduce any other evidence. The testimony for the defendant is set out in the opinion. There was a verdict of guilty and defendant appealed.

Zeb V. Walser, Attorney-General, for the State.
Argo & Snow for defendant.

FURCHES, J. This is a proceeding in bastardy, charging the defendant with the paternity of a bastard child, begotten on the body of one Catherine Barham.

The defendant pleaded former trial and conviction, and to sustain that plea introduced Moses G. Todd, the justice of the peace before whom he alleged the former trial and conviction was had.

The justice of the peace, Todd, testified that at the instance of the prosecutrix he issued a warrant against the defendant charging
(1046) him with being the father of the bastard child; that upon this warrant the defendant was arrested and brought before him, and the prosecutrix was there also; that the defendant and the prosecutrix talked together out in the road and agreed upon terms of settlement by defendant's paying to prosecutrix five dollars, and paying the cost. "The defendant paid the cost, and he (the justice) threw the papers in the fireplace, and did not docket the warrant or other proceedings; no witness was examined, and the defendant was discharged; that he neither rendered nor docketed any judgment in the matter."

Charles Todd was also introduced as a witness for the defendant. He testified to hearing the agreement of the parties, and the prosecutrix gave the defendant the following receipt: "This is to certify that Sam Robertson has paid me five dollars as hush money in a case of bastardy. I have sworn a child to him wrongfully, and the matter for the above reason is compromised finally."

The defendant's own witness, Todd, testified that he "did not docket the case, that he gave no judgment and docketed none," and that he threw the papers in the fireplace.

We can hardly think the learned counsel, who argued the case for the defendant, was serious when he contended that the facts proved by the defendant established a case of "former trial and conviction." This does not involve the question of proving a justice's judgment by oral evidence, where loss or absence of the docket is sufficiently accounted for, but there must be a judgment before it can be proved. In this case there was no trial, nor was there any judgment to prove.

Affirmed.

(1047)

STATE v. THOMAS HESTER.

(Decided 25 March, 1898.)

Indictment for Perjury—Allegation and Proof—Variance.

Where a bill of indictment for perjury alleged that it was committed in an action wherein one "H. was plaintiff and Thomas R. Robertson was defendant," and the proof was that "Thomas Robertson" was the defendant in said action, and there was evidence of the identity of Thomas Robertson and Thomas R. Robertson: *Held*, that the variance was not fatal and it was for the jury to determine the identity of the two persons, it being the policy of the law (section 1183 of The Code) that no judgment shall be arrested by reason of informality, technicality, or "refinement."

INDICTMENT for perjury, tried before *Robinson, J.*, and a jury, at September Term, 1897, of WAKE.

The defendant was convicted and sentenced for three years to hard labor on the public roads of Wake County, and appealed from the refusal of a motion for a new trial, assigning as error the refusal of a prayer for instruction to the jury that there was a fatal variance between the allegation and proof.

Zeb V. Walser, Attorney-General, for the State.
Argo & Snow and Battle & Mordecai for defendant.

CLARK, J. The defendant was indicted for perjury committed in an action wherein one "Abram Hester was plaintiff and Thos. R. Robertson was defendant," and the record offered in evidence showed that "Abram Hester was plaintiff and Thomas Robertson was defendant." The defendant prayed the court to charge that this was a fatal variance between allegation and proof, and that the jury must find the defendant not guilty. There was evidence of the identity of Thomas Robertson and Thos. R. Robertson, which indeed was not denied, nor (1048) indeed questioned in any other way than by the prayer for instruction. His Honor declined to give the prayer for instructions, but told the jury that it was their duty to determine the identity of the persons named, and if they entertained a reasonable doubt concerning the same, they should acquit.

The defendant has no ground of complaint. It does not appear that he was in any wise prejudiced, and his exception is one of the "refinements" which the act of 1811, now The Code, sec. 1183, was enacted to root out of the law. In *S. v. Brown*, 79 N. C., 642, the indictment charged that the perjury had been committed in a case "between the State and the said Benjamin Brown," while the proper title of the cause

was "The State upon the relation of Maria Williams against Benjamin Brown." This was held no material variance. In *S. v. Collins,* 85 N. C., 511, the perjury was alleged to have been committed in an action between "the State as plaintiff and the said James N. Collins as defendant." The record introduced showed that the action was entitled "The State and Cornelia Burnett against James N. Collins." The Court held "the discrepancy immaterial and the exception untenable." To the same effect is *S. v. Peters,* 107 N. C., 876. In *S. v. Hare,* 95 N. C., 682, it was held an immaterial variance that the perjury was charged to have been committed on the trial of "Willis Fain," while the record was that it was on the trial of "Willie Fanes." In *S. v. Davis,* 69 N. C., 495, the false oath was alleged to have been made in an action "before Joseph Q. Pratt, a justice of the peace in and for said county," instead of a "court of the justice of the peace for Township A of Chowan County," as should have been done. This was held a mere "refinement" and cured
(1049) by the act of 1811 (now Code, 1183). In *S. v. Lane,* 80 N. C., 407, the defendant was charged with forging an order addressed to "Dulks & Helker," and signed "J. B. Runkins." The proof was that the name of the drawee firm was "Helker & Duts," and the name of the party forged was "J. B. Rankin." The court held that there being "no uncertainty as to who were meant, this was not a substantial and fatal variance." In *S. v. Collins,* 115 N. C., 716, the defendant was charged with forging the signature of "Major Vass." The proof was that the order was signed "Mage Vase." This Court approved an instruction to the jury that if they found that the defendant was attempting to induce the belief that W. W. Vass had signed the order, and that he was commonly known as "Major Vass," as charged in the bill, the spelling, "Mage Vase," was not a fatal variance, and many similar cases are cited in that opinion. Among others, *S. v. Houser,* 44 N. C., 410, in which the property was laid in "William Michaels," and the proof was that the true name was "William H. Michael," and it was not a material variance—a case closely resembling this. Also 83 Ala., 79, where the name laid in an indictment was "George Rooks" and the proof was of "Geo. W. Rux," and 97 Mo., 311, where the name in the indictment was "J. D. Hubba," and the proof was "Joel D. Hubbard."

On a trial for larceny where ownership was laid in "Elizabeth Williams" and the proof was that "Betsy Williams" was the owner, the identity of these parties was properly left to the jury. *S. v. Godet,* 29 N. C., 210, as likewise the identity of S. L. Williams and Samuel L. Williams, when one was named in the indictment and the other
(1050) in the proof. *S. v. McMillan,* 68 N. C., 440. To like purport as to name of deceased, in a trial for murder (*S. v. Henderson,*

id., 348). Besides middle names and middle initials are immaterial and variances in that respect will not be considered, for the common law recognizes only one Christian name, 16 A. & E. Enc., 114, and judicial notice will be taken of the ordinary abbreviations of Christian names. *Ib.,* 115, "Th." was held equivalent to "Thomas," in *Ogden v. Gibbon,* 5 N. J. L., 518, 531.

The practical sense of the age demands that guilt or innocence shall be determined upon proof, and that immaterial variances and refinements and technicalities shall not avail defendants when they are not in truth prejudiced thereby. The legislative department has made this very plain in numerous enactments, notably in The Code, secs. 1183, 1189, 908, and in many other sections, and in the comparatively recent statutes providing short forms of indictment for murder (Laws 1887, ch. 58; *S. v. Arnold,* 107 N. C., 861), perjury (Laws 1889, ch. 83; *S. v. Gates,* 107 N. C., 832), and the like. It is not astonishing that defendants who have no meritorious ground of exception should clutch at shadowy nothings, but our courts have faithfully followed the letter and spirit of the legislation which favors trials upon the merits. As far back as *S. v. Moses,* 13 N. C., 452 (at page 464), the elder *Ruffin,* speaking of the act (now Code, sec. 1183) which provides that "No judgment shall be arrested by reason of any informality or refinement," says: "This law was certainly designed to uphold the execution of public justice by freeing the courts from those fetters of *forms, technicality,* and *refinement* (italics his) which do not concern the substance of the charge and the proof to support it. Many of the sages of the law had before called nice objections of this sort a disease of (1051) the law and a reproach to the bench, and lamented that they were bound down to strict and precise precedents. . . . We think the Legislature meant to disallow the whole of them and only require the *substance,* that is, a direct averment of those *facts* and *circumstances* which *constitute the crime* to be set forth. It is to be remarked that the act directs the court to proceed to judgment without regard to two things—one the form, the other refinement." This decision has been followed and cited time and again. In *S. v. Smith,* 63 N. C., 234, the Court says: "The act of 1811 (now Code, sec. 1183) has the almost universal approval of the bench and bar. It needs no higher endorsement than that of the late *Chief Justice Ruffin* (*S. v. Moses,* 13 N. C., 452). . . . The act has received a very liberal construction, and its efficacy has reached and healed numerous defects in the substance as well as in the form of indictments. . . . It is evident that the courts have looked with no favor on technical objections, and the Legislature has been moving in the same direction. The current is all one way,

sweeping off by degrees 'informalities and refinements' until indeed a plain, intelligible, and explicit statement of the charge is all that is now required."

"Ever since 1811 it has been the evident tendency," says *Ashe, J.*, in *S. v. Parker,* 81 N. C., 531, "of our courts as well as our lawmakers to strip criminal actions of the many refinements and useless technicalities with which they have been fettered by the common law, the adherence to which often resulted in the obstruction of justice and the escape of malefactors from merited punishment." To the same purport, (1052) *S. v. Kirkman,* 104 N. C., 911, at page 912; *S. v. Harris,* 106 N. C., 682, at page 689; *S. v. Haddock,* 109 N. C., 873, at page 875; *S. v: Shade,* 115 N. C., 757; *S. v. Darden,* 117 N. C., 697; *S. v. Neal,* 120 N. C., 613.

No error.

Cited: S. v. Barnes, ante, 1036; *S. v. Harris,* 145 N. C., 458; *S. v. Craft,* 168 N. C., 212.

STATE v. SOUTHERN RAILWAY CO.

(Decided 24 May, 1898.)

Indictment for Discrimination in Railroad Rates—Free Passes—Penal Statute, Construction of—Indictable Offense—Intent—Indictment.

1. Section 4 of chapter 320, Acts of 1891 (Railroad Commission Act), which prohibits the making of a greater charge against one person than against another for a like and contemporaneous service under substantially similar circumstances and conditions, applies to the carriage of both persons and property without regard to the social, political, or business influence or distinction of the persons served.

2. The transportation by a common carrier of any person (except of the classes specified in section 23 of Railroad Commission Act) without charge is unlawful under section 4 of said act, the offense being the actual free transportation and not the issuance of the free pass.

3. Where an act is forbidden by statute the doing of it constitutes the offense, and the intent with which it was done is immaterial.

4. Where an act is made an offense by statute, without reference to the intent, a charge in an indictment that it was willfully done is surplusage, and the intent need not be proved.

5. In construing a penal statute prohibiting discrimination between passengers, the construction placed on it by common carriers generally and by private individuals and officials will not be considered.

STATE *v.* R. R.

INDICTMENT for unlawful discrimination in the transportation of passengers by a railroad company, tried before *Timberlake, J.*, at March Term, 1898, of WAKE. The facts appear in the opinion. (1053)

W. C. Douglass and Cook & Green for the State.
F. H. Busbee for defendant.

MONTGOMERY, J. The defendant company was indicted for an unlawful discrimination in the transportation of passengers, under section 4, chapter 320, Laws 1891—the Railroad Commission Act. Section 4 of that act is in the following words: "That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." Section 25 of the act is written as follows: "That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs or exhibitions for exhibition thereat, for the free carriage of destitute and homeless persons transported by charitable societies and the necessary agents employed in such transportation, or the free transportation of persons traveling in the interest of orphan asylums or any department thereof, or the issuance of mileage, excursion, or commutation passenger (1054) tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons or to inmates of national homes or State homes for disabled volunteer soldiers and of soldiers and sailors orphan homes, including those about to enter and those returning home after discharge, under arrangement with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad companies or company from exchanging passes or tickets with other railroad companies for their officers or employees . . . ."

The bill of indictment was in form as follows:

"The jurors for the State upon their oath do present that on 1 July, 1897, the Southern Railway Company was a corporation operating a

line of railway from Goldsboro to Charlotte, in said State, and doing the business of a common carrier in the State of North Carolina subject to the provisions of chapter 320, Laws 1891; and that the said Southern Railway Company required and received of persons traveling over its line of railway a regular first-class passenger fare of three and one-quarter (3¼) cents per mile for each passenger.

