ANNOTATIONS INCLUDE 181 N. C.

NORTH CAROLINA REPORTS

VOL. 123

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1898

REPORTED BY
RALPH P. BUXTON

ANNOTATED BY
WALTER CLARK

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CASES REPORTED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SEPTEMBER TERM, 1898

LYDIA OVERTON, WIDOW OF MITCHELL OVERTON, v. J. L. HINTON, C. L. HINTON AND THE HEIRS AT LAW.

(Decided 10 October, 1898.)

Dower.

A widow entitled to dower right, *sub modo*, in land purchased by her deceased husband, but not fully paid for at his death, which may be asserted in the following way: She can have her dower laid off in the land, the remaining two-thirds may then be sold to pay the balance due of the purchase money. If the proceeds of sale are not sufficient, then the remainder in fee after the dower must be sold, and the proceeds applied in the same manner. If a balance still remains due on said debt, then and then only can the dower itself be subjected thereto.

PETITION for dower instituted before the clerk of the Superior Court of CAMDEN County and transferred to the court at term for the trial of an issue of fact involving the widow's right to dower, tried before *Norwood, J.*, at Spring Term, 1898. (2)

His Honor intimated that upon the showing made the petitioner could not recover. Thereupon she excepted, submitted to a nonsuit, and appealed.

STATEMENT

After statement of the case, as follows, before *Norwood, J.*: The plaintiff is the widow of the late Mitchell Overton, and filed her petition before the clerk for dower, alleging that her husband died seized in fee simple of the tract of land.

In the answer it is alleged that John L. Hinton was the owner in fee of the land and had agreed to sell the same to Mitchell Overton for $10,000; that Overton executed notes in the sum of $10,000 payable to

said Hinton, and secured the same by a deed of trust on the land, and that the defendant C. L. Hinton was the trustee in the deed; that the notes were given to represent the purchase money of the land; that Overton failed to pay the same, and the trustee sold the land under the power contained in the deed, and defendant J. L. Hinton became the purchaser on November 23, 1896; that petitioner is not entitled to dower in said land, and that defendants go without day.

The plaintiff, replying to the answer, said that the purchase money for the land was to be paid for by Mitchell Overton securing insurance policies on his life to the amount of $10,000, as she is informed, and complied with his part of the contract; that said Hinton sold the land to Mitchell Overton, and agreed to accept in payment of the same the two policies of insurance upon the life of Mitchell Overton for $5,000 each, to be delivered to J. L. Hinton, and said Overton to keep the
(3) premiums paid; that the policies were secured and assigned as aforesaid, in compliance with the agreement, and that said Hinton has collected $5,000 from the Penn Mutual Life Insurance Company on one of said policies, and plaintiff does not know what amount he has collected from other sources and policies; that at the time plaintiff's husband purchased the land from Hinton it was fully understood that the farm was not worth $10,000, and, in truth, the lands were not worth more than three or four thousand dollars, and that Hinton well knew the value thereof, and that he had received from said Overton $5,000 on the policy in the Penn Mutual, which is more than enough to pay for the land; that it was mutually agreed that the mortgage and notes were only to be held by Hinton to require Mitchell to pay the premiums on the policies and the policies were to cancel the notes at the death of Overton.

An issue of fact as to whether plaintiff was entitled to dower, as alleged in the petition, was raised before the clerk and the cause was sent to the Superior Court for trial, where, upon intimation by the court that plaintiff could not recover upon the record and evidence, the plaintiff submitted to a nonsuit and appealed.

Case: Plaintiff introduced the deed of J. L. Hinton to Mitchell Overton, dated 10 October, 1892, for the land described in the petition, and plaintiff testified in her own behalf that Mary, William, and Susan Overton are the only children of her deceased husband, and that the land mentioned in the deed is the same as that described in the petition; that the summons was issued 16 November, 1896.

Defendant introduced a deed of trust from Overton to C. L. Hinton, trustee, dated 10 October, 1892, conveying the same land set out in the petition; also deed from Hinton, trustee, to J. L. Hinton,
(4) dated 24 November, 1896, for the land described in the petition;

plaintiff objected, objection overruled, and plaintiff excepted. The bond for the purchase money, dated 7 October, 1892, for $10,000, signed by Overton and payable to Hinton, was also introduced, with sundry credits endorsed thereon, to wit: 9 July, 1894, $48.19—on 6 May, 1896, $110—on 20 November, 1896, $5,000 from life insurance.

Plaintiff was again introduced in her own behalf and testified that she was present in November when the sale was made, and that she objected to the same, and that the trustee was not present. She then proposed to prove that she objected to the sale and that if he did sell he should first sell two-thirds of the land, then the remainder after the dower, and lastly, the dower interest. Defendant objected, objection sustained, and plaintiff excepted. J. L. Hinton directed the sale; the land was sold in one body, and bid off by J. L. Hinton. The plaintiff did not know who cried the property at the sale—her attorney was present, representing her.

Jesse Overton was introduced for plaintiff, and testified: "I was present at the sale. William Morris was the man who cried the sale. J. L. Hinton was present and bid it in. Mrs. Overton objected to the sale. J. L. Hinton told Morris to sell the land." Petitioner offered to prove by this witness that plaintiff objected to the sale and demanded that if it was sold, it should be sold as indicated above. Defendant objected, sustained, plaintiff excepted. None of the Hintons were present at the sale except J. L. Hinton. Plaintiff's attorney objected for her, when J. L. Hinton said, "You need not object; I will sell it."

Defendant introduced W. R. Dozier, who testified: "I got a (5) note from C. L. Hinton, trustee, asking me to sell the property. In pursuance of this request I procured a commission to sell the same. I wrote the notice of sale and got some one to cry the property. I feel sure that it was W. S. Bartlett who cried the sale. The notice of sale was introduced. J. L. Hinton brought me the note. C. L. Hinton is J. L. Hinton's son. I asked J. L. Hinton if he was ready to have the sale."

W. S. Bartlett, introduced for defendant, said that he made the sale of the property in controversy, and that the attorney for plaintiff objected on the ground that the debt was paid. Dozier asked him to cry the sale for him. I don't think J. L. Hinton said anything to me about it. The plaintiff asked the court to be allowed to withdraw the reply, as the plaintiff had not introduced any evidence showing the payment, and that there was a suit in ejectment now pending in court for the land. The court declined to allow the reply to be withdrawn, and intimated, upon all the evidence, that plaintiff could not get along and that he would charge the jury to answer the issue "No." Plaintiff excepted, and submitted to a nonsuit and appealed.

E. F. Aydlett for petitioner.
No counsel contra.

DOUGLAS, J. This was a special proceeding for the assignment of dower. Upon the trial in the Superior Court his Honor intimated that the plaintiff could not recover. Thereupon the plaintiff submitted to a nonsuit and appealed. Summons for the defendants were issued to Camden County on 16 November, 1896, and to Pasquotank County on the day following. On 23 November, after the issue of summons,
(6) but before its return day, the defendant C. L. Hinton, through some one else, sold the land in question under a deed of trust executed during his life by the husband of the petitioner to secure the purchase money of the land. At this sale the defendant J. L. Hinton bought the land, which was sold as a whole. The petitioner publicly objected to the sale. The said J. L. and C. L. Hinton, the latter the trustee and the former the creditor and purchaser, are the only real defendants in the case, as the heirs at law made no objection to the assignment of dower. The defendants Hinton answered setting up the original purchase of the land, the deed of trust, its default, and sale thereunder. The plaintiff replied, alleging other matters, which cannot be considered, as the reply was abandoned at the trial. The plaintiff, however, insisted that she was entitled to the exoneration of her dower to the extent that the undowered land should be first sold, and then the fee in remainder after her dower, leaving the dower itself unsold unless necessary after the complete exhaustion of the other sources. To this, we think, she was clearly entitled. *Thompson v. Thompson,* 46 N. C., 430; *Caroon v. Cooper,* 63 N. C., 386; *Smith v. Gilmer,* 64 N. C., 546; *Creecy v. Pearce,* 69 N. C., 67; *Ruffin v. Cox,* 71 N. C., 253; *Askew v. Askew,* 103 N. C., 285.

The sale of the land after the commencement of proceedings and over the protest of the plaintiff does not help the defendants, and the sale must be set aside. The plaintiff petitioner is entitled to have her dower laid off in the lands in question, the remaining two-thirds of which may then be sold to pay the balance due on the debt secured by the deed of trust. If the proceeds of sale are not sufficient, then the remainder in fee after the dower must be sold, and the proceeds applied in the
(7) same manner. If a balance still remains due on said debt, then and then only can the dower itself be subjected thereto. There is error in the intimation of the court.

New trial.

CAMP MANUFACTURING COMPANY v. A. T. LIVERMAN, P. C. JENKINS, W. W. JENKINS, B. F. RENFROW, M. F. RABY, E. E. JENKINS, P. C. TYLER AND PULASKI TYLER.

(Decided 10 October, 1898.)

Partial Devise—Testator—Creditors—Real Assets, How Applied—Parol Partition—Resale.

1. Upon deficiency of personal assets, the land undevised to be next subjected to the payment of creditors.
2. Land specifically devised not to be resorted to, unless the undevised land proves insufficient.
3. Parol partition cannot be sustained where *feme coverts* and infants are interested.
4. A resale will be ordered, where the first sale made is accompanied by circumstances calculated to arouse the suspicions of the court.