"And the jurors aforesaid do further present that the said Southern Railway Company, on the day and year aforesaid, and at and in the county aforesaid, unlawfully and wilfully did collect and receive from one H. L. Grant a less compensation for the transportation of said H. L. Grant from the city of Raleigh to the town of Goldsboro, in said
(1055) State, than it collected, demanded, and received for the transportation of other passengers from the city of Raleigh to the said town of Goldsboro, for a like and contemporaneous service, in the transportation of passengers in its first-class carriages, under substantially similar circumstances and conditions.

"And the jurors aforesaid, on their oath aforesaid, do say that the said Southern Railway Company did then and there wilfully and unlawfully and unjustly discriminate in the collection of passenger fares in favor of the aforesaid H. L. Grant and against other persons to whom like and contemporaneous service was rendered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, on their oath aforesaid, do further present, that 1 July, 1897, the Southern Railway Company was a corporation operating a line of railway from Goldsboro to Charlotte, in said State, and doing business of a common carrier in the State of North Carolina, subject to the provisions of chapter 320 of the Public Laws of 1891; and that said Southern Railway Company demanded and received a regular passenger fare of three and one-quarter (3¼) cents a mile for passengers traveling in its first-class carriages over its line of railway.

"And the jurors aforesaid do further present, that the said Southern Railway Company, on the day and year aforesaid, and at and in the county aforesaid, wilfully and unlawfully did make and give an undue, unreasonable preference and advantage to one H. L. Grant, by then and there carrying the said H. L. Grant as a passenger free of charge over its line of railway from the city of Raleigh to the town of Golds-
(1056) boro, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"POU, *Solicitor.*"

The jury rendered a special verdict in which they found the following facts: "That the defendant is a corporation carrying on the business of a common carrier in the State of North Carolina, and operates a rail-

road, part of which line lies between the cities of Raleigh and Goldsboro in said State; that during the year 1897 the defendant, through its vice-president, issued to one Hiram L. Grant, who was a member of the General Assembly of North Carolina, an annual free pass, which was accepted as valid for transportation in the State of North Carolina; that on 1 July, 1897, the said Hiram L. Grant was, on the presentation of this annual pass to defendant's conductor, transported free by the defendant between the cities of Raleigh and Goldsboro in said State; that upon the train there were persons who paid for their transportation at the rate of three and a quarter cents per mile for first-class passengers; that during the greater part of the year 1897 passes of substantially like character were issued to the Chief Executive and to the State officers and to members of the Railroad Commission, as they had been for many years previously, and were accepted and used by them in the same manner as by the said Grant; that the members of the Railroad Commission are charged with the duties as set forth in chapter 320, Laws 1891; that the officer of defendant who issued the annual pass was advised by counsel and not by members of the Railroad Commission that he was not violating the law of the State; there was no actual intent to violate the law upon the part of the officer of defendant issuing the pass." Judgment was pronounced on the special verdict against the defendant and the minimum penalty was imposed. (1057)

The question presented for our decision is, Does the act prohibit and make indictable the giving of free transportation to passengers by common carriers? Upon its face clearly it does not in all cases, because in section 25 the giving of such free transportation, or transportation at reduced rates, to certain classes of persons therein particularly specified, is allowed; but the person who received free transportation in this case did not come within either of the exceptions of the statute.

In the argument here the counsel of the defendant company contended that the defendant had not violated the provisions of the statute: First, because there was no intention on its part to violate the law; second, that the statute does not in express terms forbid the giving of free transportation to passengers, and that if the General Assembly had intended such prohibition, that body ought to have made known its purposes in clear and unmistakable language; third, that the giving of free transportation to a particular person, while it charged for like and contemporaneous service another person the prescribed rate of fare, is not an unjust discrimination; that thereby no injustice is done to the person who pays his fare, for he has only paid what the law declares a fair price for the service rendered; fourth, that the "dead-head" and the paying passenger do not necessarily stand *"Under substantially similar circumstances and conditions,"* as contemplated in the statute; and last, that

the act itself has received an almost universal and practical construction in accordance with the foregoing views by the habit of railroad companies generally giving free passes since the enactment of the
(1058) law, just as they did before, to "gentlemen long eminent in the public service," "higher officers of the State, members of the Legislature, members of the Railroad Commission," etc.

The crucial point in the case is centered around the defendant's contention and assumption that the "like and contemporaneous service" in the transportation of two individuals, one carried free and the other for the prescribed tariff rate, is not necessarily "under substantially similar circumstances and conditions"; that is, that the company can take into consideration, as to whether it will give free transportation to a passenger, the circumstances and conditions which surround two persons, and if one is a "higher official" or a large shipper, or a politician of power whose influence may be of service to the company, or one of social distinction, and the other a laborer, then the conditions and circumstances are not the same and, therefore, the statute does not apply. Of course, if this contention of the defendant is sound, this case is at an end, and the free transportation of passengers is therefore in no case unlawful. So we will examine that position of the defendant first in order.

What then, in respect to the transportation of passengers in connection with the statute, is meant by the words "substantially similar circumstances and conditions"? It cannot be doubted that, if each of two persons desired to ship a thousand pounds of freight of like kind over a railroad between the same points, and at the same time, the company must render the same service at the same rate to both, whether one of the shippers was a politician with a "pull," or a "higher officer," or a member of the Legislature or of Congress, or a laborer. Beyond question,
(1059) that would be a like and contemporaneous service in the transportation of a like kind of traffic under "substantially similar circumstances and conditions."

In our opinion, section 4 of the act in plain words prohibits the making of a greater charge against one person than against another, for a like and contemporaneous service under substantially similar circumstances and conditions, applicable to the carriage of both passengers and property. The language is so clear "that he may read who runs." In contemplation of section 4 of the statute, the only possible difference between two individuals is that in relation to the size of their bodies; but this can have no bearing upon the matter of transportation, as the difference in size or weight of persons (over a certain age) has not yet been regarded in the business "of hauling passengers" as ground for making difference in passenger rates. Boiled down, the contention of the defendant on this

point is just this: If one person should be the Governor of the State, a member of Congress or of the General Assembly, or a leader in what is called the business or the social world, and the other is an ordinary toiler for his bread, a case of substantially *dissimilar* circumstances and conditions exist, and the company may give the favored ones free transportation for their influence, and charge and receive from the other full fare because he has no influence! Can it be supposed for a moment that the General Assembly of North Carolina would enact as law, a law purporting to protect the great body of the people against inequality and unjust discrimination on the part of railroad companies, based on such class distinctions? This contention of the defendant, if it could be maintained, would simply divide the people of the State, not into the sheep and the goats, the good and the bad, and reward or punish (1060) them by giving to one and withholding from the others free passes, but into those whose influence is considered valuable to the corporation on the one part, and the remainder of the people on the other, and then giving to the first-named class the privilege of using the public franchise free, while it extorts from the latter the full rates allowed by law; the extortion consisting in making those least able to bear it pay the cost of transporting the well-to-do and influential. That position of the defendant cannot be maintained.

We will now consider the other positions of the defendant: It was insisted that the company was ignorant of the provisions of the law in respect to the prohibition of the free transportation of passengers, and that it had no intention to commit the offense with which it is charged; and counsel dwelt especially upon that finding in the special verdict in which the jury said "There was no actual intent to violate the law upon the part of the officer of defendant issuing the pass." Who was the officer of the company who issued the pass and who put into the hands of the "dead-head" passenger the piece of paper which secured his free transportation that his intention should be inquired into? Probably some local attache. What notice does the law take of his intentions or purposes in the matter before us? The thing which was denounced by the statute, and for which the defendant is indicted, is not the *act of giving the free pass,* the mere handing to the passenger the piece of paper on which was written the privilege of riding free, but the *act* of *transporting the favored passenger without charge or the payment of fare.* The law would be violated if no pass was actually issued, if the passenger was carried free. The favored passenger might be known personally to the conductor, or be made known to him by precon- (1061) certed signs, or mileage books distributed *gratis* or sold at reduced rates; and in other ways the law might be violated. But we leave the matter of the handing over, by the officer, of the free pass to the

passenger and his intention in so doing, as it has no bearing in the case; and we will take up the question of the intent of the acting, working, planning corporation in its giving the free transportation.

If there is anything well settled by the decisions of this Court it is that, wherever an act is denounced as unlawful by statute, the doing of that act constitutes the offense, and the intent with which the act is done is immaterial; and this has been settled law for a long period of time. In the case of *S. v. King,* 86 N. C., 603, the Court said: "When an act forbidden by law is intentionally done *the intent to do the act is the* criminal intent which imparts to it the character of an offense; and no one who violates the law, which he is conclusively presumed to know, can be heard to say that he had no criminal intent in doing the forbidden act." In *S. v. McBrayer,* 98 N. C., 619, it is held that when the statute plainly forbids an act to be done and it is done by some person, the law implies conclusively the guilty intent although the offender was honestly mistaken as to the meaning of the law he violates. In *S. v. Voight,* 90 N. C., 741, the Court said, "The criminal intent is inseparably involved in the intent to do the act which the law pronounces criminal." To the like effect are the decisions in *S. v. Kittelle,* 110 N. C., 560; *S. v. Downs,* 116 N. C., 1064; *S. v. Chisenhall,* 106 N. C., 676; *S. v. Scoggins,* 107 N. C., 959; *S. v. McLean,* 121 N. C., 589.

It is to be observed that in the section of the act under which
(1062) this defendant was indicted neither the word "intent" nor any word synonymous with the word intent was used. The act simply denounced the unjust discrimination. And, besides, section 25 of the act excepts from the provisions of section 4 certain carefully specified classes of persons, and such explicit enumeration of the excepted classes absolutely and necessarily excludes all other persons. It is true that in the bill of indictment the word "wilfully" was used in connection with the discrimination, and it was insisted for the defendant that a vicious or covinous intent on its part was necessary to be proved. But that did not follow even if such intent had been alleged in the indictment. It would have been surplusage. *S. v. Edwards,* 90 N. C., 710; *S. v. Keen,* 95 N. C., 646. It is only where a statute makes the particular intent an essential element of the crime that it need be charged and proved." *S. v. McCarter,* 98 N. C., 637. As to the plea of ignorance of the statute in reference to unjust discrimination between passengers, it is only necessary to cite some of the numerous decisions of this Court on that point. In *S. v. Downs, supra,* the Court said: "Ignorance of the law excuses no one, and the vicarious ignorance of counsel has no greater value." *S. v. Boyette,* 32 N. C., 336. The law does not encourage ignorance in either. *S. v. Dickens,* 2 N. C., 406. If ignorance of counsel would excuse violations of the criminal law, the more ignorant counsel

could manage to be the more valuable and sought for, in many cases, would be his advice."

But how is it possible to seriously consider that the defendant acted in this matter in ignorance of the law? It is not too much to say in a judicial opinion that the defendant is represented in his legal department by many of the best equipped lawyers in the country; (1063) and it would be a most violent presumption to say, or even to think, that they were not thoroughly posted as to the laws, State and Federal, concerning the interests and liabilities of their clients under this statute. Through their counsel the defendant must have been acquainted with the act of Congress concerning interstate commerce and the rulings of the Commission (Interstate) upon the act; and that act in section 2 is in the very words of the fourth section of the act of our General Assembly, chapter 320, Laws 1891—the law under which the defendant is indicted. The defendant could hardly be ignorant, in fact, of the decided cases reported by the Interstate Commerce Commission on the matters about which the defendant is before the court. In the case of *Griffee v. R. R.*, in Nebraska, before that commission (2 Interstate Com. Reports, 301) the report and opinion filed nearly ten years ago, it was held in effect that free transportation to a passenger was in contravention of section 2 of the act (U. S.) to regulate commerce (that section being, as we have said, identical with section 4 of the act of our General Assembly of 1891). In the same volume (page 359) in the case of *Slater v. R. R.*, it was declared that free transportation furnished on an annual pass to a person not embraced in one of the excepted classes was illegal. In that case it was further said by the Commission: "Carriers can reward persons not in their stated and regular employment for occasional services or benefits indirectly received, in other and better ways than by furnishing them with free transportation. It may be said that a pass costs the carrier little or nothing, and that when the good-will and occasional good words of a person, who is able to influence the direction of traffic, can be obtained so cheaply, it is a handicap to (1064) prevent the carrier from making use of the opportunity; but the evils in the unrestricted employment of free passes by common carriers had grown so great and had become so apparent, both to the public and to the carriers themselves, that it was deemed by Congress to be absolutely necessary to eradicate the whole system from Interstate Commerce in order to put an end to the abuses which had grown beyond the limits of any other regulation or control. The law was framed accordingly prohibiting the giving of free transportation to passengers carried under substantially similar circumstances and conditions as an unjust discrimination under the general terms employed, with only the exception made in section 22. . . ."