CIVIL ACTION to set aside a judicial sale of land, and for a resale, tried before *Norwood, J.*, at Spring Term, 1898, of HERTFORD Superior Court.

W. P. Jenkins died in July, 1886, leaving a will in which two of his sons, W. W. Jenkins and P. C. Jenkins, were named executors, and who qualified on 21 July, 1886. He left surviving him his widow, E. E. Jenkins, and the following children: P. C. Jenkins, W. W. Jenkins, M. F. Raby, wife of C. W. Raby, Stella Jenkins, under age; and grandchildren, P. C. Tyler and Pulaski Tyler, infant sons of a deceased daughter, his heirs at law. (8)

He owned at the time of his death 837 acres, which descended to his heirs, except 200 acres, including his residence, which he devised to his wife and his daughter Stella, to be theirs jointly and to be Stella's after the death of her mother. Should Stella die without issue, the property to be divided among her half-brothers and sisters, or their heirs. Stella married the defendant Renfrow in December, 1893, and died without issue in 1894, her mother surviving her.

After the death of testator his children occupied separate portions of the land under a parol arrangement among themselves.

In March, 1888, M. F. Raby and her husband sold to one A. W. Taylor, for full value, the timber trees on the portion of land occupied by them. The defendant A. T. Liverman, who held a mortgage on the property, joined in the conveyance, and received payment of his debt out of the proceeds of sale; also, in March, 1888, W. W. Jenkins and wife sold to said Taylor the timber trees on the portion of land occupied by them. On 6 June, 1888, Taylor sold and conveyed whatever interest he had under these two deeds to the plaintiff. On 9 February, 1893, Mrs. E. E.

Jenkins, the widow, and Stella Jenkins sold and conveyed for full value the pine trees on their 200 acres to plaintiff.

The personal property of the testator proved to be insufficient to pay his debts, and his executors taking no steps to subject the land for sale as assets, certain creditors of the testator, including A. T. Liverman, instituted a creditors' bill against his executors, heirs, and devisees, to have the 200 acres, devised to the widow and Stella, sold to pay
(9) their claims, and obtained a decree of sale to be made by a commissioner.

Upon the day of sale, 5 April, 1895, the defendants in the creditors' suit signed an agreement to have the pleadings and orders so amended at Spring Term, 1895, as to describe and embrace the whole of the lands of the late W. P. Jenkins, and it was agreed that the whole of said lands, to wit, the home place, containing about 736 acres, and the Joyner place, containing about 100 acres, may be sold on Monday, the first day of the Spring Term, 1895, by the commissioner in said suit, and reported to the court as if the same had been described fully in the order of sale.

It is further agreed that if any one of the signers of this agreement should become the purchaser of said lands at said sale, then he shall reconvey to the heir at law or devisee or his assign or grantee or other party succeeding to his or her right that part of said land which was allotted to said heir or devisee in the former division of said land between said heirs or devisees upon the payment by said heir, devisee, or other party succeeding to his or her right of his or her part of said purchase money, with interest, and also upon his paying over and settling all amounts due by him to any of said parties or legatees or distributees of the estate of said W. P. Jenkins, provided said party or parties desiring to redeem any part of said land under this agreement, shall do so within 7 months and 15 days from day of sale.

The defendant A. T. Liverman signed and sealed this agreement, and became the purchaser at said sale at the price of $1,575, which was paid and title made after the confirmation of sale. There was evidence that the land sold was worth between $3,000 and $4,000.

(10) The present action against Liverman, the purchaser, and the heirs at law of W. P. Jenkins is to have this sale, the consent decrees, orders and conveyances set aside so far as they affect plaintiff's right to the timber trees upon said lands and the plaintiff's right to said trees be declared good against the defendants.

At the close of plaintiff's evidence, defendants moved for judgment of nonsuit, which was allowed by the court, and plaintiff appealed.

George Cowper, Winborne & Lawrence, and Francis D. Winston for plaintiff (appellant).

No counsel contra.

FURCHES, J. W. P. Jenkins died in July, 1886, having first made a last will and testament, which was duly admitted to probate. Said Jenkins, at the time of his death, was the owner of something over 800 acres of land, and by his will he devised 200 acres "lying in the angle formed by the St. John and Woodland's road, also including the dwelling-house and out-buildings which I now occupy, to my beloved wife and daughter, Stella." "This gift shall be theirs jointly and Stella's after the death of her mother (my wife). Should Stella die without issue, this said property shall be divided among her half-brothers and sisters or their heirs." But the testator does not dispose of any other part of his lands by said will. This being so, he died intestate as to all other lands except the 200 acres thus willed to his wife and his daughter Stella. The said W. P. Jenkins left other children and grandchildren surviving him besides Stella, to wit, P. C. Jenkins, W. W. Jenkins, M. F. Raby, wife of C. W. Raby, and two grandchildren, to wit, H. C. Tyler and Pulaski Tyler, sons of a deceased daughter. And it seems to be conceded that he did not leave sufficient personal property to pay his debts, and that is was and is necessary to sell lands to pay his (11) debts.

After his death the children had a parol partition of the land, and within less than two years from the death of the testator, W. P. Jenkins, the plaintiff bought growing timber standing on the land of Raby and wife and W. W. Jenkins, according to their parol partition. (It is admitted that these purchases were within two years from the death of the ancestor.) The plaintiff also bought timber growing on the lands willed to the widow and Stella. But this transaction seems to have taken place more than two years after the death of the testator. The said Stella married the defendant Renfrow and soon thereafter died without having issue; and since the commencement of this action W. W. Jenkins has died, and neither his personal representatives nor his heirs at law have been made parties to this action.

The executors named in the will of W. P. Jenkins, failing to pay the debts of the estate of their testator, and failing to take steps to convert real estate into assets for that purpose, the creditors in 1893 commenced proceedings against the executors and the heirs at law of the testator to sell lands for assets to pay debts. The complaint, as originally filed, only asked a sale of the 200 acres devised to the widow and the daughter Stella. But afterwards, and on the day of sale, by consent of the parties, the pleadings were amended so as to include all the lands of which the testator died seized, and the decree theretofore had was amended so as to include all his lands. Under this amended order they were all sold and

(12) purchased by the defendant Liverman at the price of $1,575, although there is evidence tending to show that the lands were worth $3,700 or $4,000.

It is provided in this agreement to amend the pleadings and order of sale, so as to include all the lands, that if any of the parties thereto shall buy the lands, any of their heirs shall have seven months and a half to redeem their parts. In other words, if Liverman bought, the heirs should have seven and a half months to redeem, and Liverman was one of the signers to this paper, and it appears that the heirs are still in possession of the lands.

This is a case of singular complications, and we have had much trouble in arriving at a satisfactory solution of the matters involved. We are asked by the same attorneys who brought the creditors' suit and obtained the order under which the lands were sold to set aside this sale for irregularity and fraud. The testator was the owner of a large landed estate embracing more than 800 acres. Of this large estate he willed 200 acres to his wife and daughter Stella jointly, with a contingent remainder over, upon Stella's death without issue, to her half brothers and sisters. This contingency has happened and the half brothers and sisters of Stella have become the owners of this remainder not as her heirs, as was contended by plaintiff, but under the will of W. P. Jenkins. This 200 acres, specifically devised, was not subject to the payment of the debts of the testator until the 600 and odd acres, not devised, were first appropriated. And it would seem from the amount of debts proved and the value put upon the land, that the undevised land would have been amply sufficient to have paid all the debts and proper costs of administration. But singular as it may seem, the complaint as originally drawn only asked for the sale of the *two hundred* acres willed to the widow and the (13) daughter Stella, and the original order was drawn in this way.

It may be, if this order had not been changed by the agreement of the parties and the defendant Liverman that they would have lost their rights, and the widow, who seems to have been the special object of the testator's bounty, would be without a home. But owing to the fact that the complaint was changed, and the order of sale changed so as to include all the land on the very day the land was sold, and this sale made and confirmed on the same day it was made, although there were *femes covert* and infant children interested; and this under an agreement that if the defendant Liverman became the purchaser, the parties to this agreement should have 7 months and 15 days to redeem; and when it appears that said defendant purchased the land for less than one-half its value; that these heirs are still in possession and insisting on their rights under this sale; which causes us to look at the whole proceeding with suspicion. It does not seem to us that the widow, who seems to be the stepmother

of the other children, except Stella, whom seems to have been a half sister and a minor at the time this proceeding was had, has been fairly dealt with. The consent paper seems to have been more in the nature of a mortgage to raise money to pay the debts of the estate than to procure a *bona fide* sale of the property, in which was included the 200 acres willed to the widow and Stella, and which they had no right to sell unless the unwilled lands proved unsufficient to discharge the debts.

The parol partition set up by the plaintiff cannot be sustained where there is a *feme covert* and two infant children at the time it is alleged it took place, interested in the land, who were incapable of making any such partition. We do not say that we would sustain it (14) without this, but with this we certainly cannot.

Our opinion then is, that this sale should be set aside, that the personal representative and heirs at law of W. W. Jenkins should be made parties defendant, that an order should then be made in this proceeding (all the parties being before the Court) to first sell all the lands not willed to the widow and Stella, and, if they bring enough to pay the debts mentioned in the petition to sell land, that the other lands so willed to the widow and Stella should not be sold. If the unwilled lands should not bring enough to pay the debts, as above stated, and it becomes necessary to resort to the lands so willed, they should be sold subject to the life estate of the widow and that her life estate should only be sold in the event that this and the rest and residue of the lands do not bring enough to pay the debts; that out of the proceeds of said sale the defendant Liverman be first paid the money he has paid on the sale theretofore had; that the residue, if any after this, be divided among the heirs at law, but the plaintiff be paid out of the share of Raby and wife the amount he paid them for timber, with interest thereon; and the residue of their part, if any, be paid to Mrs. Raby; that the same thing be done as to the heirs of W. W. Jenkins, and the defendant Liverman; that as Mrs. Jenkins and Stella sold to plaintiff more than two years after the death of the testator and as plaintiff denies that he had any knowledge, at the time he purchased of them, of any outstanding debts (and this seems not to be disputed by defendants) it would seem that this sale will stand.

The case will be proceeded with as directed in this opinion. There is Error.

Cited: S. c., 128 N. C., 53.

(15)

LOVEY NICHOLSON v. COMMISSIONERS OF DARE COUNTY, APPELLANTS.

(Decided 10 October, 1898.)

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

PER CURIAM. Affirmed.

FURCHES, J., dissenting: This case is here for the fourth time. A majority of the Court have affirmed the judgment appealed from by a *"per curiam"* order. I cannot concur in this summary manner of disposing of this appeal. In my opinion it overrules all three of the former opinions of this Court, without giving any reason for doing so. If these opinions are erroneous and are overruled, the Court should have said so.

I do not propose to discuss the case in this opinion. Were I to do so, it would be but to repeat the arguments contained in the opinions rendered upon former hearings and reported in 118 N. C., 30; 119 N. C., 20, and 121 N. C., 27.

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(16)

E. H. KRUGER v. BANK OF COMMERCE OF BUFFALO, N. Y.

(Decided 18 October, 1898.)

Practice—Corporation—Attachment.

1. When there is a verified complaint filed, and there is no answer or demurrer, the plaintiff is entitled to judgment (unless time is granted defendant to answer or demur) and from a refusal of judgment an appeal lies.
2. When a nonresident corporation owns real estate in this State, an attachment levied thereon will not be discharged by reason of the appointment of a receiver and order of dissolution by the courts of the home State of the corporation.
3. Such appointment has no extra territorial effect, and title to real estate here cannot be divested to the prejudice of creditors by such order of dissolution.

THIS was a civil action, heard before *Norwood, J.*, at Spring Term, 1898, of the Superior Court of DARE County.

The plaintiff moved for judgment upon his verified complaint, filed on the first day of the term. The defendant did not appear, and was not

represented by any one, and upon the last call of the appearance docket, as the court had finished its other business and was ready to adjourn, the plaintiff moved for judgment upon said complaint.

Motion denied, and plaintiff excepted.

The plaintiff then moved for judgment by default and inquiry. Motion denied, and plaintiff excepted.

Messrs. Pruden & Pruden appeared specially and asked to introduce affidavit of John R. Hazel and H. H. Persons, showing that they were receivers of the defendant, and that the corporation was dissolved, and moved that the action be dismissed. Plaintiff objects. Objection overruled, and plaintiff excepted.

Messrs. Pruden & Pruden then offered their affidavit, and upon (17) request of plaintiff, he was allowed time to answer the same.

Plaintiff appealed to the Supreme Court from the ruling of his Honor refusing judgments upon his motions, as set out.

E. F. Aydlett and F. H. Busbee for plaintiff (appellant).
Shepherd & Busbee and Pruden & Pruden for appellee.

CLARK, J. The complaint was for an unliquidated account and duly verified. No answer having been filed, the plaintiff was entitled to judgment by default and inquiry (The Code, sec. 386), and from its refusal an appeal lay. *Griffin v. Light Co.,* 111 N. C., 434; *Curran v. Kerchner,* 117 N. C., 264. If the defendant had appeared and asked for time to file answer, its allowance would have been in the unreviewable discretion of the Court. The Code, sec. 274; *Mallard v. Patterson,* 108 N. C., 255. Though such extension of time is a practice not to be encouraged. *Dempsey v. Rhodes,* 93 N. C., 120; *Griffin v. Light Co., supra.* But there was no appearance, and the affidavit of one claiming to be one of the receivers for the defendant corporation, appointed by the Court in New York, averring their appointment was entitled to no consideration, as he did not come in and make himself a party to the action. The affidavit is not even accompanied by a certified copy of the alleged judgment of dissolution and appointment of receivers. It was in no sense an answer, and the plaintiff is entitled to have judgment by default and inquiry entered here, as was done in *Alspaugh v. Winstead,* 79 (18) N. C., 526; The Code, sec. 957.

Had the foreign receiver come in and made himself a party to the action and put his affidavit in the form of a verified answer, it would not have defeated the plaintiff's right to judgment, for it did not negative the plaintiff's grounds of recovery, but set up the appointment of receivers for the defendant corporation at its residence in New York. The court here having acquired jurisdiction by the levy of the attachment

upon the defendant's realty in this State, the plaintiff's lien cannot be divested by the appointment of receivers in another state. *Mosely v. Burroughs,* 52 Texas, 396. The appointment of receivers in the state of defendant's residence has no extra territorial effect (*Boothe v. Clark,* 17 Howard, U. S., 322, 338), though the courts of other states as a matter of comity may permit such receivers to bring actions in their courts where this will not militate to the injury of their own citizens. 6 Thompson Corp., secs. 7334, 7344; *Hunt v. Columbian Ins. Co.,* 55 Me., 290; Beach on Receivers, sec. 685. In *Ins. Co. v. Bank,* 68 Ill., 348, it is said: "Where real estate in one state belonging to a corporation which has its chief place of business in another state is attached in the courts of the state where the land lies, a decree of the court of the home state of the corporation appointing a receiver and restraining it from further transacting business affords no ground for quashing a writ of attachment, as the corporation is liable to suit in the state where the property is situated to subject it to the demands of creditors." The decree in New York declaring insolvency and appointing receivers has no effect upon the title to real property in another state. 6 Thompson, *supra,* sec. 7343, and cases there cited. If titles could be affected
(19) by decisions of the courts of another state, of what avail would be our registration laws?

This sums up the doctrine as almost universally recognized (*Day v. Telegraph Co.,* 66 Md., 354), and especially is this so in states like ours, in which by statute the existence of corporations is continued for the benefit of creditors and winding up affairs, for a prescribed time (The Code, sec. 667) after the charter has expired or been declared forfeited. *Life Asso. v. Fossett,* 102 Ill., 315.

Error.

Cited: Abbott v. Hancock, post, 90; *Investment Co. v. Kelly, post,* 389; *Ins. Co. v. Edwards,* 124 N. C., 121; *Person v. Leary,* 126 N. C., 505; *Best v. Dunn, ibid,* 561; *Pearson v. Leary,* 127 N. C., 115; *Hall v. Hall,* 131 N. C., 186; *Timber Co. v. Butler,* 134 N. C., 52; *Holshouser v. Copper Co.,* 138 N. C., 255; *Dunn v. Marks,* 141 N. C., 233.

A. F. STAFFORD, ADMINISTRATOR, v. ISAAC GALLOPS, ALFRED GALLOPS, AND LOT GALLOPS.

(Decided 18 October, 1898.)

Judgments Erroneous—Void—Irregular—Insufficient Notice.

1. *Erroneous* judgment is one rendered according to the course and practice of the courts, but contrary to law, that is, based upon an erroneous application of legal principles.
2. *Void* judgment is in legal effect no judgment, as if a judgment be rendered without service, or appearance.
3. *Irregular* judgment is one contrary to the course and practice of the courts and is held valid until vacated or reversed.
4. A judgment in an action in which the required number of days notice was not given to the defendant is erroneous and irregular, but not void, and cannot be questioned in a collateral proceeding.

CIVIL ACTION for trespass, involving title, tried before *Timberlake, J.*, at July Special Term, 1898, of PASQUOTANK County.

The plaintiff, in deducing his title, introduced a deed of trust from H. C. Harris and wife to John A. Harris, trustee, who died (20) before making sale of the land.

Plaintiff then offered in evidence the record of proceeding of the Superior Court purporting to appoint F. Vaughan trustee in place of John A. Harris, deceased. The clerk had issued a summons on 8 December, 1891, notifying the trustors and Sarah E. Harris, *cestui que trust,* to appear before him on 19 December, 1891, and answer. The officer's return was "Executed 11 December, 1891." On the return day the defendants failed to appear, answer, or demur, and the clerk appointed F. Vaughan as trustee, who sold the land, on proper notice, and conveyed to the intestate of plaintiff.

The defendants objected to the introduction of the record—their position being that as they had not the ten days notice required by The Code, secs. 279 and 1276, the judgment of the clerk appointing a trustee was void, and that the trustees' sale and deed conveyed no title.

Objection sustained, and the proposed evidence was excluded by the court. The plaintiff excepted, submitted to a nonsuit, and appealed.

G. W. Ward for plaintiff (appellant).
E. F. Aydlett for defendants.

FAIRCLOTH, C. J. Action for trespass by cutting wood, etc., involving title to the *locus in quo.* The plaintiff in deducing his title offered in evidence a certain record and judgment, presently referred to, which was excluded by his Honor, and the plaintiff took a nonsuit and appealed. The competency of said judgment is the only question we have to con-

(21) sider, and that raises the question whether the judgment was *void,* or irregular and voidable only.