In the third annual report of the Interstate Commerce Commission (Vol. 3, page 300, filed 30 November, 1889) it is stated that "the statute (Interstate Commerce Act) undoubtedly was framed to prohibit passes or free transportation of persons as one of the forms of unjust discrimination, favoritism, and misuse of corporate powers that had grown into an abuse of large proportions and become demoralizing in its influence, and detrimental to railroads, both in loss of revenue and in provoking public hostility. One of the minor and meaner phases of this abuse is the distinctive preference shown in various ways by employees both in the service and civility to holders of passes, as if discrimination by free carriage includes discrimination in treatment of passengers."

"It is well known that persons who are carried free were to a large extent precisely the persons who had no claim whatever to such favors. They were officials and others from whom free passes might be expected to secure reciprocal favors, and men of wealth and prominence (1065) who rode at the expense of others less able to pay; or the passes were given to influence business. In nearly all cases, not specifically exempted by the act, the motive in demanding or giving them was one deserving of no favor. The principle of equality under like conditions for the traveling public had been grossly violated by the railroads, favored persons or classes of persons had been furnished free transportation at the expense of the general public by higher general charges to reimburse for gratuitous carriage."

It is of interest to observe that it appears from that report that the returns of the railroad companies embraced therein show the largest number of interstate free passes issued were designated as "complimentary." The next most numerous classes embraced steamship and transportation lines, officers, Federal, State, and municipal, palace car companies and newspapers. Of State free passes, the largest number were issued to members of the legislatures, drovers with "complimentaries" next, and United States, State, and municipal officers, newspapers, and shippers next in numbers.

In the investigation of this subject as it affected the Boston and Maine Railroad Co. (5 Interstate Commerce Reports, 69, December, 1891), it was decided by the Commission that the giving of free passes to others than those embraced in the exceptions were illegal. The opinions of the Commission was in the following words: "The construction we give to section 2 of the act to regulate commerce is that, where the service by the carrier subject to the act is like and contemporaneous for different passengers, the charge to one of a greater or less compensation than to another constitutes unjust discrimination and is unlawful, unless (1066) the charge of such greater or less compensation is allowed under the exceptions provided in section 22, and that, where the traffic

is 'under substantially similar circumstances and conditions' in other respects, it is not rendered dissimilar within the meaning of the statute by the fact that such passengers hold unlike or, as sometimes termed, unequal official, social, or business positions, or belonging to different classes as they ordinarily exist in a community, or are arbitrarily created by the carrier. Under this construction of the act, the practice of the defendant in giving free transportation, such as it concedes was issued 'to gentlemen long eminent in the public service,' 'higher officers of States, and prominent officials of the United States, members of legislative railroad committees, persons whose good-will is important to the corporation,' is unwarranted, unless the favored person also comes under some exception specified in section 22 of the act to regulate commerce. In this matter it was that Mr. Richard Olney (afterwards Attorney-General under Mr. Cleveland), who represented the Boston Railroad Co., stated in his brief that Mr. Chandler, who brought the proceeding for the people, was inspired to make the charges in the complaint by 'personal spite and political considerations.' "

The report goes on, however, to say that "Mr. Chandler made a reply not without interest or point." In the same decision the Commission said further: "Other utterances and decisions of the Commission to the same legal effect have been made every year since its organization, and its construction of the act has been indicated by its repeated recommendations to Congress to add other classes of persons to the exceptions (as they were always regarded by the Commission) contained in section 22. We find not only these views held by the Commission from the organization, but by the Federal courts when the question has (1067) arisen." The case of *Harvey v. R. R.*, 5 I. C. C., 153, closes with the following declaration: "The fundamental and pervading purpose of the law is equality of treatment. It assumes that the railroads are engaged in a public service and requires that service to be impartially rendered. It asserts the right of every citizen to use the agencies which the carrier provides on equal terms with all his fellows, and finds an invasion of that right in every unauthorized exemption from the charges, commonly imposed. No form of favoritism and no species of partiality seem more odious or indefensible than that which accords to personal influence or public station privileges not enjoyed by the community at large. The free carriages of certain persons merely because they occupy official positions, or have acquired some measure of distinction, offends the rudest conception of equality and contravenes alike the policy and the provisions of the statute."

As to the last position of the defendant, that is, the alleged practical construction which the common carriers and the favored passengers have put upon the statute, the first giving and the last receiving free

transportation, just as they did before the enactment of the statute, and assuming that the general community have adopted that as the proper construction of the law, we have nothing to say, except that it would seem to all reasonable minds that such a construction could not be the proper one, and that the law, as often construed by the Interstate Commerce Commission, which construction seems true to us, is a just and wholesome law. In the face of the clearly expressed provisions
(1068) of the law and in face of the repeated constructions of that part of the Federal statutes regulating interstate commerce, which is in precisely the same words in which our statutes are framed upon the point now before us, the defendant took its chances. It has in doing so violated the criminal law of the State and must abide the consequences as all others ought to do who break the laws. It must be presumed that common carriers know well what they are doing in this matter. They are not, and neither do they wish to be considered, charitable institutions; they are corporations formed for profit and gain; and whenever they grant a thing of value—free transportation to a passenger not embraced in the excepted classes specified in the act—they must be acting, as they think, on business principles expecting a return upon their investments. If, in pursuing their business interests, they violate the law, they must abide the result. There is no error, and the judgment is

Affirmed.

DOUGLAS, J., dissenting. I feel compelled to dissent from the judgment of the Court; but in doing so, I wish to express my unqualified concurrence in the able opinion of *Justice Montgomery* except in so far as it necessarily conflicts with what is said herein. That free transportation, under whatever device it may be given, is prohibited by the act of 1891, unless covered by the statutory exceptions, is unquestionable; and I am glad that it has now been settled by a unanimous Court. Such a construction is in strict accordance with the settled rules of judicial interpretation and with the highest principles of public policy.

It is currently reported that a hundred thousand passes were issued in the State of North Carolina within the year 1897. Of our three leading railroad systems one reported over fifteen thousand passes
(1069) issued, while another reported thirty thousand. The defendant herein, the largest system of all, and having a direct pecuniary interest of vital importance before the Legislature, refused to make any report, relying upon its legal exemption from compulsory self-crimination. Taking the estimate of 100,000 passes as correct, as it is 397 miles from Raleigh to Murphy on the west, and still further to Elizabeth City on the east, it is fair to assume that each pass would represent at least

one hundred miles of travel, equal to $3.25 in fare. This would represent the equivalent of $325,000 a year given to somebody, but to whom we do not know, and for what purpose we need not inquire. These figures may not be correct, but they are the best obtainable under the circumstances. It is needless to suppose that transportation of such great pecuniary value would be given without some return either present or prospective; and in any aspect its continuance would be unjust to the public interest and dangerous to the public welfare. Free transportation to so large an amount would necessarily place an additional burden upon the traveling public to make up the deficiency; while its irresponsible distribution would be a serious menace to public morality. So far, I fully concur in the opinion of the Court; but, to convict a person charged with crime, it is requisite not only to determine that a crime is committed but also that the defendant is guilty of the crime.

The defendant here admits a free transportation, but pleads want of intent. Ordinarily the admission of the forbidden act would be conclusive evidence of guilt; as in misdemeanor, at least, the intent to commit the act is the criminal intent, unless the statute itself constitutes the intent the gravamen of the offense. In this action, however, there seems to me so many peculiar circumstances that have (1070) never happened before, and may never happen again, as to take the case out of the usual rules of construction, and force us to regard it *sui generis.*

If the act itself forbade the issuing of passes in express terms, it would be an end of the question. But it does so only by implication as is shown in the opinion of the Court. It is true it seems to us a clear and necessary implication; but it evidently did not seem so to the higher officers of State and members of the Legislature who accepted these passes.

We can scarcely ask a clearer insight into the law and a nicer sense of propriety from the soulless corporation than we do from those who make and enforce the law. This act was ratified 5 March, 1891, more than seven years ago. Since then we have had four different legislatures, three governors, and seven different railroad commissioners, as well as two complete sets of solicitors. I do not mean to impute any improper motive to these men, many of whom I personally know, and whose names and characters are too well known to need any vindication from me; but is it not possible that the defendant may have been honestly misled in issuing passes to them from the mere fact that they would receive them? The giving of a pass is only *malum prohibitum,* and not *malum in se,* and is neither as to the one that receives it. There is nothing innately wrong in it further than that it is prohibited by law and may lead to dangerous abuses. Moreover, section 5 of the act under consideration provides that the Railroad Commissioners "*shall* make such just

and reasonable rules and regulations as may be necessary for preventing unjust discrimination in the transportation of freight and passengers on the railroads in the State."

(1071) It was the imperative duty of the Commission, without any outside suggestion, to make all just rules necessary for carrying out all the provisions of the act, the proper enforcement of which was the sole object of their official existence. We have held, in *Caldwell v. Wilson,* 121 N. C., 425, 472, that the Commission is an *administrative* and not a judicial court; and this view is still more strongly expressed by the Supreme Court of the United States in *Reagan v. Loan and Trust Co.,* 154 U. S., 362, 397, where it says: "Such a commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislature." It is their duty to actively enforce the law, and to prevent, and, if necessary, prosecute, all violations thereof that may come to their knowledge in any manner. They are the active instruments of its enforcement, and are not merely required to construe it upon a sworn complaint. For the purposes of their creative act, they are the grand inquest of the State, and should diligently inquire and true presentment make of all its violations. Any other construction of their powers and duties would destroy their usefulness and make the commission a mere excrescence upon the judicial system of the State. As a court, their powers are very limited; but, as a commission, they are charged with grave and responsible duties of the State, and are clothed with ample powers for their performance. While they may be compelled to appeal to the courts for the ultimate enforcement of their decisions, they possess powers beyond the jurisdiction of any court, and which, if properly exercised, may be made of inestimable value to the people. The mere fact of thorough investigation, and consequent publicity, of existing abuses will strongly tend to their correction.

(1072) The jury find in their special verdict "That the officer of defendant who issued the annual pass was advised by counsel and by *members of the Railroad Commission* that he was *not* violating the law of the State"; "that there was no actual intent to violate the law upon the part of the officer of the defendant issuing the pass." They further find that during the year 1897 passes were issued to members of the Railroad Commission, which, using the plural, must mean a majority of the Commission, of whom there are only three. In a case of doubt, where the act was not expressly prohibited in words by the statute, to whom better could the defendant have gone than to those charged in express terms with its enforcement? What more positive answer could it have received than the answer of a majority of the Commission that it was not unlawful, coupled with the personal acceptance of a pass? I do not question the integrity of the commissioners. They

were doubtless honestly mistaken, misled perhaps by the universal custom throughout the United States; but so, also, may have been the defendant. It is not fair to say that it was innocently misled?

The possible results of an adverse decision to the defendant are practically beyond calculation. If it has issued fifty thousand passes a year for the two years within the statute, it is not probable that over forty thousand were issued to the excepted classes, leaving at least sixty thousand violations of law. This would subject it to penalties of which the minimum would be sixty millions of dollars and the maximum three hundred millions. It is true that this may not be the result. Solicitors may not prosecute, the Executive may pardon or the Legislature may condone; but with this I have nothing to do. Upon the special verdict rendered in this case, and in view of the exceptional circumstances that force themselves upon our attention, I think that the (1073) defendant should be held not guilty purely upon the ground of intent. This would end the matter, as hereafter there could be no honest mistake. As this Court has now held that free transportation, outside of the excepted classes, is a violation of the act, no matter under what form or device it may be given, the mere performance of the act will hereafter be deemed conclusive evidence of its guilty intent.

I am aware that, in arriving at my conclusions, I have been forced to ignore some of the general rules of judicial construction, but under the exceptional circumstances appealing so strongly to my judgment I do not feel that we should permit the bar sinister of an ironclad rule of interpretation to lie in cold obstruction across the conscience of the Court.

Cited: S. v. R. R., post, 1074; *S. v. R. R.,* 125 N. C., 670; *McNeill v. R. R.,* 132 N. C., 513, 515; *S. c.,* 135 N. C., 720, 735; *S. v. R. R.,* 145 N. C., 550; *S. v. R. R., ibid.,* 573, 575; *Hill v. R. R.,* 143 N. C., 605.

STATE v. RALEIGH AND AUGUSTA AIR LINE RAILROAD CO.

(Decided 24 May, 1898.)

Indictment for Unjust Discrimination in Railroad Rates—Free Passes.

(For syllabus see *State v. Southern Railway Co., ante.*)

C. A. Cooke and W. C. Douglass for the State.
MacRae & Day and J. B. Batchelor for defendant (appellant).

PER CURIAM: The bill of indictment, the special verdict, and the judgment of the court below, except as to the name of the defendant and the

(1074) person in whose favor discrimination was made in the transportation of passengers, are the same as were in the case of *S. v. R. R., ante,* 1052; and for the reasons given in that case the judgment of the court below in this case is

Affirmed.

STATE v. PETER CAMERON.

(Decided 29 March, 1898.)