In 1887, H. C. Harris and wife, Laura T., executed their promissory notes payable to Sarah E. Harris and conveyed the land to John A. Harris in trust to secure the payment of said notes, and subsequently the payee assigned said notes to the plaintiff's intestate. Before the trust was closed the trustee died. The plaintiff applied to the clerk to have another trustee appointed, and the clerk issued a summons on 8 December, 1891, notifying the trustors and Sarah E. Harris to appear before him on 19 December, 1891, and answer the plaintiff's complaint. The officer's return on the summons was "Executed 11 December, 1891." On the return day of the summons the defendants failed to appear, answer, or demur, and the clerk appointed a trustee with all the powers of the first trustee. The trustee, on proper notice, sold the land and the plaintiff's intestate was the purchaser.

The defendant's position is that, as they had not the ten days notice required by The Code, secs. 279 and 1276, the judgment of the clerk appointing a trustee was *void,* and that the trustee's sale and deed conveyed no title. That is the point.

Much has been written on the character and force of judgments, and we find them to be erroneous, irregular, or void.

An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law, that is, based upon an erroneous application of legal principles. *Wolf v. Davis,* 74 N. C., 597; *McKee v. Angel,* 90 N. C., 60.

A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and (22) all proceedings founded upon it are worthless. 1 Freeman on Judgments (4 ed.), sec. 117; Black on Judgments, sec. 170—as if judgment be rendered without service on the party, or his appearance. *Armstrong v. Harshaw,* 1 Dev., 187; *Stallings v. Gulley,* 3 Jones, 344; *Condry v. Cheshire,* 88 N. C., 375.

An irregular judgment is one contrary to the course and practice of the courts, and is held valid until vacated or reversed. *Wolf v. Davis* and *McKee v. Angel, supra;* Black, *supra,* sec. 170; 1 Freeman, *supra,* sec. 116 *et seq.*

The question of jurisdiction lies behind all judgments, decrees and orders. If they are entered by a court without jurisdiction, they are nullities and may be disregarded by any one, whether relied upon directly or collaterally.

Every court, before it can enter a lawful judgment, must have jurisdiction, (1) of the subject-matter, and (2) of the person. Jurisdiction of the subject is conferred by the Constitution, statutes and the law of

the land, that is, by sovereign authority. Black, *supra,* sec. 240; *Cooper v. Reynolds,* 10 Wall., 308. Jurisdiction of the person is acquired by service of process. A court, thus having acquired jurisdiction, is clothed with power to hear and determine, and its orders and decrees are binding upon all the parties, until reversed or vacated by some direct proceeding, because public policy requires it and because a judgment is a record, and a record imports in it such uncontrollable credit and verity as it admits no averment, plea, or proof to the contrary. Coke Little, 260a. Defective service has given rise to many irregularities in the course of the courts, but it will be found that they do not render the final judgment void, but only irregular, unless the defect is such as to (23) amount to no service. The instances found in the opinions of this Court of such irregularities are too numerous to mention here. Examples: A judgment exceeding the amount demanded in the writ is not void, but irregular and erroneous, but has full force until reversed by a direct proceeding. *Savage v. Hussey,* 3 Jones, 149. A judgment against an infant with no guardian to represent him; held, irregular only. *Keaton v. Banks,* 10 Iredell, 381. A constable returned his warrant "executed," but did not sign his name to his return: *Held,* that the judgment was not void. *McElrath v. Butler,* 7 Iredell, 398. "A judgment in an action in which the required number of days notice was not given to the defendant is erroneous, but not void, and cannot be questioned in a collateral proceeding." *Ballinger v. Tarbell,* 16 Iowa, 491; *Glover v. Holman,* 3 Heisk., 519; *West v. Williamson,* 1 Swan, 277; *Hendrick v. Whittemore,* 105 Mass., 23; *Pope v. Hooper,* 6 Neb., 178; 1 Freeman, *supra,* sec. 126; *Isaacs v. Price,* 2 Del., 351.

When the time between service and the return day of the summons is less than the time allowed by The Code, the clerk is not bound to dismiss the action, but should allow the time, allowed by The Code, to the defendant for an appearance. *Guion v. Melvin,* 69 N. C., 242. The object of service of process is to advise the defendant of the plaintiff's action, and that he must appear at the time and place named and make his defense, and in default therein judgment will be prayed. If he attends, as he should, he can defend on the merits or have irregularities corrected. Failing in this does not affect the jurisdiction or judgment as long as it stands unreversed. A service of four days notice, when the law required five, is sufficient to support a justice's judgment. *Ballinger v. Tarbell,* 85 Am. Dec., 527; 1 Freeman, *supra,* sec. 126. (24)

Applying these principles to the present case, his Honor committed error in excluding the judgment of the clerk appointing a trustee. That judgment, although irregular, is valid until reversed or vacated by a direct action, and cannot be collaterally attacked.

New trial.

FIRST NATIONAL BANK OF WASHINGTON v. EUREKA LUMBER COMPANY.

(Decided 25 October, 1898.)

Promissory Note—Endorser—Judgment—Merger.

1. An endorser of a promissory note is liable, as surety, without demand upon the maker, or notice of dishonor. The Code, sec. 50.
2. Where judgment is rendered against the maker, the note as to him is merged in the judgment—not so as to the sureties, when not made parties, their liability to the holder still exists. The Code, sec. 186.
3. When the evidence is conflicting upon the matter of credits to which a note may be entitled, it is error to charge, that if the jury believe the evidence, to find the amount of the recovery at the face of the notes with interest.

CIVIL ACTION to recover of the defendant the amount of two notes executed by the Washington Planing Mills to the defendant company, and which the plaintiff alleges the defendant endorsed and guaranteed to plaintiff, who discounted the notes for defendant, and defendant checked out the money; tried before *Norwood, J.*, at February
(25) Term, 1898, of the Superior Court of BEAUFORT County.

The plaintiff claims that the Eureka Lumber Company, for value, endorsed and guaranteed to plaintiff the payment of both notes; that no part thereof has been paid to plaintiff, but that the whole thereof is due; that plaintiff demanded payment of said notes from defendant, and payment has been refused.

The various grounds of defense are adverted to in the opinion filed—among them is that of payment, as to which there was a conflict of evidence.

Judgment for plaintiffs; appeal by defendant.

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

MONTGOMERY, J. The plaintiff alleges in its complaint that the defendant company *endorsed and guaranteed* to the plaintiff the payment of the notes sued upon, the notes having been executed by the Washington Planing Mills to the defendant, and the counsel of the plaintiff in the conduct of the trial and in his argument here treated the writing on the back of the notes as an *endorsement* and not as a *guaranty*. The defendants in their answer denied that they were either guarantors or endorsers of the notes, and aver that they simply sold the notes to the plaintiff. On the trial, however, the president of the defendant company, as a witness for the defendants, testified in substance that the defendants had

an agreement with the plaintiff by which these notes were to be discounted by the plaintiff bank upon their endorsement by the defendants and others, and that in pursuance of that agreement the notes were endorsed by the defendants and discounted by the plaintiff. So we will take it as an intended endorsement and not a guaranty, thereby eliminating from the discussion the conflicting testimony of the (26) witness as to the nature of the words on the back of the notes and as to the time when they were placed there. But the defendants insist that the endorsement was not made according to the requirements of the by-laws of defendant company, and therefore created no liability against them. If it be conceded that the by-laws were not strictly followed in reference to the endorsement, yet, it appeared by the testimony of the defendant's witnesses that the money for which the notes were discounted was entered to the credit of the defendants in the plaintiff's bank and was drawn out by the defendants for their uses and purposes. The defendants will not be allowed, under such conditions, to deny that they made the endorsement.

The defendants further insist that, even if there was an endorsement by them of the notes, this action cannot be maintained, because they say that no notice of any demand upon the makers of the notes was given to the defendants before the commencement of this action. There is nothing in that contention. No such notice was necessary. The endorsment was upon a plain promissory note and rendered the defendants liable as sureties, and no demand on the maker or notice to the defendants of such demand was necessary previous to the bringing of this action. The Code, sec. 50.

Another contention of the defendants was that, as the maker of the note (Washington Planing Mills) had before the commencement of this suit confessed a judgment to the plaintiff for the amount of the notes, the notes had been on that account merged in the judgment, and they asked his Honor to instruct the jury that the notes were merged in the judgment, that they had ceased to exist for any purpose, and that the plaintiff could not maintain any action on them against the (27) defendants. His Honor was right in refusing to give the instruction. Between the parties to an action wherein a judgment is rendered the judgment is a merger and the note or instrument sued upon is extinguished; but as to sureties or endorsers who are not parties to the judgment, there is no merger or extinguishment of the note or instrument. The Code, sec. 186; *Hicks v. Davis,* 68 N. C., 231.

The defendants requested the court (No. 3) to instruct the jury: "That it being admitted that C. M. Brown was president of the Washington Planing Mills, and it being further admitted that C. M. Brown is an endorser on the notes declared on and is now the holder of the judg-

ment due James J. Fowle, and that he is the owner of a certain part of the judgment in favor of the plaintiff, and it being further admitted that the property of the Washington Planing Mills is held by George W. Kugler, in trust to sell the same and apply the proceeds to the payment of the Fowle judgment and then to other judgments *pro rata;* the court charges you that it being admitted that this arrangement was made with the consent of the plaintiff, that the plaintiff is, as between the plaintiff and this defendant, compelled to credit the judgment notes sued on with the value of said plant, or all except the amount due to the Kugler Lumber Company under said trust, and especially to all that part which under the trust would go to C. M. Brown."