Indictment for Rape—Appeal—Affirmance of Judgment—Record, Costs of—Neglect of Clerk of Superior Court.

1. Where on the trial of an indictment no testimony objected to by the defendant was admitted and none rejected which he offered, and there was no exception to the charge and no error appears in the record on appeal, the judgment below will be affirmed.

2. Where the clerk of the Superior Court fails to send up as a part of the transcript the drawing and swearing in of the grand jury who found the indictment, he will not be allowed his costs for making and sending up the transcript of the record.

INDICTMENT for rape, alleged to have been committed upon one Lou Cole, tried before *McIver, J.,* and a jury, at September Term, 1896, of CHATHAM.

In the progress of the trial George Cole, a witness for the State and the husband of the prosecutrix, was asked by the solicitor whether or not the prosecutrix, on her return home immediately after the rape was alleged to have been committed upon her, made complaint to him and told him what had occurred. The witness answered that she did. The solicitor then inquired as to the nature of the complaint made.

(1075) The prisoner objected to the question. After some discussion of the point the solicitor withdrew his question and no answer was made thereto by the witness.

The testimony of the State was contradicted by only one witness, and prisoner himself.

The prisoner's counsel asked for no special instruction, but at the conclusion of the testimony requested his Honor not to read over to the jury his notes of the testimony, with which request, the solicitor assenting, his Honor complied. His Honor however stated to the jury the substance of the testimony and the law of rape applicable, and explained the issue upon which the jury were to pass—stated the contentions of

the State and the evidence bearing thereon and the law arising upon the same. He likewise stated the contentions of the prisoner and the evidence favorable to him and the law arising thereon and proceeded to charge the jury fully upon every aspect of the case, cautioning them that they should not convict the prisoner unless, upon the whole evidence, they were fully satisfied beyond a reasonable doubt of his guilt. There were no exceptions to the charge. Verdict of guilty. Motion for new trial overruled and prisoner excepted. Sentence of death was pronounced and prisoner appealed.

Zeb V. Walser, Attorney-General, for the State.
Murchison & Calvert for defendant.

PER CURIAM. The defendant's counsel and the solicitor of the Fifth Judicial District having failed to agree upon a case on appeal, the case was made up by his Honor, *Judge McIver*. No testimony was received against the objection of the defendant and none rejected which he offered in his own behalf. There was no exception to the (1076) charge to the jury. A new trial was moved for and the motion overruled. Judgment was pronounced and the defendant appealed therefrom. There is now no error appearing on the record and the judgment is therefore affirmed.

Because of the failure of the Clerk of the Superior Court to send up, in the first instance, as a part of the transcript of the record, the drawing and the swearing in of the grand jury who found the bill of indictment, the clerk is not to be allowed his costs for the making and sending up the transcript of the record. The omission to send up that part of the record is too grave a matter to be passed over by this Court without notice.

Affirmed.

Cited: S. v. Crook, 132 N. C., 1058.

STATE v. E. F. HANNA.

(Decided 15 March, 1898.)

Criminal Court—Appeal—Jurisdiction.

No appeal lies direct to this Court from a criminal or other inferior court.

INDICTMENT for a criminal offense tried before *Sutton, J.*, and a jury, at July Term, 1897, of NEW HANOVER. The defendant was convicted and appealed direct to this Court.

Zeb V. Walser, Attorney-General, for the State.
John D. Bellamy for defendant.

PER CURIAM. This was an appeal taken direct to this Court from the Eastern Criminal Circuit Court. The appeal should have (1077) been taken in the Superior Court of New Hanover. It has been held at this term in *S. v. Ray, post,* 1097, and *Pate v. R. R., ante* 877, that appeals lie to this Court only from the Superior Courts. Appeal dismissed.

Cited: S. v. Hinson, 123 N. C., 756.

STATE v. H. E. NEWBURY ET AL.

(Decided 22 March, 1898.)

Indictment for Forcible Trespass—Possession.

One cannot be guilty of forcible trespass where the owner of the land is not in actual use and enjoyment of the same, using it for such purpose as it is capable of.

INDICTMENT for forcible trespass, tried before *Allen, J.*, and a jury, at September Term, 1897, of PENDER. The facts are stated in the opinion. The defendants were convicted and appealed.

Zeb V. Walser, Attorney-General, John D. Bellamy, and J. D. Kerr for the State.
Stevens & Beasley and Jones & Boykin for defendants.

MONTGOMERY, J. The motion in arrest of judgment on account of an alleged defective bill of indictment, made by the counsel of the defendants here, for the first time, is supported by a decision of this Court in

S. v. R. R., 109 N. C., 860. The indictment does not follow the forms recommended in works on Criminal Indictments and Precedents but it is in the very words upon which the defendant was tried in the case of *S. v. Buckner,* 61 N. C., 558, and the Court held that to be sufficient. (1078)

But the defendants are entitled to a new trial for error in the charge of the court. His Honor was requested by the counsel of the defendants to instruct the jury that "The offense of forcible trespass is the high-handed invasion of the actual possession of another, he being present forbidding it; the prosecutor must be in the actual possession, that is, actually using the land for such purposes as it is capable of being used, and occupying the same either by himself or tenants, not actually present all the while, but actually using the same by himself or his tenants for such purposes as it is capable of being used; and if the land was not so used at that time, although the prosecutors were present forbidding the entry, the defendants would not in law be guilty of forcible trespass."

The instruction was given, but his Honor in defining actual possession added the words "or exercising such control and authority over it (the land) as allows him to so use it if he chooses." The defendants were entitled to the instruction just as it was asked. It is the high-handed invasion of the actual possession of another, he being present, that constitutes the particular offense known as *forcible entry.* By actual possession, however, it is not meant that the prosecutor shall be actually present all the time, but that he shall be in the actual use and enjoyment of the land for such purposes as it is capable of. The words added by his Honor, "or exercising such control and authority over it as allows him to so use it (that is, actually using it) for such purposes as it is capable of if he chooses," import only *constructive* possession—a possession in law as distinguished from actual possession; that is, just such possession as would be had by the owner in fee of real estate who had never set foot on it. He could be said to have such (1079) control and authority over the land as would allow him to use it if he chose to do so. He claimed it, had title to it, and paid taxes on it. But still his possession could be only constructive.

Such authority and control as would amount to actual possession must be such control and authority as result in having the land cultivated or used for some purpose by his family or servants and not such as will allow him to so use it if he shall choose so to do. *S. v. Bryant,* 103 N. C., 436.

New trial.

Cited: S. v. Conder, 126 N. C., 988.

STATE v. JAMES WOLF.

(Decided 19 April, 1898.)

Indictment for Forgery—Forgery—Intent—Instructions.

1. A fraudulent intent is a necessary ingredient in the offense of forgery.
2. A charge that signing the name of another without authority is forgery, without stating that it must be done with fraudulent intent, is erroneous.

INDICTMENT for forgery, tried before *McIver, J.*, and a jury, at January Term, 1898, of CABARRUS. The indictment was as follows:

"The jurors, etc., present that defendant, etc., did willingly, falsely, and feloniously utter, publish, and show forth in evidence as true a certain other forged, false, and counterfeited instrument in writing, purporting to be a mortgage, etc., as follows: '4 Dec., 1897, I bought a cow from Emma Wolf, and gave her $15, and paid her $6, and gave her a mortgage on the cow for the balance, and she is a little Jersey
(1080) cow with a bob tail; and I cannot write, and I told him what to write, and he did as I told him to do, but I promise to pay her on 10 or 11 December without fail; and I went and looked at the cow for myself, and was satisfied and was willing to take her and pay for her. [Signed by Mr. B. O. Atwell and Mrs. B. O. Atwell by X mark, and by Emma Wolf]'—with intent to defraud, etc., contrary, etc."

The evidence was that the name of the prosecuting witness was Richard O. Atwell. There was evidence tending to show that the defendant's wife, Emma Wolf, on 4 December, 1897, had sold to the prosecuting witness and his wife the cow described above for $15, of which $6 was paid in cash, and the balance of $9 was to be paid on or before 10 or 11 December; that neither the prosecuting witness nor his wife could read or write, and that the prosecuting witness and his wife authorized the defendant to sign for them a duebill for the $9 balance of purchase money; that said paper-writing was written and signed without the knowledge or consent of the prosecuting witness. The court, after giving the definition of "forgery" and reciting the evidence, told the jury "that, if they were satisfied beyond a reasonable doubt that the defendant signed the names of B. O. Atwell and Mrs. B. O. Atwell to the paper-writing purporting to be a mortgage, without being authorized by the prosecuting witness or his wife, they should return verdict of guilty." Verdict of guilty. Judgment. Appeal by defendant.

Zeb V. Walser, Attorney-General, for the State.
W. G. Means for defendant (appellant).

STATE *v.* WOLF.

FAIRCLOTH, C. J. This was an indictment for forgery in signing the names of the prosecuting witnesses to what purports to be (1081) a mortgage without their authority "with intent to defraud," etc. There was evidence that neither the prosecuting witness nor his wife could read or write, and that they both authorized the defendant to sign for them a duebill for the $9 balance of purchase money. The court, after defining forgery and reciting the evidence, told the jury that "if they were satisfied beyond a reasonable doubt that the defendant signed the names of B. O. Atwell and Mrs. B. O. Atwell to the paper-writing purporting to be a mortgage without being authorized by the prosecuting witness or his wife, they should return a verdict of guilty." This charge is erroneous in that it fails to state that if the signing of the mortgage was done "with intent to defraud," etc., then the verdict should be guilty.

The bill charges a fraudulent intent, and that is a necessary ingredient in the offense of forgery. The judge below failed to state the law correctly, and the omission was calculated to mislead the jury. If the court simply omits to give an instruction which it has not been requested to give, perhaps the defendant could not complain; but when the judge undertakes to state the law he must state it correctly, and an omission of an essential ingredient is a *misdescription*. The court must administer the law correctly, and an admission of counsel would not excuse an error in expounding its principles to the jury. *S. v. Austin,* 79 N. C., 624.

The parties were illiterate, and as the defendant was authorized to sign a note for the parties he may have signed the mortgage in good faith. One of the prosecuting witnesses testified: "I told him what to write, and he did as I told him to do." These were matters for the jury under a correct charge of the law in such cases. This (1082) was the only exception relied upon.

New trial.

Cited: S. v. Ridge, 125 N. C., 657; *S. v. McDonald,* 133 N. C., 684; *Jarrett v. Trunk Co.,* 144 N. C., 301.

STATE v. SIMON A. GRAGG.

(Decided 26 May, 1898.)

Indictment for Murder—Trial Sufficiency of Evidence.

When, on the trial of one indicted for murder, it appeared that by the explosion of dynamite under a house two persons sleeping there were killed; that defendant was overseer of a public road and kept dynamite in his possession for use in making the road; that dynamite was also kept and used by other persons in the neighborhood; that defendant had been employed by the deceased M., who had dismissed him, and that they had quarreled about it; that defendant had been unfriendly with the deceased B., of whose attentions to a widow, to whom defendant had been engaged, he was jealous; that he had said if the deceased and the widow should marry they should never live together in this country; that he and B. had "made up" but defendant had said it was only "from the teeth out"; that there were some tracks made by an 8 or 9 shoe on the hillside a few hundred yards from the place of the homicide which was the size of a shoe defendant wore; that the day after the homicide the defendant looked pale and nervous: *Held*, that as the evidence did not exclude every reasonable supposition that it could have been done by some one other than the prisoner, it did not justify the jury in finding a verdict of guilty.

CLARK and MONTGOMERY, JJ., dissent.

INDICTMENT for murder, tried before *Hoke, J.*, and a jury, at June Special Term, 1897, of CALDWELL. The defendant was convicted of murder in the first degree, and appealed. The facts are stated fully in the opinion of *Furches, J.*, and in the dissenting opinion of *Clark, J.*

(1083) *Zeb V. Walser, Attorney-General, and W. C. Newland for the State.*

R. Z. Linney, W. H. Bower, and Edmund Jones for defendant.

FURCHES, J. The evidence tends to establish a horrible murder. This was hardly disputed, though there was evidence offered to show that the deceased Moore had been in possession of dynamite, which he had sometimes used. The evidence tends to show that the deceased Moore and Bowman went to sleep in this world and woke up in eternity; and the question for the jury was one of identity.

There are exceptions to evidence, but they cannot be sustained, and the ruling of the court upon defendant's exceptions as to evidence are based upon principles so often sustained by this Court that we cannot think it profitable to the defendant or the profession to discuss them in this opinion.

There are exceptions to his Honor's charge (which seems to us to have been a fair and correct exposition of the law, provided there was suffi-

cient evidence to authorize him in submitting the case to the jury, and to justify them in finding a verdict of guilty). The prisoner contended there was not, and asked the court to so instruct the jury. This his Honor declined to do, and this is the real question presented by this appeal.

It is contended for the State that there is some evidence of defendant's guilt, and this being so, it takes the case to the jury, and that this Court cannot correct their verdict; and cites *S. v. Allen,* 48 N. C., 257, and a number of other cases, which the Attorney-General contends sustain this contention. If the first proposition is true, that there is sufficient evidence to authorize the finding of the jury, then the second proposition would be certainly true—that this Court cannot review (1084) their finding.

But this is the question in the case that we are called upon to decide: whether there is sufficient evidence to go to the jury and to justify their finding. This question is often embarrassing to the courts, and probably gives them as much trouble as any question that comes before them; and with that disposition that is in all persons to avoid responsibility, it is but natural that it should sometimes be left to the jury when it should be decided by the judge. And it is considered best in questions of very great doubt that it should be left to the jury.

This makes it necessary that we should review the testimony to see what evidence there is connecting the defendant with the *corpus delicti.* In doing this we do not expect to quote the testimony (though we have carefully examined it all) but only to call attention to those parts bearing most strongly against the prisoner.

There was evidence offered by the State tending to show that the prisoner lived a mile and a half from the place of the homicide; that he was a well-to-do man, was overseer of the public road, and had been and was at that time in possession of dynamite which he used in making the road. "There was also evidence that dynamite was had by other persons in the community, and used by them for fishing . . . blasting, and other purposes"; that he had at one time been in the employ of the deceased, who dismissed the prisoner from his employ, and that the prisoner and the deceased Moore had a quarrel about the matter; that the prisoner and the deceased Bowman had been unfriendly; that prisoner had courted a widow Benfield who had discarded him because, as prisoner thought, she preferred Bowman as a suitor (1085) to the prisoner; and that prisoner had said if she and Bowman did marry they should never live together in this country; that prisoner and deceased had made friends, but prisoner after this said it was "only from the teeth out"; that there were some tracks made by an 8 or 9 shoe on a hillside a few hundred yards from the place of the homicide, and

that prisoner wore an 8 or 9 shoe; that prisoner was seen plowing in a field unusually early next morning, in about a half mile of the place where the men were killed, and that prisoner next day looked pale and nervous. The prisoner introduced no evidence.

This is substantially all the evidence in the case, and all as we think that tends to connect the prisoner with the homicide, if this tends to do so. It cannot be denied that this evidence was sufficient to cast suspicion on the prisoner. But does it do more than this? There was no evidence of any confession or declarations amounting to confessions. There was no evidence shown or tending to show that the prisoner was nearer the place of the homicide than his home, one and a half miles off. The shoe tracks found on the hillside not far off were no evidence connecting the prisoner with the killing, as there was no peculiarity shown about the tracks or the prisoner's shoes. No. 8 or 9 is the ordinary number that men wear. Threats may be offered to show malice for the purpose of fixing the degree of crime, and may be competent, as some evidence, tending to prove identity. But for this purpose it was very slight evidence, if any. The rule is, not that there is some evidence, a scintilla, but that it must be such as would reasonably justify the verdict. *Wittkowsky v. Wasson,* 71 N. C., 451; *Spruill v. Ins. Co.,* 120 N. C., (1086) 141; *Caldwell v. Wilson,* 121 N. C., 423.

The court, among other things, charged the jury as follows: "No eyewitness has testified that he saw the prisoner do this deed. The State relies on facts and circumstances which it claims establish the guilt of the prisoner. When such evidence is relied on for conviction, every material and necessary circumstance must be established beyond a reasonable doubt, and the entire circumstance so established must be so strong as to exclude every reasonable supposition but that of guilt." This was a "clear-cut" charge and a correct statement of the law. But can any reasonable man, unbiased and without prejudice, say that the evidence in this case, taking everything proved to be true (and that is the light in which it must be considered by this Court), excludes every reasonable supposition that it could have been done by some one other than the prisoner? Without discussing the matter further, the statement of this proposition of law, correctly given to the jury, we think affords the answer to all intelligent minds, when coolly and deliberately considered, in the negative.

This we say without intending any reflection on the integrity of the jury that tried the case. It was a shocking affair. There was evidence throwing suspicion on the prisoner. He introduced no evidence—did not go on the witness stand and deny the charge. And while the law

says he need not do this, and that his not doing so shall not be considered against him, it is impossible to prevent it from having its effect upon the jury. In our opinion it had it in this case.

In our opinion there was not such evidence of the prisoner's guilt as to justify the jury in finding a verdict of guilty. Another trial may develop other evidence. Error. (1087)

New trial.

CLARK, J., dissenting. A jury is the constitutional mode provided for the trial of facts, and juries are composed of twelve men, not of thirteen. It is not for the judge to refuse to let a cause go to the jury unless the evidence is sufficient in his mind (sitting as a juror) to convict. If it were, then the fact that the judge submits a case to the jury at all becomes the strongest kind of an intimation that in his opinion the jury should convict. *S. v. Green,* 117 N. C., 695; *S. v. Kiger,* 115 N. C., 746; *S. v. Christmas,* 101 N. C., 749. If after a verdict of guilty the judge thinks, notwithstanding the respect which is due to the unanimous opinion of twelve impartial men, that the interest of justice demand a new trial, he is vested with the discretion to grant it. But this is very different from holding as a matter of law that there is no evidence to go to the jury, and a very different matter from this Court, out of sight and hearing of the witnesses and surroundings of the trial, holding as a matter of law that there was no evidence to go to the jury, when the jury found that there was sufficient to find the prisoner guilty, and a learned and just judge has not only held as a proposition of law that there was enough evidence to go to the jury, but had so little doubt about its weight that he refused as a matter of discretion to set the verdict aside. Besides it must be remembered that on the trial below the presumption is in favor of the innocence of the prisoner, which must be overcome, by proof satisfying the jury beyond a reasonable doubt, but on appeal there is no such presumption of fact, but on the contrary there is a presumption of law that the judge below ruled correctly, and, unless this is overcome or if the Court is in doubt, his judgment must stand. There have been cases where there was no evidence sufficient (1088) to submit the case to the jury, but when the judge has held otherwise and the jury has convicted, and the judge has refused even as a matter of discretion to set the verdict aside, it must be a very bald case that should constrain a court of appeals to hold that jury convicted and the judge sustained the verdict without any evidence. If the evidence is merely such that this Court, sitting as jurors, would not have convicted, we are not authorized to interfere. To do so would be to invade the province of the jury and of the judge below as well, all of whom are presumed competent and impartial in the discharge of the

duties confided to them by the Constitution and laws. We only correct errors of law, we have no authority to correct a finding of fact by a jury. Now, was there an entire absence of evidence in this case, "nothing beyond a mere scintilla?"

It was in evidence that on 4 June, 1896, at a shanty at a sawmill in Caldwell County, Walter Moore and Dallas Bowman were killed by an explosion of dynamite which had been placed under that part of the shanty where stood the bed in which the deceased slept. As a rule, no other persons remained in the mill yard at night, except these two. The mill was to have been removed the next day. There was evidence that there was no dynamite in the shanty or about it on the day of the explosion, and none in the possession or control of the deceased; that the prisoner, Simon Gragg, lived in a house about three-fourths of a mile through the woods from the shanty and a mile and a half from it, going round the public road; the prisoner was overseer of the public road, and just prior to the explosion admitted having 32 or 33 joints of dynamite; he had used dynamite frequently and knew how to use it; the (1089) sheriff searched his house soon after the explosion and found only 25 joints of dynamite. A witness testified that on the night after the explosion he was at the prisoner's house and heard his brother Tom ask him whom he had been letting have dynamite, and the prisoner replied, "No one"; and Tom said that the day of the explosion he had seen 5 or 6 joints out of the box, lying near it, with a fuse and cap on one of the joints. The evidence was that the prisoner kept his dynamite under his bed. There was evidence that the prisoner and Walter Moore, one of the deceased, had quarreled a few months before and were heard to curse each other a short time before the explosion; that Dallas Bowman, the other deceased, had come into the neighborhood a few months before; that a deep enmity sprung up between the prisoner and Bowman, and that the prisoner was engaged to be married to a widow in the neighborhood but he became so jealous of Bowman that she discarded him, and the prisoner said that if she put him off on account of Bowman she should never live with him in this country; that about ten days before the explosion the prisoner asked Betty Baird about the relations between the widow and Bowman, and said if "Alice quit him for Bowman there would be the damnedest time this country ever knew"; that on the Monday just before the killing he was inquiring where Bowman boarded; that the mill was on the prisoner's land, and he had stipulated when allowing it to be put there that Bowman should be employed there. Two or three months before the killing he had waited along the road for Bowman and inquired if he were coming. It was also in evidence that between the prisoner's house and the mill a recent track was discovered leading through the woods from the house in the direction of the

mill, with occasional impressions, especially distinct on a log (1090) about 100 feet long; the track was a shoe No. 8 or 9, the size the prisoner wore. Some witnesses testified that the conduct of the prisoner on the ground the day after the killing was peculiar, and calculated to arouse suspicion; he was pale, preoccupied, and stood apart from others. When the sheriff and witness started through the woods to look for tracks, the prisoner said they need not do that, for the man who did this was smart enough to cover up his tracks, and to another he said that the man who did this came around the road. The morning after the explosion he was plowing in a conspicuous place on the roadside, before sunup, about a mile from his house, which was a very unusual time for him to be at work. There was evidence that going to the mill soon after being told of the explosion he was so agitated that he had to stop once or twice, and said he did not believe he would be able to go there. There was some evidence contradictory of his bearing at the house after the explosion, but in considering whether there is any evidence it is only necessary to consider that against the prisoner. There was no evidence offered for the defense.

If this case could be submitted to this Court as a jury upon this evidence, we should be at a great disadvantage, compared to the jury and judge who tried it, in that we have not had the presence and bearing of the witness upon the stand, the knowledge of witnesses, and the surroundings which the jury had, nor the same argument of counsel. The reproduction of evidence upon paper is a poor substitute. But it is not for us to say whether upon this evidence, if sitting as jurors, we would convict. We have no such power. Nor is it for us to say whether, sitting as a trial judge, we would not have granted a new trial as a (1091) matter of discretion. That power and duty are confided to him, and not reviewable. The sole power confided to us is to declare as a proposition of law that the presumption of the correctness of the ruling below is overcome and that there was plainly no evidence to be submitted to a jury. There was motive, strong motive, and bitter threats shown, the killing by dynamite, the fact that the prisoner had dynamite and seven pieces in his possession disappeared just at the time of the killing, and he made no effort to account for it, the recently made track leading from his house through the woods to the place of the homicide, a shorter way than around the road, and that the track was the size of the prisoner's, and the remarks of the prisoner to discourage hunting for the tracks, and his agitation. No one was sufficient, but taken together the whole was enough evidence to be submitted to the jury.

That these circumstances could not be declared on appeal no evidence would seem plain. Whether they were sufficient evidence was for the jury. There are many cases in which this Court has refused to hold less

evidence than this to be no evidence. *S. v. Green,* 117 N. C., 695; *Young v. Alford,* 118 N. C., 215; *S. v. Kiger,* 115 N. C., 746; *S. v. Chancy,* 110 N. C., 507; *S. v. Christmas,* 101 N. C., 749; *S. v. Powell,* 94 N. C., 965; *S. v. Atkinson,* 93 N. C., 519; *S. v. White,* 89 N. C., 462; *Brown v. Kinsey,* 81 N. C., 245; *S. v. Waller,* 80 N. C., 401; *S. v. Patterson,* 78 N. C., 470; *S. v. Allen,* 48 N. C., 257; *Sutton v. Madre,* 47 N. C., 320; *Cobb v. Fogelman,* 23 N. C., 440, and many others.

The institution of the jury has been preserved from encroach-
(1092) ment at this term by many decisions upon the application of chapter 109, Laws 1897. This is an encroachment upon its prerogative upon the criminal side, but not less to be deplored upon that account.

MONTGOMERY, J. I concur in the dissenting opinion.

Cited: Webb v. Atkinson, 124 N. C., 453; *S. v. Rhyne, ibid.,* 852; *S. v. Truesdale,* 125 N. C., 698; *S. v. Vaughan,* 129 N. C., 507; *S. v. Foster,* 130 N. C., 670.

STATE v. J. G. HORD.

(Decided 26 April, 1898.)

Violation of Town Ordinance—Discrimination—Nuisance.

1. A nuisance is to the public or to others, and not an injury or annoyance which a person causes to himself and family.
2. Under the statute (section 3802) of The Code, as well as at common law, the commissioners of a town can prohibit the keeping of hog-pens in a town to such an extent as to protect the public from nuisances, and of the limits necessary to be prescribed they are the sole judges unless the ordinance made for the purpose be unreasonable.
3. A town ordinance is not void for discrimination which prohibits a citizen from keeping hog-pens within 100 yards of the residence of another but does not prohibit him from keeping them within like distance from his own.