This instruction was asked as if Brown was a party to the action, but, as he was not, it could not have been properly given. However, the same question was raised by a motion made by the defendant, upon the answer, to make Brown and George W. Kugler, trustee, and the other parties mentioned in the answer parties to this action as necessary to a
(28) proper determination of the suit; and further, in the language of the motion, "That the plaintiff be required to first proceed against the property bought by G. W. Kugler, trustee, and exhaust the same before proceeding against the defendant." The motion was denied and the defendant appealed. So, in discussing the motion, the instruction will necessarily be involved.

The defendant contends, first, that the plaintiff occupies the position (he being president of the defendant company) of an officer of a corporation, who has procured for himself a preference of his own debt against the corporation over other creditors at a time when the corporation was insolvent. But such is not the fact here. Brown, though president of the company, was so far as the plaintiff is concerned, only a surety. The planing mills was the principal debtor, and the notes were executed for a consideration which inured to the benefit of Brown's company, the planing mills, and not for his benefit as an individual. The defendant further contends that because Kruger bought in the real estate of the planing mills company at execution sale with the consent of the plaintiff in trust for the benefit of all the execution creditors, including the plaintiff and the defendant, to be sold by the trustee and the proceeds applied among the execution creditors, and the property not yet having been sold out being still in the hands of the trustee, that he is in equity entitled to have Brown made a party in order that he may apply his part of the money arising from the sale of the property by Kugler, to the payment of the notes sued on, because, as he alleges, Brown was a prior endorser on the notes. If there was any equity upon the above statement which the defendant could invoke out of the facts in this case to aid him in
(29) carrying out his demand, Brown would be a proper party. But

we see nothing in the case but a plain legal arrangement among execution creditors to prevent a sacrifice at execution sale of property in which they were all interested. The execution debtor, the Washington Planing Mills, so far as we see from the record, has no longer any interest in the controversy as to the property in the hands of Kugler. And the only interest the defendant has in the trust property is the right to compel the trustee, Kugler, to sell it and out of the proceeds to pay him his proper share.

As to whether or not Brown is a prior endorser of the notes sued on, that question it can raise in the execution of the trust by Kugler, or in an action between it and Brown; and it will not be allowed to obstruct and delay the plaintiff in the collection of whatever amount is due upon the notes. The defendant was an endorser, and made by our statute a surety, and the plaintiff had a right to sue the defendant alone, as he did.

We have thought it best to discuss the case at length, because most of these matters involved the right of the plaintiff to make any recovery on the endorsement of those notes under any circumstances; but at the same time, because of the erroneous instruction given by his Honor, which was in these words, "If you believe the evidence in this case you should answer both issues 'Yes,' and fix the amount of the recovery at the face of the notes, allowing interest from the day that each note respectively fell due," there must be a new trial. The instruction was erroneous because the testimony was conflicting as to what amounts the plaintiff bank had in its possession in the way of cash and collateral securities belonging to the Washington Planing Mills after the notes
fell due and before the appointment of a receiver for the planing (30) mills.

It is not necessary to notice the objections to the evidence from the view which we take of the case.

New trial.

Cited: Bank v. Carr, 130 N. C., 480.

H. T. GREENLEAF AND OTHERS v. BOARD OF COMMISSIONERS OF PASQUOTANK COUNTY.

(Decided 18 October, 1898.)

Bridges, Ferries and Public Roads—Arbitration and Award in Former Action.

1. Public bridges and ferries are incidental to public roads and are not to be established or assumed, or maintained, as county charges, unless as parts thereof, in actual existence or in contemplation.
2. While county commissioners control public bridges and ferries, it is by virtue of their duties, imposed by law, in regard to public roads.
3. It is *ultra vires* for county commissioners to accept a bridge to be maintained at the county's cost, where it appears it is not a part of a public road, in existence or in contemplation of being made—and they may be enjoined from doing so.
4. A former action against a previous board of county commissioners relating to the subject matter of this suit, in which there were an arbitration and award, but no judgment, works no estoppel; nor if there had been a judgment, would it have that effect upon the discretionary powers of their successors legitimately exercised.

CIVIL ACTION, brought by H. T. Greenleaf and others, taxpayers of PASQUOTANK County, to enjoin the defendants from accepting a bridge over Knob's Creek and making the maintenance thereof a county charge.

The bridge in question is a part of a private road owned by E. F. Lamb, which leads to his ferry over Pasquotank River several
(31) miles from the bridge, and for the use of which ferry tolls are charged. The bridge was erected by Lamb, and Knob Creek being a navigable stream, it is necessary to maintain a draw in the bridge for the passage of vessels. The bridge was dedicated by Lamb to the county upon condition that its maintenance become a county charge.

The complaint alleges that there was no public road leading to or branching from the ferry road to any other public road in the county; that the acceptance of the bridge as a county charge will impose upon the taxpayers an unnecessary burden; that the bridge is not necessary for the convenience of the public, and would serve no purpose to any one save the owner of the ferry; that several years ago, in an action to enjoin the acceptance of this same bridge by the county, the matter was arbitrated and an award made against the county.

The answer, while controverting some of the allegations of the complaint, insisted that by the Constitution and by statute law the board of county commissioners were invested with discretionary powers over the domestic administrative affairs of the county, including roads, bridges, etc., and denies that their action is reviewable by the courts; and it is

contended that the former adjudication upon an arbitration and award in 1887 works no estoppel upon the present defendant board of county commissioners.

There was an order to show cause granted by *Norwood, J.*, at chambers in Elizabeth City on 14 May, 1898, which came on to be heard at July Term, 1898, of the Superior Court of PASQUOTANK County, before *Timberlake, J.*, upon affidavits on both sides. His Honor directed the continuance of the restraining order, heretofore granted, until the final hearing—from which ruling the defendant board of county commissioners appealed to the Supreme Court. (32)

E. F. Aydlett and J. W. Ward for plaintiffs.
S. S. Lamb and A. C. Avery for defendants (appellants).

FURCHES, J. The object of this action is to enjoin the commissioners of Pasquotank County from accepting a bridge across Knob Creek, and making the maintenance thereof a county charge.

One E. F. Lamb is the owner of a ferry across Pasquotank River, some two miles or more from this bridge, which ferry he keeps up and charges tolls for its use. Said Lamb, for the benefit of his ferry, has constructed a road from said ferry to this bridge across Knob Creek, which he has also constructed and maintained up to this time as a part of his road. This road and this bridge are the private property of said Lamb.

Knob Creek is the boundary line of Elizabeth City, and a street called "Pennsylvania Avenue" runs to the creek at the point where said bridge is located. Knob Creek is 100 feet wide and navigable for steamboats and other vessels, at the point where said bridge spans the same. So that it is necessary to have and maintain a draw in said bridge, at a very considerable expense to the owner thereof. Said Lamb claims the right to prevent the public from using said road between his bridge and his ferry, and has in some instances charged parties for the use of the same.

Said Lamb proposes to donate said bridge to the county of Pasquotank upon the condition that the county will maintain and keep the same up as a free public bridge. The commissioners have agreed to accept this proposition, and this action is brought by the plaintiff Greenleaf and other citizens and taxpayers to enjoin and prevent the con- (33) summation of this agreement.

It is stated in the record and claimed by plaintiffs, as one reason for this injunction, that some ten or more years ago this same proposition was made to the then commissioners; that an action was then brought

by certain of the citizens and taxpayers to enjoin the same; that the matter was then arbitrated and an award made against the county. But there was never any judgment upon said award.

We do not see how this former action and award cut any figure in this action. There was no judgment, and for that reason it cannot be an estoppel. And if there had been a judgment, we cannot see how it amounted to an estoppel against the present board of commissioners, acting in their legislative and discretionary capacity, if they are so acting. And this is the only question that remains for our consideration.

Is it within the discretionary power of the commissioners to accept this bridge and make its maintenance a county charge? If it is, then this Court has no right to control or interfere with their action. *Brodnax v. Groom,* 64 N. C., 244; *Long v. Comrs.,* 76 N. C., 273; *Burwell v. Comrs.,* 93 N. C., 73.

The county commissioners may establish roads and ferries. The Code, sec. 2014. They may also discontinue roads and ferries. The Code, sec. 2038; and fix and regulate the tolls of ferries and bridges. The Code, sec. 2046. But the establishment of ferries and bridges must be considered as a part of the system of *public* roads, and, when established, become a part of the public road—the public highway. They are
(34) constructed at the expense of the public, and for the benefit and convenience of the public. They must go somewhere, to be a convenience or a benefit to the public. It could not be considered a public benefit to cross this bridge to Lamb's side of Knob Creek and back. If the road from this bridge to Lamb's ferry was a public road, and this bridge was to make a part of the public highway (free to all goers and comers) from Elizabeth City to Lamb's ferry, it would then be a matter within the discretionary power of the commissioners, over which this Court would have no control. *Brodnax v. Groom,* and other cases cited *supra.*

But as it is, the action of the commissioners in accepting this bridge and making it a county charge (if they were to do so) would be *ultra vires* and cannot be allowed. There must be a public road, leading to a public bridge, and the bridge must constitute a part of that public road.

We are not unmindful of the fact that it is stated in *Brodnax v. Groom, supra,* that the bridge under discussion in that case is said to be a mile from the old bridge, and at a point to which there was no public road leading. But it is manifest from what is said in the opinion of the Court that this change was made to get a better location for the bridge, to which the road was to be changed. And the bridge, when built, was to constitute a part of the public highway.

The defendants have the same power to accept this bridge and make it a public charge that they would have to erect a new bridge at that point, if there was no bridge there, but no more.

It was said in the argument that Lamb threatened to close this bridge and to build another above the point of navigation on Knob Creek. This he may do, as it is his private property. But he may not (35) have entire control of the situation. He is exercising a franchise, in operating his ferry and taking tolls, over which the commissioners have control. And it may be, if he is disposed to act ugly about the matter, that the commissioners may discontinue his ferry. But this is not the matter before us on this appeal, and is only noticed because it was a matter that entered into the discussion on the argument of the case. The judgment is

Affirmed.

Cited: McPeeters v. Blankenship, post, 654; *Hornthall v. Comrs.,* 126 N. C., 31; *Robinson v. Lamb, ibid.,* 497.

L. G. DANIELS, ADMINISTRATOR DE BONIS NON OF S. H. FOWLER, AND GUARDIAN OF RUTH H. DANIELS AND HENRIETTA FOWLER, v. CHARLES H. FOWLER, JAMES O. BAXTER, CHARLES H. FOWLER, ADMINISTRATOR, ET AL.

(Decided 22 November, 1898.)

Motion for New Trial—Deed—Undue Influence—Tax Lists—Administration—Accounts.

1. Mere irregularities occurring on the trial below, for which the judge in his discretion might set aside the verdict, not sufficient ground to support a motion here for a new trial.

2. While the insolvency of an assignee and the fact of his having been many years in the employment of the principal party secured would be no evidence of fraud on his part in procuring the execution of a deed, when he was not present when the deed was made, yet coupled with the fact that he afterwards refused to allow the guardian of the children of the deceased maker to see his books, accounts of sales and vouchers—they would all be circumstances for the consideration of the jury upon the issue of fraud.

3. While tax lists are not competent evidence to show the value of land, the valuation being made by third parties not examined as witnesses, yet they are evidence against the parties listing personal property.

4. An administrator, who after many years, still has funds in hand belonging to the estate is liable to an account.

5. A party who seeks benefit from one side of an account kept by himself cannot object to the other side of the account being considered by the jury.

(36) CIVIL ACTION, tried before *Norwood, J.*, at May Term, 1898, of the Superior Court of PAMLICO County.

The action was instituted by the plaintiff as administrator *de bonis non* of S. H. Fowler and guardian of his children to set aside a deed of trust from S. H. Fowler to defendant Baxter, and for an account as to matters relating to this deed and the administration of defendant, C. H. Fowler, former administrator upon the estate of S. H. Fowler.

The jury having found in response to one of the issues submitted: Q. Was the execution of the said deed of trust procured by the fraud and undue influence of the defendant C. H. Fowler and J. O. Baxter? Answer: "Yes."

There was an order of reference made by his Honor to Hon. H. G. Connor as referee to hear evidence and report his findings of facts and conclusions of law as to all other matters mentioned in the pleading, etc.

Defendants excepted and appealed.

W. W. Clarke and O. H. Guion for defendants (appellants).
Simmons, Pou & Ward for plaintiffs.

MONTGOMERY, J. Upon the call of this case in this Court, the counsel of the defendants made a motion, based on affidavits, for a new trial on the ground of having discovered material evidence since the case was docketed in this Court. The application is founded on the alleged
(37) misconduct of one or more of the jurors. The instances indeed are few where this Court has granted a new trial for such cause. In *Davenport v. McKee,* 98 N. C., 500, the Court said on this subject: "The only case in which a new trial will be granted in this Court is the discovery of such new evidence as was proper to be heard by the jury, a judge, or a referee in passing upon and finding the facts, and not for irregularities occurring on the trial, and for which the judge in his discretion might set aside the verdict or finding and reopen the case." We are not disposed to make a departure from this rule upon the facts disclosed in the affidavits before us.

Four causes of action are stated in the complaint, although they are not separately set out. As a first cause it is alleged that the deed of trust which was executed by S. H. Fowler to J. O. Baxter, one of the defendants, was void for the reason that the grantor was at the time of its execution without sufficient mental capacity to execute it, and also that it was procured through the fraud and undue influence of Baxter and C. H. Fowler, another one of the defendants.

As a second cause of action it is alleged that the defendants Baxter, C. H. Fowler, and J. F. Cowell, another defendant, fraudulently combined to get possession of the property conveyed in the deed of trust, and that they did, after the execution of the deed of trust, fraudulently convert the property to their own use. In the third cause of action it is alleged that the defendant Kennedy fraudulently aided the defendant C. H. Fowler to acquire a part of the real estate conveyed in the deed; and the fourth cause of action sets out that the defendant C. H. Fowler qualified as administrator of S. H. Fowler, that he took possession as such administrator of certain property of his intestate not (38) included in the deed of trust, and that he made a false and fraudulent report of his administration. The action was brought by the plaintiffs, who are children and heirs at law of S. H. Fowler, and L. G. Daniels, administrator *d. b. n.* of S. H. Fowler, to have the deed set aside and an account taken both as to the matters relating to the trust deed and the administration of the intestate's estate. The plaintiffs introduced evidence tending to show the want of mental capacity of S. H. Fowler to execute the deed, and also to show fraud on the part of Baxter and C. H. Fowler in procuring the execution of the deed. Mrs. Wharton, the sister of the grantor, testified that on the morning before his death on the following night, he was in an unconscious condition produced by a stroke of paralysis; that while he was in that condition some gentlemen came in (afterwards shown by other witnesses to have been C. H. Fowler and Mayhew, his attorney, and E. G. Wise), and she was asked out of the room, together with the others who were there when the gentlemen arrived. Church Miller, a deputy clerk of Pamlico Superior Court, met Fowler, Mayhew and Wise there by appointment of C. H. Fowler at the same time, and took what purports to be the probate of the deed. He testified that S. H. Fowler was a very sick man; that he thought he did not take notice of anything; that S. H. Fowler did not sign the paper himself, but that Mayhew, the attorney, took hold of his hand and helped him to make his mark, though ordinarily he wrote a very good hand; that he did not think he understood the nature of the transaction nor what he was doing. That Mayhew told him that it was an assignment or a paper, and that they did not read the paper to him. E. G. Wise testified that Mayhew called Miller and himself (39) and asked them to go into Fowler's house with him; that he saw Fowler sign the paper; that it was not read to him; that Fowler said nothing; that Mayhew put the pen in Fowler's hand and helped him make his mark; that he did not think he was conscious. It was admitted that Baxter had been in Fowler's service for twenty-five years, and that Baxter was insolvent at the time of the execution of the deed. It was

also admitted that the stock of goods embraced in the deed of trust was sold by Baxter at private sale to the defendant C. H. Fowler at 60 cents on the dollar at inventory price, and that the land was sold at auction and bought by the defendant C. H. Fowler, and that he paid no money at that time, but that the purchase money was credited on C. H. Fowler's debt and on the account due C. H. Fowler for money advanced by him in compromising S. H. Fowler's debts. In the defendants' joint answer they admitted that before this action was brought, the plaintiffs, through their guardian, requested the defendant Fowler to permit him to examine the alleged account of $9,000 which defendant Fowler claimed that S. H. Fowler owed him, and which was claimed to be secured in the deed of trust, and that Fowler declined to permit the inspection of the amount. It was further admitted in the answer that prior to the beginning of this action the guardian of the plaintiff twice requested Baxter, the assignee, to permit him to inspect his inventory of the alleged assigned estate, his itemized account of sales of the real and personal property conveyed in the deed, his vouchers as such assignee, and the papers and books belonging to the alleged assigned estate, and that Baxter refused all of these requests. It was further admitted in the answer that on one
(40) occasion, when these requests were made and refused, the defendants Fowler and Baxter were together in the store of Fowler, and that Baxter admitted that all of his books, papers, accounts and vouchers were then in the store. It was further admitted in the answer that the defendant Baxter, assignee, took into his possession the property mentioned in the deed of trust and made sales thereof to Fowler. The defendant Fowler admits in his answer that he filed no account of his administration with the estate of S. H. Fowler until after a period of ten years from his qualification.

The plaintiffs entered a *nol. pros.* as to the cause of action against Kennedy, and it was agreed that only the pleas in bar should be tried. Upon the plaintiff's evidence, the defendants, under the act of 1897, ch. 109, moved to dismiss the causes of action set out in the complaint, except those which referred to the assignment alleged to have been made by S. H. Fowler. The motion should have been allowed as to the second cause of action, for there was no evidence introduced tending to sustain it.

The motion as to the fourth cause of action was properly disallowed. The plaintiffs alleged that the defendant C. H. Fowler qualified as administrator of S. H. Fowler; that assets came into his hands, and that he made a fraudulent report of the same. The defendant C. H. Fowler denied that his report was fraudulent, but admitted that he had received assets belonging to the estate of his intestate, and that ten years elapsed

after his qualification as administrator before he made a report or filed any account. The plaintiffs were therefore entitled to an account. *Neil v. Becknell,* 85 N. C., 299.