ACTION for the violation of the ordinance of the town of King's Mountain, tried before *Hoke, J.,* and a jury at Fall Term, 1897, of CLEVELAND, on appeal from a judgment of the mayor of said town.

The ordinance in question was as follows:

"Any person who shall keep a hogpen with a hog therein within one hundred yards of another's dwelling, storehouse, or well, shall pay a fine of five dollars for each day such pen with a hog therein is so kept; and

if any person shall keep a hog within one hundred yards of (1093) another's dwelling, storehouse, or well, such person so offending shall be fined five dollars for each day the hog is so kept, unless such hog shall be at large in field or inclosure, containing at least two acres."

The defendant introduced no evidence, but admitted that he had kept the hog at the date mentioned in an inclosure less than two acres within the town of King's Mountain, and within three hundred feet of the dwelling mentioned in the complaint, but contended that said ordinance was in violation of the Constitution, was unreasonable in its terms, not uniform, and beyond the power of the town authorities to make. The population of King's Mountain is agreed to be seven hundred.

Section 4 of the charter of the town is as follows: "The commissioners of the town shall have power to pass all by-laws, rules and regulations for the good government of the said town not inconsistent with the laws of the State or of the United States."

Upon considering the case, his Honor instructed the jury that if they believed the evidence they should find the defendant guilty. The jury returned a verdict of guilty. There was a motion for a new trial for error committed by his Honor in instructing the jury that if they believed the evidence they should find the defendant guilty. The motion was overruled, and defendant excepted and appealed.

Zeb V. Walser, Attorney-General, and E. Y. Webb for the State.
Jones & Tillett and Osborne, Maxwell & Keerans for defendant.

CLARK, J. The Code, sec. 3802, confers on every town and (1094) city the power "to pass laws for abolishing or preventing nuisances, for preserving the health of the citizens." Under such authority the board of town commissioners could forbid the keeping of hogpens in the town to such an extent as they might deem necessary to prevent nuisances to the public, and, indeed, they could have done so without this express authority. 2 Kent. Com., 340; 1 Dillon Mun. Corp. (4 Ed.), sec. 369. In a thickly settled town the town ordinances usually forbid the keeping of hogpens altogether, not because they may be injurious to the owner of the hogs but because they are nuisances to the public. In a less thickly settled town, as King's Mountain, a prohibition of hogpens within one hundred yards of another's dwelling may be a sufficient protection against a nuisance to the public; of that the commissioners, the local legislature, are the sole judges (*Hill v. Charlotte,* 72 N. C., 55), unless their ordinance is unreasonable. In the more thickly settled parts of the town the prohibition of a hogpen within one hundred yards of the residence of another will be a prohibition of keeping hogpens altogether. The object of the ordinance is not to prevent a man from injuring him-

self by keeping his hogpen too near his own house, for that is a matter he can remedy at will, but to protect the public against a nuisance which they have no power to prevent except through the authority of a town ordinance acting on the offender.

A nuisance is to the public, or to others, and not an injury or annoyance which a person causes to himself and family. It is an anomaly that the defendant, who has disobeyed the ordinance forbidding him to commit a nuisance upon the public, should be complaining that the town did not go further and forbid him being a nuisance to himself. He could refrain from that without official help.

(1095) There is no discrimination in this ordinance, for it forbids all citizens alike from keeping hogpens within one hundred yards of the residence of another. The learned counsel of the defendant, however, frankly admitted that it is not every discrimination which would make a town ordinance invalid and that this would be the case only when the discrimination is an unreasonable one. *S. v. Call,* 121 N. C., 643 (at page 648); *Slaughter House cases,* 83 U. S., 36.

No error.

Cited: S. v. Hill, 126 N. C., 1144, 1148; *S. v. Rice,* 158 N. C., 638; *S. v. Bass,* 171 N. C., 783, 784, 785.

STATE v. JESSE RAY.

(Decided 11 May, 1898.)

Criminal Action—Witness Fees—Discretion of Court.

It is within the discretion of the trial court (under section 733 of The Code) to refuse to make an order for the payment by the county of the fees of witnesses for a defendant acquitted of a criminal charge, where no prosecutor is marked, and the exercise of such discretion is not reviewable.

INDICTMENT for assault and battery, before *Greene, J.,* at January Term, 1898, of UNION. The defendant was acquitted by the jury. There was no prosecutor in the case and no person adjudged to pay the costs as prosecutor.

After the acquittal of defendant it was made to appear to the court by a certificate of Adams & Jerome, counsel for the defendant, that the defendant had witnesses (seventeen in number) duly subpœnaed, and that said witnesses were in attendance and were necessary for the defense of defendant. Said counsel also prepared and presented to the

court an order directing that said witnesses be paid by the (1096) county in such manner and to such extent as is authorized by law for the payment of State witnesses in like cases, but upon reading and considering said certificate and order the court refused to sign the same.

The court found the following facts:

1. That the certificate and order made by defendant's counsel were in compliance with the requirements of the statute and in proper form.

2. That Jordan Collins and Nannie Rogers and five others were witnesses for the defendant on the trial of an indictment for assault and battery, and that the defendant was acquitted by the jury.

3. That Jordan Collins and Nannie Rogers were duly subpœnaed as witnesses for the defendant, were in attendance and examined as witnesses on the trial, and were necessary witnesses for the defense of the defendant, and they attended as such witnesses two days, and have proven and filed their witness tickets with the clerk.

Thereupon the court held as a matter of law that the court had the discretion to refuse to make and file an order in the cause directing that the witnesses be paid by the county, and the court exercised such discretion and refused to sign said order, and defendant excepted.

Said counsel also appeared as counsel for the witnesses, and asked in their behalf that the court make an order directing that they be paid by the county. The court again refused to make such order, and the witnesses excepted.

The defendant and said witnesses, Jordan Collins and Nannie Rogers, excepted to the refusal of the court to make an order directing that the county pay said witnesses, and appealed, assigning such (1097) refusal as error.

Zeb V. Walser, Attorney-General, for the State.
No counsel contra.

FAIRCLOTH, C. J. The defendant was indicted, tried, and acquitted of the charge of an assault and battery. There was no prosecutor and no person adjudged to pay the costs as prosecutor.

The defendant prayed the judge for an order directing that defendant's witnesses be paid by the county. His Honor, in the exercise of his discretion, refused to make such an order. The exercise of such discretion is not reviewable in this Court. The question is fully considered in *S. v. Massey,* 104 N. C., 877. This discretion is expressly conferred on the court by The Code, 733.

Affirmed.

Cited: S. v. Hicks, 124 N. C., 832, 835, 838.

STATE v. BENNIE RAY.

(Decided 22 February, 1898.)

Courts—Superior and Inferior Courts—Appeal—Jurisdiction—Constitutional Law.

1. Appeals can come to this Court only through the Superior Courts; and hence, section 5 of chapter 75, Acts of 1895, providing that appeals lie from a circuit criminal court, established by that act, direct to this Court is in derogation of the constitutional provisions in regard to the Superior Courts.

2. Where an appeal is improvidently taken from an inferior court direct to this Court, it will be dismissed and the appellant will be remitted to his right to *certiorari* from the Superior Court and to an appeal from the latter if said appeal becomes necessary and desirable.

(1098) INDICTMENT for keeping a bawdy house, tried before *Ewart, J.*, at July Term, 1897, of the Circuit Criminal Court for BUNCOMBE. The court was asked to charge the jury that the Criminal Circuit Court had no jurisdiction of his case for the reason that the Legislature, at its session of 1895, had given the jurisdiction of the offense charged in the indictment to the mayor of the city of Asheville, it appearing in the proof offered by the State that the offense, if any offense had been committed, was committed in Asheville. This instruction was refused. There was a verdict of guilty; motion in arrest of judgment on the ground that the court could not proceed to judgment for want of jurisdiction. Motion overruled. The judgment of the court was that the defendant be confined in the common jail of Buncombe for six months, and the defendant appealed.

Zeb V. Walser, Attorney-General, for the State.
F. A. Sondley and E. D. Carter for defendant.

CLARK, J. Section 3, chapter 75, Laws 1895 (by which act the Criminal Circuit Court of Buncombe, Madison, Haywood, and Henderson counties was created) confers upon said court (1) exclusive original jurisdiction of all crimes, misdemeanors, and offenses committed within the counties composing said districts, fully and to the same extent as the Superior Courts of the State, and (2) exclusive appellate jurisdiction of all offenses tried and determined before a justice of the peace in said counties. In *Rhyne v. Lipscombe, ante,* 650, we have held the first provision to be within the purview of section 12, Article IV, of the Constitution, but the second provision was held void, being in con-
(1099) flict with section 27 of the same article which provides that the

appeal lies from justices of the peace in both civil and criminal actions to the Superior Court of the county. Section 5 of said chapter 75 provides that appeals lie from said criminal court direct to this Court, but in the case just cited we have felt constrained to hold that this is in derogation of the constitutional provisions in regard to the Superior Courts from which alone appeals lie to this Court. While the power of this Legislature to create such courts has been sustained (*S. v. Jones,* 97 N. C., 469; *Ewart v. Jones,* 116 N. C., 570), the right of a direct appeal from such courts to this Court has not before this term been ruled upon. The appeal having been improvidently taken, must be dismissed. The appellant will take his appeal by *certiorari* or otherwise, as he may be advised, to the Superior Court of Buncombe County, and from the judgment of that court, should it be adverse to him, an appeal can be prosecuted, should he so desire to this Court.

Appeal dismissed.

Cited: Malloy v. Fayetteville, ante, 482; *Pate v. R. R., ante,* 879; *S. v. Hanna, post,* 1077; *S. v. Rumbough, post,* 1104; *S. v. Potsell, post,* 1105; *S. v. Hinson,* 123 N. C., 756; *Mott v. Comrs.,* 126 N. C., 876, 877, 881.

(1100)

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

No. 15. *D. S. Lidden v. T. H. B. Myers;* from Beaufort. Appeal by defendant. Mr. J. H. Small for plaintiff, Mr. W. B. Rodman for defendant.

PER CURIAM: Affirmed 26 April, 1898.

No. 27. *Matilda Lester v. Norfolk and Southern Railway Company;* from Dare. Appeal by plaintiff. Messrs. Shepherd & Busbee for defendant.

PER CURIAM: Affirmed 11 May, 1898.

No. 41. *State v. M. S. Pegram;* from Warren. Appeal by defendant. Attorney-General Zeb V. Walser for State, Messrs. Cook & Green for defendant. Appeal dismissed by consent, 15 February, 1898.

No. 70. *J. T. Gooch, Administrator, v. J. D. Boone, Trustee, et al.;* from Northampton. Appeal by plaintiff.

PER CURIAM: Dismissed under Rule 17, 15 February, 1898.

No. 102. *W. B. Wilson v. Farmers and Traders National Bank et al.;* from Pitt. Appeal by defendants. Messrs. Harding & Harding for defendants.

(1101) PER CURIAM: Affirmed 22 February, 1898.

No. 104. *Emily Norris, Administratrix, v. Wilmington and Weldon Railroad Company;* from Pitt. Appeal by defendant. Messrs. Bond & Fleming for plaintiff; Messrs. John L. Bridgers, R. O. Burton, and B. M. Gatling for defendant.

PER CURIAM: Judgment affirmed 23 February, 1898.

No. 141. *Frank W. Moseley v. John W. Cross;* from Wake. Appeal by plaintiff.

PER CURIAM: Judgment affirmed 2 March, 1898.

No. 142. *Alice A. Shaffer v. Donna M. Bledsoe;* from Wake. Appeal by defendant. Mr. W. N. Jones for plaintiff; Mr. M. A. Bledsoe for defendant.

PER CURIAM: Judgment affirmed 2 March, 1898.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

No. 145. *William Smith v. B. F. Montague;* from Wake. Appeal by plaintiff. Mr. M. A. Bledsoe for plaintiff; Messrs. Jones & Boykin for defendant.

PER CURIAM: Action dismissed 2 March, 1898, on motion of defendant on the ground that complaint does not state a cause of action.

No. 146. *M. H. Blake v. D. C. Blake et al.;* from Wake. Appeal by defendant. Mr. J. H. Fleming for plaintiff; Mr. M. A. Bledsoe for defendant.

PER CURIAM: Appeal dismissed 2 March, 1898.

No. 159. *Moses A. Bledsoe v. Alice A. Shaffer;* from Wake. Appeal by plaintiff. Mr. M. A. Bledsoe for plaintiff, Mr. W. N. Jones for defendant.

PER CURIAM: Judgment affirmed 11 May, 1898.