After the motion to dismiss was overruled, evidence was given (41) for the plaintiffs and for the defendants. The plaintiffs offered the books of C. H. Fowler, which contain the account of C. H. Fowler & Company (S. H. Fowler having been one of the company). The object of this evidence was to show that the amount due by S. H. Fowler to C. H. Fowler, for C. H. Fowler's interest in the stock of goods of C. H. Fowler & Company, which S. H. Fowler had bought and which was the debt claimed in the deed, was not worth $9,000, set out in the deed, and that the balances had been forced in order to make up the sum mentioned in the deed. The defendants objected to the testimony of the witness Strong, who as an expert in bookkeeping and handwriting, was examining these books, in reference to the account of C. H. Fowler & Company. The books were undoubtedly before the court, and they are described in the case on appeal as "the books of C. H. Fowler containing the C. H. Fowler account," and the objection, too, seems to be pointed, not to the books, but to the account of C. H. Fowler & Company—a part of the books. We think it was competent for the purposes for which it was introduced.

There was also an objection made by the defendants to the introduction of the credit side of the account against S. H. Fowler on the books of C. H. Fowler, to show that the aggregate credits for ten years did not exceed $600. We think that evidence was competent as evidence to show that, under the circumstances set out in this case, the debt of $9,000 claimed by C. H. Fowler against S. H. Fowler was fraudulent. But the testimony of C. H. Fowler himself relieves the case of any trouble, if any existed, in respect to the introduction of testimony concerning the books of C. H. Fowler and the account of C. H. Fowler & Company. He said "the books show what I have received from S. H. Fowler on his debt to me for my interest in the copartnership. In re- (42) sponse to your question (question put by counsel of plaintiffs) as to how much S. H. Fowler had paid me on that debt, I adopt the books as my answer." The purchase by S. H. Fowler of C. H. Fowler's interest in the goods was made in 1877 and the purchase price was claimed to be between $6,000 and $7,000. To prove that that could not have been the true value of the goods and was a fraudulent claim against S. H. Fowler, the plaintiffs were allowed to introduce the tax list of 1876, which showed that C. H. Fowler & Company listed only $1,650 for taxation, and $525 in 1877. We think the evidence was admissible. In *Cardwell v. Mebane,* 68 N. C., 487, this Court held that "tax lists were not competent evidence to show the value of land, as the assessors were not witnesses in

the case sworn and subject to cross-examination in the presence of the jury." But for the purposes for which this evidence was offered, the decision in that case has no bearing. If the amount listed for taxation for C. H. Fowler & Company was all upon the *real estate* of the firm, then the tax list was evidence that C. H. Fowler & Company had no stock of goods at the time of the sale of C. H. Fowler's interest to S. H. Fowler, and that if the whole consisted of the goods, then the interest of C. H. Fowler in the same was worth only a few hundreds instead of thousands.

The foregoing is based upon the fact that the taxpayers themselves, and not the assessors of real estate, value their personal property under oath. The listing of this property was the valuation which these partners put upon their stock of goods at or about the time of the sale, and is competent between them as admissions as to value—not conclu-
(43) sive, but still some evidence of value. Two issues were submitted to the jury:

1. Did S. H. Fowler have sufficient mental capacity to execute the deed of trust to J. C. Baxter, mentioned in the complaint?

2. Was the execution of the said deed of trust procured by the fraud and undue influence of the defendant C. H. Fowler and J. C. Baxter?

The jury responded to the first issue "Yes," and to the second issue "Yes."

As to defendant Baxter, we deem it probably just to him to say that the evidence was not conclusive as to him, but there was some evidence, and the weight of it was for the jury. That he was insolvent at the time of the execution of the deed and that he had been in the employment of C. H. Fowler for 25 years, as his clerk, alone would be no evidence of fraud on his part in procuring the execution of the deed, for he was not present when the deed was made. But these facts, when taken in connection with the other fact that he refused to permit the guardian of the children of the deceased intestate and grantor to examine either or all of the accounts which made up the debt claimed to be secured in the deed, his books and accounts, his vouchers connected with the sale of the trust property, the disbursement of the proceeds, then the matter became serious, and they constituted evidence from which the jury might have inferred that he had a hand in procuring the deed to be executed, though he was not present at the time it was done.

In his answer, after admitting his conduct, he undertook to justify it by saying that "For a long time prior to said request the plaintiff L. G. Daniels had been publicly charging the defendants with improper conduct with reference to said assignment, and had been threatening to institute suit against defendants, and that, acting under advice
(44) of counsel for the express purpose of compelling the said Daniels

to institute the said threatening suit, in order that the matter might be settled by he courts, refused to permit said inspection." This was indeed a lame excuse. If his accounts had been carefully and honestly kept, he should have most willingly submitted them to the inspection of an intelligent man who was interested, and such a course would probably have prevented a lawsuit instead of provoking one. It may have been that his better judgment suggested that the guardian should have been permitted to examine the books, but that the undue influence of Fowler over him constrained him to deny that right to the plaintiff's guardian.

The judgment of the court below is affirmed, but the referee, in stating the accounts ordered therein, will not take into his consideration any connection which the defendant Cowell was alleged to have had with any of the matters set out in the complaint. The jury having found that the deed of trust was procured by the fraud and undue influence of Baxter (as well as of C. H. Fowler), and he having admitted that he took into his possession the property conveyed in the deed and sold the same to the defendant C. H. Fowler, the conversion of the property is thereby established, and the plaintiffs are entitled to the accounts prayed for against both Baxter and C. H. Fowler. With the above explanation, the judgment is

Affirmed.

Cited: Ridley v. R. R., 124 N. C., 39; *Martin v. Knight,* 147 N. C., 581.

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(45)

D. B. BATTS v. H. L. STATON.

(Decided 25 October, 1898.)

Boundary, Parol Evidence of—Deeds—Declarations of Deceased Persons.

1. Where partition has been made by decree of the court between two tenants in common of a tract of land, neither will be estopped from setting up the original line of division between them, in consequence of a subsequent change in the line adopted by parol agreement.

2. Adverse possession for twenty years, uninterruptedly, would ripen the defective claim into a good title; and in such a case it would not be admissible to give in evidence the declaration of one of the deceased tenants that he had only given permission to his brother to use the line agreed on, as a matter of favor, reserving the right of property in himself.

CIVIL ACTION for the recovery of land, tried before *Timberlake, J.,* at June Term, 1897, of EDGECOMBE Superior Court.

Both parties derived title from a common source, Benjamin Batts, who devised his land to his two sons, D. B. Batts and I. F. Batts, between whom it was divided by decree of the Superior Court in a proceeding for partition.

About a year after the decree, the two brothers, by parol, agreed upon a change in the dividing line. The plaintiff instituted this suit in order to reëstablish the original dividing line.

There was a verdict and judgment in favor of plaintiff, and appeal by defendant.

The points made are considered in the opinion.

H. G. Connor for appellant.
Gilliam & Gilliam for appellee.

(46) MONTGOMERY, J. Partition by decree of the Superior Court of Edgecombe was made of a tract of land in that county, in 1870, among the devisees of Benjamin Batts. The shares of Isaac and D. B. Batts were coterminous and the line between them was described in the survey made at the time of partition as running from a bunch of birches, near Bryan's old mill, south 70½ west to an oak on the road, being represented on the map used in the trial by the line running from A to B. The plaintiff, who is the son of D. B. Batts, is the owner of (two-thirds undivided interest) the share allotted to his deceased father, and the defendant is the owner of the share which was allotted to Isaac by purchase from the son and only heir at law of Isaac. The defendant is in possession also of a part of the share allotted to the plaintiff's father, lying just along and south of the line A B and between the lines represented by A, D and E on the map.

This action was brought to recover the possession of that piece of land lying between A, D and E. The defendant in his answer admits that the commissioners, in their report in the partition proceedings, fixed the line between the two shares as the plaintiff has alleged in his complaint, but he avers that at the time of the filing of the report in 1870 Isaac and D. B. Batts made an agreed line which changed the line set out in the survey, by which Isaac, under whom the defendant claims, obtained the land represented by the letters A, D and E; that each took possession of his share under the changed line, and that adverse possession has been had of the same by the defendant and those under whom he claims since that time up to the commencement of this action—a period of about 25 years.

The defendant introduced several witnesses, who testified on the matter of the changing of the line between Isaac and D. B. Batts, all of whom testified, however, that the agreement was made after the (47) partition was completed. Henry Batts said that "Doctor D. B.

Batts and his brother had some difference about the dividing line fixed by the division, but after a while they came upon an arrangement so as to give Isaac a way over the creek." Frank Batts testified that "some time after the division was made Dr. Batts told me to catch my horse and get some sticks. He wanted me to run the furrow from the white oak to the gum bush on the path. Isaac was there. I ran to the gum bush where it strikes the path. The fence was run on the furrow. The fence went down after the stock law was passed. The ditch on Dr. Batts' side goes to the line and stops. Dr. Batts had the ditch cut. I was there from the time the land was divided until two years ago. The hedge row was always recognized as the line by Dr. Batts and his brother after the agreement." G. L. Lilly testified that "I was on the land when it was divided; after that, Dr. Batts and his brother made an agreed line between them, which began at the white oak on the road and ran with the fence until it struck the path, and then with the path until it struck the creek. Dr. Batts told me the change was made to give his brother an outlet to the creek; this line was made the year after the division. It was recognized as a line for the ten or eleven years I remained there."