No. 180 "a." *Whitney Glass Works v. Paul Sneed;* from (1102) Durham. Appeal by defendant. Messrs. Graham, Green & Graham for plaintiff.

PER CURIAM: Dismissed under Rule 17, 9 March, 1898.

No. 186. *Mary E. Wagner v. W. H. Herbin;* from Guilford. Appeal by defendant. Mr. L. M. Scott for plaintiff, Mr. John A. Barringer for defendant.

PER CURIAM: Judgment affirmed 24 March, 1898.

No. 201. *L. L. Hendren v. J. W. Alspaugh et al.;* from Guilford. Appeal by defendant. Messrs. J. A. Barringer and L. M. Scott for plaintiff, Mr. C. M. Stedman for defendant.

PER CURIAM: Judgment affirmed 13 May, 1898.

No. 207. *J. W. Scott & Co. v. B. L. Duke et al.;* from Guilford. Appeal by plaintiff. Messrs. R. R. King and Jno. N. Wilson for plaintiffs, Messrs. Winston & Fuller for defendants.

PER CURIAM: Judgment affirmed 12 May, 1898, *Douglas, J.,* dissenting.

No. 210. *State v. E. F. Hanna;* from New Hanover. Appeal by defendant. Zeb V. Walser, Attorney-General, and Mr. Brown Shepherd for the State, Mr. Jno. D. Bellamy for defendant.

PER CURIAM: Dismissed 15 March, 1898.

Cited: S. v. Hinson, 123 N. C., 756. (1103)

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

No. 224. *Lewis Cox v. Chas. F. Dunn;* from Lenoir. Appeal by defendant. Mr. George Rountree for plaintiff, Messrs. Jones & Boykin for defendant.

PER CURIAM: Judgment affirmed 22 March, 1898.

No. 225. *Metta H. Hullen v. City of Wilmington;* from New Hanover. Appeal by defendant. Mr. J. D. Bellamy for plaintiff, Messrs. Ricaud & Bryan for defendant.

PER CURIAM: Judgment affirmed 22 March, 1898.

No. 229. *Kellam & Moore v. Isaac Brown;* from Duplin. Appeal by plaintiffs. Messrs. Jones & Boykin and A. C. Davis for plaintiffs, Messrs. Stevens & Beasley for defendant.

PER CURIAM: Judgment affirmed 22 March, 1898.

No. 258. *F. M. Sorrell, Executor, v. J. M. Stinson et al.;* from Moore. Appeal by defendant. Messrs. Douglass & Spencer and Black & Adams for plaintiff, Messrs. Womack & Hayes, A. P. Gilbert, and W. E. Murchison for defendants.

PER CURIAM: Appeal dismissed 23 March, 1898.

No. 267. *New Home Sewing Machine Company v. B. F. Thomas;* from Monroe. Appeal by defendant. Messrs. W. C. Douglass and Seawell & Burns for plaintiff, Mr. W. E. Murchison for defendant.

PER CURIAM: Dismissed 22 March, 1898, under Rule for failure to print the record.

(1104) No. 291. *J. L. Hartsell v. W. C. Coleman et al.;* from Cabarrus. Appeal by defendant. Messrs. Montgomery & Crowell for plaintiff, Mr. W. G. Means for defendants.

PER CURIAM: Judgment affirmed 25 March, 1898.

No. 339. *Susan M. Fulp, Administratrix, v. Roanoke and Southern Railroad Company;* from Forsyth. Appeal by plaintiff. Messrs. Watson, Buxton & Watson for defendant.

PER CURIAM: Judgment affirmed 5 April, 1898.

No. 401. *C. V. Henkel v. Pullman Palace Car Company;* from Caldwell. Appeal by defendant. Mr. Edmund Jones for plaintiff.

PER CURIAM: Dismissed 15 April, 1898, under Rule 17.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

No. 404. *John A. Teeter v. A. W. Heath et al.;* from Stanly. Appeal by plaintiff. Mr. J. M. Brown for plaintiff, Messrs. S. J. Pemberton and T. J. Jerome for defendants.

PER CURIAM: Judgment affirmed 25 March, 1898.

No. 442. *State v. H. T. Rumbough;* from Madison. Appeal by defendant. Mr. Zeb V. Walser, Attorney-General, and Mr. J. M. Gudger for plaintiff, Mr. E. C. Smith for defendant.

PER CURIAM: Appeal dismissed 26 April, 1898, under ruling in *S. v. Ray* (Bennie), *ante,* 1097.

Cited: Mott v. Comrs., 126 N. C., 881; *S. c.,* 126 N. C., 881.

No. 443. *State v. W. J. Potsell;* from Buncombe. Appeal by (1105) defendant. Mr. Zeb V. Walser, Attorney-General, for plaintiff, Mr. H. B. Stevens for defendant.

PER CURIAM: Appeal dismissed 26 April, 1898, under ruling in *S. v. Ray* (Bennie), *ante,* 1097.

Cited: Mott v. Comrs., 126 N. C., 881.

No. 456. *D. W. Allen v. F. M. Hammond;* from Madison. Appeal by plaintiff. Mr. J. M. Gudger for defendant.

PER CURIAM: Dismissed 28 April, 1898, for defective record.

Cited: Finch v. Strickland, 130 N. C., 46.

No. 468. *J. H. Clontz v. J. J. Simonds;* from Cherokee. Appeal by defendant. Mr. J. W. Cooper for defendant.

PER CURIAM: Judgment affirmed May 11, 1898.

No. 489. *E. Everett et al v. J. F. Shuffler;* from Swain. Appeal by plaintiff. Mr. G. S. Ferguson for plaintiff.

PER CURIAM: Judgment affirmed 3 May, 1898.

No. 495. *W. L. Henry v. W. L. Hilliard et al.;* from Haywood. Appeal by defendant. Mr. T. H. Cobb for defendant.

PER CURIAM: Motion under Rule 31, allowed 3 May, 1898.

No. 499. *B. P. Chatfield v. W. W. Stringfield et al.;* from Haywood. Appeal by plaintiff. Mr. H. R. Ferguson for defendants.

PER CURIAM: Dismissed 27 April, 1898, under Rule 17.

APPENDIX

REMARKS OF MR. WILLIAM H. DAY IN PRESENTING THE PORTRAIT OF JUDGE BYNUM, 19 FEBRUARY, 1898

MAY IT PLEASE YOUR HONORS:

I have been requested by the Hon. Wm. P. Bynum, an ex-member of this Court, to present to you his portrait.

To me, for personal reasons, it is a pleasure; and I feel, in doing this, I am assisting in handing down to those who shall follow us here the features of a great jurist and a good man.

Had Judge Bynum lived during the period of our Revolution he would have been of the few who shaped and moulded government. Living in these days of banalities he, by his life, gives expression to the highest anticipation of the fathers.

Strong, virile, earnest, in his manliness, in his power!

These great attributes will leave upon coming generations the impress of this man. No influence can be exerted upon the life of another but by those who have a real life of their own. All other men are imitators. Judge Bynum is too original and sincere for this. He stands for himself: sometimes isolated, always erect. He was courageous enough, in 1865, to wring himself away from the baneful prejudices of 1861—a strength vouchsafed to but few men of those titanic days.

In her army, in her legislative halls, upon her bench, he has served North Carolina well.

Called to this Court in 1873, he at once commanded the respect and
(1107) then the admiration of the legal profession, through it, that of our entire people!

His dissenting opinion in the *S. v. Blalock* rang out upon our profession like a tocsin in the dark; its clear tones aroused them to a full appreciation of their rights. So true was its vibrant ring, the next succeeding Legislature unanimously enacted it to be the law.

In *S. v. Turpin* (77 N. C., 473) his clear sympathetic reasoning exorcised from our State the last ghost of common-law brutality.

In his opinion in *S. v. Richmond and Danville R. R. Co.* (73 N. C., 640), with the keen foresight of a genuine seer he foretold the result upon our liberties of the aggregation of corporate power. Said he: "The rapid multiplication of these bodies, their resources and far-reaching ambition, their ubiquity and vast combinations, all moved and directed by concentrated power and talent, constitute them a distinct and almost independent overshadowing power in our Government, and, in fact, the great social and political problem of the age. Whether they shall control governments or governments shall control them are questions that are forcing themselves upon public attention and fast assuming practical importance. They should and will be maintained in the exercise of all their essential and legitimate powers, as necessary and useful institutions of modern civilization. But if, in addition to the dangerous power of transferring all of their property and franchises to anybody anywhere, it should also be held that their corporate powers are such contracts as puts them beyond the reach of all legislative check or control, then

the problem will have been solved. But government, in my opinion, will have abdicated its sovereignty, heretofore supposed inalienable, and society will be without protection against chartered irresponsibility.

When these words were uttered, many called them wild; a few (1108) called them wise. Today every thinking man shudders to know that these truths fell upon deaf ears. Had this timely warning been his only life's work, it would not be flattery to say his services to the State had been great. I claim no North Carolinian is entitled more to this praise.

His opinion contained in our Reports, from Volume 70 to 79, rank him easily by the side of the greatest judges who have ever adorned your bench, and who have helped to make Anglo-Saxon law synonymous with human liberty.

Judge Bynum is the best misunderstood man in North Carolina. He will not be fully appreciated until we have lost him and he shall have joined the "silent majority." Then, not till then, will the unostentatious charity of his life be known—a charity "as broad and genial as the casing air."

But, your Honors, I am reminded I speak of a living man; in doing this I must not be as frank and candid as when speaking of the dead. So I leave unsaid today many things that will be said of him hereafter, all in his praise.

FAIRCLOTH, C. J., in reply for the Court, said:

The Court receives the portrait of Judge Bynum with pleasure, and tenders its thanks to the donor. The clerk will make a record of these proceedings and cause the portrait to be suspended in an appropriate place.

APPENDIX NO. 2

WILSON v. NORTH CAROLINA.

(In the United States Supreme Court.)

Error to the Supreme Court of North Carolina.

No. 558. Submitted 17 January, 1898—Decided 21 March, 1898.

(169 U. S., 586.)

1. Chapter 320 of the Laws of North Carolina of 1891 was a valid law, and the action of the Governor of the State under it in suspending the plaintiff in error as railroad commissioner, appointed under it, was, as construed by the Supreme Court of that State, a valid exercise of the power conferred upon the Governor by that act, and was due process of law within the meaning of the Constitution.

2. The Federal question which is attempted to be raised in this case is unfounded in substance, and does not really exist.

3. The judgment of the State court in this case operated of itself to remove the plaintiff in error from the office of railroad commissioner, and there is no foundation in the evidence for the allegation that his successor knew of the filing of the supersedeas bond when he took possession of the office, or was guilty of contempt in doing so.

(The decision of the Supreme Court of North Carolina, from which the writ of error was taken to the Supreme Court of the United States, together with a statement of the facts involved, is reported in 121 N. C., 425, in the case entitled State on the relation of *L. C. Caldwell v. James W. Wilson.* See, also, 121 N. C., 480. In the Supreme Court of the United States two motions were made, one to dismiss the writ of error and the other to punish the defendant as for contempt. REPORTER.)

(1110) *R. O. Burton for plaintiff in error.*
James C. MacRae, W. H. Day, and A. C. Avery for defendant in error.

MR. JUSTICE PECKHAM, after reciting the case, delivered the opinion of the Court on the motion to dismiss:

A consideration of the facts convinces us that the motion to dismiss this writ of error for lack of jurisdiction ought to be granted.

Under the statute of 1891, creating the railroad commission and providing for the appointment, suspension, and removal of the officers of such commission, the act of the Governor in suspending the plaintiff in error was not a finality. Before there could be any removal the fact of suspension was to be reported to the next Legislature by the Governor, and unless that body removed the officer the effect was to reinstate him in office, and he then became entitled to the salary during the time of his suspension.

In speaking of the statute and the purpose of this particular provision the Supreme Court of the State said: "The duty of suspension was imposed upon the Governor from the highest motives of public policy to prevent the danger to the public interests which might arise from leaving such great powers and

responsibilities in the hands of men legally disqualified. To leave them in full charge of their office until the next biennial session of the Legislature, or pending litigation which might be continued for years, would destroy the very object of the law. As the Governor was, therefore, by the very letter and spirit of the law, required to act and act promptly, necessarily upon his own findings of fact, we are compelled to hold that such official action was, under the circumstances, due process of law. Even if it were proper, the Governor would have no power to direct an issue like a chancellor."

The highest court of the State has held that this statute was not a (1111) violation of the Constitution of the State; that the hearing before the Governor was sufficient; that the office was substantially an administrative one, although the commission was designated by a statute subsequent to that which created it, a court of record; that the officer taking office under the statute was bound to take it under the terms provided for therein; that he was lawfully suspended from office, and that he was not entitled to a trial by jury upon the hearing of this case in the trial court. As a result, the Court held that the defendant had not been deprived of his property without due process of law, nor had he been denied the equal protection of the laws.

The controversy relates exclusively to the title to a State office, created by a statute of the State, and the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the Constitution of the State, excepting in so far as they may be protected by any provision of the Federal Constitution.

Authorities are not required to support the general proposition that in the consideration of the Constitution or laws of a State this Court follows the construction given to those instruments by the highest court of the State. The exceptions to this rule do not embrace the case now before us. We are, therefore, concluded by the decision of the Supreme Court of North Carolina as to the proper construction of the statute itself, and that as construed it does not violate the Constitution of the State.

The only question for us to review is whether the State, through the action of its Governor and judiciary, has deprived the plaintiff in error of his property without due process of law, or denied to him the equal protection of the laws.

We are of opinion that plaintiff in error was not deprived of any (1112) right guaranteed to him by the Federal Constitution by reason of the proceedings before the Governor under the statute above mentioned and resulting in his suspension from office.

The procedure was in accordance with the Constitution and laws of the State. It was taken under a valid statute creating a State office in a constitutional manner, as the State court has held. What kind and how much of a hearing the officer should have before suspension by the Governor was a matter for the State Legislature to determine, having regard to the Constitution of the State. The procedure provided by a valid State law for the purpose of changing the incumbent of a State office will not in general involve any question for review by this Court. A law of that kind does but provide for the carrying out and enforcement of a policy of a State with reference to its political and internal administration, and a decision of the State Court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question.

Upon this subject it was said in the case of *Allen v. Georgia*, 166 U. S., 138, as follows: "To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error

of his life, liberty, or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this Court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen to justify our interference."

This statement is quoted with approval in *Hovey v. Elliott*, 167 (1113) U. S., 409, at 443.

No such fundamental rights were involved in the proceedings before the Governor. In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely State purposes, and of the terms upon which it shall be held by the person filling the office. And in such matters the decision of the State court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this Court.

In *Kennard v. Louisiana* [*Morgan*], 92 U. S., 480, the proceeding under which the title to office of Justice of the Supreme Court of the State was tried, was held not to violate the Fourteenth Amendment of the Constitution of the United States. The Court said the officer had an opportunity to be heard before he was condemned. There was no intimation in that case that a hearing such as was had here would be insufficient or that the officer would be entitled to be "confronted with his accusers and to cross-examine the witnesses," and to have a jury trial. In *Foster v. Kansas* [*Johnson*], 112 U. S., 201, the *Kennard Case* was approved. Neither case gives any support to the claim that such a hearing as was given in this case would be insufficient under the Fourteenth Amendment.

(1114) Nothing in that amendment was intended to secure a jury trial in a case of this nature.

The demand made by the plaintiff in error for such a trial in the court below must have been for the purpose of submitting to the jury the question of the truth of the allegations set up in the answer regarding the proceedings before the Governor, and to claim that if the jury found them to be true he was not legally suspended. But the motion for judgment on the pleadings was equivalent to a demurrer to the answer for insufficiency, and was therefore an admission of all the facts well pleaded. The question then became one of law for the court to decide, and in granting the motion the court did decide that no defense was set forth in the answer. In a case like this, such a decision of the State court is conclusive. The mere refusal of a jury trial, in and of itself, and separated from all other matters, raises no Federal question. *Walker v. Sauvinet*, 92 U. S., 90.

In the proceedings for trying the title to office in the case of *Kennard v. Louisiana* [*Morgan*], 92 U. S., *supra*, the statute provided for a hearing without a jury, and this Court held it was not objectionable for that reason.

Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.

In *Hamblin v. Western Land Co.*, 147 U. S., 531, it was stated that "a real, and not a fictitious, Federal question is essential to the jurisdiction of this Court over the judgments of State courts. *Millingar v. Hartupee*, 73 U. S., 258; *New Orleans v. New Orleans Water Works Co.*, 142 U. S., 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this Court invoked simply for the purpose of delay.'" (1115)

We think this case falls within the principle thus stated. Although an office has been held in North Carolina to be generally and in a certain restricted sense the property of the incumbent, yet in this case the Supreme Court held that the incumbent, in taking the office, holds it subject to the act creating it, which binds him by all its provisions, all of which were held to be valid. We should be very reluctant to decide that we had jurisdiction in such a case, and thus in an action of this nature to supervise and review the political administration of a State government by its own officials and through its own courts. The jurisdiction of this Court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our Government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution.

We are of opinion that the facts herein present no such case, and that the jurisdiction of this Court does not extend to the case as made in the record now before us.

For these reasons the motion of the defendant in error to dismiss this writ should be granted, and the writ is accordingly dismissed.

The following are the facts upon the motion to punish defendant in (1116) error as for a contempt:

The plaintiff in error, after the entry of the judgment of the Supreme Court affirming the judgment of ouster, sued out a writ of error from this Court, which was duly allowed by the Chief Justice of the Supreme Court of the State on 23 December, 1897, and on the same day a good and sufficient bond, conditioned as required by law in cases of *supersedeas*, was tendered, and the Chief Justice duly approved it and signed the citation. A few minutes after 7 o'clock in the afternoon of that day the writ of error with the petition therefor and the assignment of errors and the citation and bond were filed in the clerk's office of the State Supreme Court, and at the same time copies of the writ of error were lodged in the clerk's office for the State of North Carolina and for the relator. The plaintiff in error alleged, on information and belief, that the relator, with full knowledge of the issuing of the writ and of the action of the Chief Justice, broke into the room occupied as offices by the railroad commission and took possession. The judgment of affirmance directed the issuing of a writ of possession. On the morning of 25 December, 1897, counsel for the relator made a motion in the State court to set aside the supersedeas, while at the same time counsel for the plaintiff in error made a motion that the execution of the writ of possession issued on the judgment of the State court be recalled on account of the supersedeas. Both motions were refused, and an opinion delivered by *Mr. Justice Clark* holding that the judgment of the Court *ex propria vigore* placed the relator in the possession of the office at the time the judgment was filed, and that such judgment took effect immediately upon being entered, and it was not superseded

by the subsequent writ of error, regular or irregular. He also held (1117) that the Court had no power to set aside the writ of error or to pass upon the regularity thereof.

The relator made answer under oath. He alleged that after the judgment of the Supreme Court of North Carolina was rendered, and pursuant to its directions, a writ was issued out of that Court at half past 5 o'clock of that day, and was immediately placed in the hands of the sheriff, and that the sheriff went to the offices of the railroad commission for the purpose of executing the writ, but that the plaintiff in error could not be found, and that he was absent from the county and State for the purpose, as alleged, of avoiding service of the writ; that the doors of the commission's rooms were locked, and the sheriff left the building for the purpose of getting keys or other means of entry, but did not return, and that the relator, after waiting a reasonable time for the return of the sheriff and being advised by counsel that he had good right in law so to do, procured the door of the room to be opened, and he then entered therein and assumed to exercise the duties of the office of railroad commissioner.

He denied under oath that any notice of the filing of a supersedeas by the plaintiff in error was served upon him, or that he had any knowledge of the filing of said bond until the day after the taking possession of the rooms of the commission as above stated.

MR. JUSTICE PECKHAM, after stating the above facts, delivered the opinion of the Court:

Plaintiff in error claims that by virtue of the allowance of the writ of error and the filing of the supersedeas bond the relator was precluded from taking any step under the judgment of the State court, which ousted the plaintiff in error and adjudged the right to the office to be in the relator. It is argued that the filing of the proper bond operates as a supersedeas of the (1118) judgment in an action in the nature of a quo warranto, as well as in any other action. *United States, Crawford v. Addison*, 63 U. S., 22 How., 174. In that case Addison held the office of Mayor of the city of Georgetown. Proceedings in the nature of quo warranto were commenced against him by the United States on the relation of Crawford. Upon the trial of the action judgment of ouster was entered against the defendant. A writ of error from this Court was sued out by him and a sufficient bond was filed. The relator applied to this Court for a peremptory writ of mandamus to be directed to the judges of the Circuit Court of the District of Columbia, commanding them to execute the judgment of that Court by which Addison had been ousted and the relator adjudged entitled to the office. This Court denied the motion, and decided that after a writ of error had been sued out from this Court and the proper bond filed further proceedings were stayed in the court below. It was not a case where immediately upon the entering of the judgment of ouster the Court had directed the possession of the office to be taken by the relator who had taken possession accordingly. The Court was asked to actively intervene to put the relator in possession of the office, notwithstanding the allowance of a writ of error and the filing of a bond. The Court refused to do so, holding that the supersedeas bond stayed further proceedings under the judgment.

In *Foster v. Kansas [Johnson]*, 121 U. S., 201, the Attorney-General of Kansas had instituted a proceeding to remove Foster, the plaintiff in error, from the office of county attorney for Saline County. The Supreme Court of Kansas rendered judgment on 1 April, 1884, removing Foster, and, (1119) under a statute of the State making it his duty so to do, the judge of the district court of Saline County, upon being presented with an authenticated copy of the record of the Supreme Court, which removed

Foster, duly appointed Moore to such office, and approved his bond on 7 April. A writ of error from this Court had been allowed in Washington on 5 April, and the supersedeas bond approved and citation signed. Although notice of these facts was telegraphed on the same day from Washington to counsel in Kansas, who immediately exhibited the telegram to the judge of the district court, and notified him of what had been done in Washington, yet neither the writ of error nor the supersedeas bond arrived from Washington until 8 April, on which day they were duly lodged in the office of the clerk of the Supreme Court of the State. Moore, the appointee of the district judge, thereafter appeared as county attorney, and a rule was therefore granted requiring him to appear before this Court and show cause why he should not be adjudged in contempt for violating the supersedeas. This Court, after argument, held that he was not in contempt, and that the supersedeas was not in force when Moore was appointed to and accepted the office. The Court said: "The judgment operated of itself to remove Foster and leave his office vacant. It needed no execution to carry it into effect. The statute gave the judge of the district court authority to fill the vacancy thus created. The judge was officially notified of the vacancy on the 7th, when the authenticated copy of the record of the Supreme Court was presented to him. The operation of that judgment was not stayed by the supersedeas until the 8th, that being the date of the lodging of the writ of error in the clerk's office. It follows that the office was in fact vacant when Moore accepted his appointment, gave (1120) his bond, and took the requisite oath. He was thus in office before the supersedeas became operative. What effects the supersedeas had, when it was afterwards obtained, on the previous appointment, we need not consider. This is not an appropriate form of proceeding to determine whether Foster or Moore is now legally in office." The rule was therefore discharged. In this case it is also true that the judgment operated of itself to remove the plaintiff in error. The judgment also adjudged the title to the office to be in the relator. After the filing of the supersedeas bond it may be assumed that further action under the judgment was stayed. The question is whether the relator is shown to be guilty of a contempt in proceeding to take possession after he knew of the filing of the bond. He swears unequivocally that he was ignorant of the fact of the allowance of a writ in the filing of the bond at the time when he took possession of the room occupied by the commission, and that he was not informed of that fact until some time the next day. We think this a sufficient answer to the case as it is now presented to us, and that any further proceeding is rendered unnecessary because of our conclusion to dismiss the writ of error for want of jurisdiction. We see no evidence of any intentional contempt on the part of relator, and our conclusion is that *the rule must be discharged.*

In No. 559 (*S. Otho Wilson, Plff. in Err., v. State of North Carolina, etc.*), the same questions are involved and the same orders are made.

Cited: McPeters v. Blankenship, 123 N. C., 655.

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CONDUCTOR AND ENGINEER.

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CONSTITUTION, THE.

CONSTITUTIONAL LAW, 5, 31, 420, 602, 650, 661, 856, 1097.

1. It is competent for the General Assembly to provide for the collection of arrearages in taxes due for past years when ascertained in the mode prescribed by law. *Wilmington v. Cronly.*

2. Neither the three nor the ten-year statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. *Ibid.*

CONTRACT.

1. Where one violates his contract he is liable for such damages as are caused by the breach and such as may reasonably be presumed to have been in the contemplation of the parties when the contract was made. *Neal v. Hardware Co.*, 104.

2. Where in an action for damages by a tobacco planter against a manufacturer of tobacco flues for breach of contract to deliver to plaintiff, on July 1, tobacco flues for curing plaintiff's crop, it appeared that the flues were not delivered at that date, and that the defendant wrote on 15 July and again on 27 July that the flues would be shipped at once, but they were never shipped: *Held*, that plaintiff can recover for damages to his crop because, in consequence of waiting for the flues, the tobacco was not cut and cured in time and he had to use cast-off flues in bad condition. *Ibid.*

3. Whether a contract between "promoters" and stockholders of a corporation is void upon its face because not made by the directors is a question for the court and not for the jury. *Gaines v. McAllister*, 340.