His Honor refused to give, at the defendant's request, an instruction which was in the following words: "If the jury find that D. B. Batts and Isaac Batts made an agreement as to the location of the dividing line between their land in 1870 and made an agreed line and placed a fence upon said agreed line, and so recognized the line during their joint lives and during the life of the survivor, D. B. Batts, (48) till his death in 1885, and said land was recognized by their heirs and assigns until 1896, the plaintiff, the heir of D. B. Batts, is estopped from disturbing the line which was established by his father, D. B. Batts."

There was no error in his Honor's refusal to give this instruction. By all the evidence bearing on that question it appeared, as we have said, that the changed line was made after the survey and partition. But, if the change had been made contemporaneously with the survey and running of the line in the partition proceedings, the plaintiff would not be estopped from setting up the original line. In no case will the description contained in a deed be set aside by parol evidence, except where the deed describes the land by *distance and course only,* and old marks are made to appear corresponding in age with the time of the execution of the deed so nearly within the courses and distances that they may reasonably be supposed to have been made for the boundaries. *Reed v. Schenck,* 13 N. C., 415; *Carraway v. Chancy,* 51 N. C., 361; *Davidson v. Arledge,* 88 N. C., 326; *Shaffer v. Hahn,* 111 N. C., 1. In the first cited case the Court said: "And for many years we have in all cases, I believe, except one, adhered to the description contained in the deed; and it is much to

be lamented that we do not altogether. The case to which I allude is where the deed describes the land by course and distance only, and old marks are found, corresponding in age, as well as can be ascertained, with the date of the deed, and so nearly corresponding with the courses and distances that they may well be supposed to have been made for its boundaries, and marks shall be taken as the *terminii* of the land. This is going as far as prudence permits; for what passes the land not included
(49) by the description in the deed but included by the marked *terminii?* Not the deed, for the description contained in the deed does not comprehend it. It passes, therefore, either by parol or by mere presumption. As far as we know, there has been no series of decisions by which the description in the deed is varied by marks, unless they were made for the *terminii* of the land described in the deed, or supposed to be so made, and to which it was intended the deed should refer, or to which it was supposed the deed did refer; or, rather, supposed that the courses and distances corresponded with the marks, and that the same land was described, whether by course and distance in the deed or by the marked *terminii.*

But the defendant set up as a second defense that his claim, followed by 20 years adverse possession on the part of himself and those under whom he claims, had ripened into a title in fee to the land. On that matter, J. M. Howell, a witness for the plaintiff, was permitted to testify over the objection of the defendant that "shortly before his death Dr. Batts said to me that he had entered into possession of his brother's (Isaac) land soon after his death as administrator and had so held possession for many years, and that thus being in possession of both sides of the disputed lines was the reason he had never taken the trouble to straighten the line." This witness had already testified that Isaac died in 1872 and that Dr. Batts took possession of his land as administrator and so continued in possession until his death in 1885. That part of the testimony of Howell which referred to the declarations of Dr. Batts as to not straightening the line and his reason for not doing so, ought
(50) not to have been received. It carries with it the weight of Dr. Batts as a witness testifying to the fact that he had only given permission to his brother to use the line agreed upon as a matter of favor, reserving the right of property in himself. This is apparent, and its importance is emphasized in the fact that in his charge his Honor said to the jury that one of the plaintiff's contentions was that the location of the line by consent was made by Dr. Batts simply for the convenience of his brother and not in any sense to affect the established line. The effect of Howell's testimony in this vital point was to bring to the aid of the plaintiff the declaration of his deceased father, and that testimony must have had weight with the jury.

The defendant introduced no evidence on the defense set up in his amended answer, and it is needless to notice that part of the case.

For the error in receiving the evidence of Howell in the respect pointed out in this opinion, there must be a

New trial.

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(51)

GENERAL ELECTRIC COMPANY v. R. P. WILLIAMS.

(Decided 18 October, 1898.)

Counterclaim.

1. Counterclaim is the creature of The Code and is an extension of the set-off, enlarging the class of claims that may be pleaded and enabling the defendant to obtain judgment for the excess.
2. To be capable of affirmative relief, it must be one on which judgment might be had in the action, and must therefore come within the jurisdiction of the court. It cannot exceed $200 in a justice's court.
3. Where several counterclaims are pleaded in the same action, their aggregate sum will be taken as the jurisdictional amount.

APPEAL from justice's court, heard before *Bryan, J.*, at Fall Term, 1897, of the Superior Court of CRAVEN County.

The plaintiff sued for the sum of $171.85 for goods sold and delivered.

The defendant denied the allegations of the complaint and set up "a further defense and counterclaim" that he had paid $33 on plaintiff's account, and that he had shipped to the plaintiff to be repaired and returned instruments worth $165.16, which plaintiff had never returned. Of these two sums, amounting to $198.16, the defendant remitted all in excess of the plaintiff's claim and pleaded the remainder ($171.85) as a set-off. He sets up as a second counterclaim that he had shipped to plaintiff four additional transformers, worth $180, which had never been returned, and that the damages caused by the detention amounted to $80 in addition to their value, making $260. Of this sum he remits all in excess of $200 and prays judgment for that amount and costs.

The plaintiff demurred, insisting, among other things, that the answer did not show that the counterclaims existed at the time of (52) the bringing of the action; that they did not arise out of the same cause of action, and that their total amount was in excess of the jurisdiction of the justice of the peace.

The demurrer was overruled, and plaintiff appealed.

C. R. Thomas for plaintiff (appellant).

W. W. Clark and O. H. Guion for defendant.

DOUGLAS, J. This case is before us on demurrer to a counterclaim. The action was originally brought before a justice of the peace, and subsequently heard on appeal in the Superior Court. The plaintiff sued for the sum of $171.85 for goods sold and delivered. The defendant denied all the allegations of the complaint, and set up as "a further defense and counterclaim" that he had paid $33 of the account and had shipped to the plaintiff, to be repaired and returned, two arc lamps and one transformer worth the sum of $165.16, which the plaintiff had never returned. Of these two sums, amounting to $198.16, the defendant remitted all in excess of the plaintiff's claim and pleaded the remainder, $171.85, as a set-off. From this it would appear that the defendant, in denying the allegations in the complaint, intended simply to deny the indebtedness, as he does not seek to recover this amount. He does, however, go on further and set up as a second counterclaim that he had shipped to the plaintiff four additional transformers, worth $180, which had never been returned, and that the damages caused by their detention amounted to $80 in addition to their value. Of this sum of $260 he remits all in excess of $200 and prays judgment for that amount, with the costs of the action.

(53) The plaintiff demurred, insisting, among other things, that the answer did not show that the counterclaims existed at the time of the bringing of the action, that they did not arise out of the same cause of action, and that their total amount was in excess of the jurisdiction of the justice of the peace. The demurrer was overruled, and the plaintiff appealed.

We think that the subject-matter of the counterclaims is sufficiently connected with the subject of the action to be maintained under section 244 of The Code, as the transactions apparently all arise in the same general course of dealing. But we also think that the demurrer should have been sustained, inasmuch as the total amount of the unremitted counterclaims was in excess of $200, and therefore beyond the jurisdiction of the justice of the peace. In this computation we have entirely eliminated the alleged payment of $33, which is in no sense a counterclaim. The plea of payment is essentially different from set-off or counterclaim in its nature, its origin, and its results. A payment *pro tanto* extinguishes the debt *eo instanti,* and is itself thereby extinguished, so that neither remains any longer the subject of an action. On the contrary, a counterclaim, which now includes a set-off, is the assertion by the defendant of an independent demand which might be maintained in an independent action. Payment was a good defense at common law, and from time immemorial was regarded as a valid plea in bar. Set-off, except in some few instances of equitable jurisdiction, rests purely upon statute and was unknown to the common law, which could not conceive

of the defendant ever being an actor. It originated in the Bankrupt Act of IV and V Anne, ch. 17, suggested, perhaps, by the *compensatio* of the civil law, but was given general application by the statutes of 2 George, II Chapter, 22, and 8 George, II Chapter, 24, which (54) enact: "That where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial, which shall operate as payment, and extinguish so much of the plaintiff's demand." 3 Bl., 304. Payment extinguished the debt at the time of payment, while a set-off required mutual existing debts, and *operated as payment* only when pleaded and by judgment of the court. The difference is thus stated by *Judge Henderson* in *McDowell v. Tate,* 12 N. C., 249, 251: "A payment is by consent of the parties either expressed or implied, appropriated to the discharge of a debt; a set-off is a mutual independent claim, which still continues to exist as such, and one which the parties did not intend should be appropriated to the satisfaction of an existing demand, but that each should have mutual causes of action, and, of course, mutual actions, if they please, against each other." This distinction is of vital importance in the determination of the case at bar, as well as the proper understanding of the decisions of this Court.

The counterclaim is the creature of The Code, and is an extension of the set-off, enlarging the class of claims that may be pleaded, and enabling the defendant to obtain judgment for the excess. The Code, sec. 244, provides that: "The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the (55) commencement of the action."

It is said in *Hurst v. Everett,* 91 N. C., 399, 403, that a counterclaim includes both set-off and recoupment, and in fact every defense to the action, except a demurrer, which does not amount to a plea in bar. It is true that recoupment and set-off are now both counterclaims, and yet they are essentially different from each other. We have seen that the set-off was of statutory origin and applied only to mutual independent claims, the defendant's claim necessarily arising out of a transaction extrinsic to the plaintiff's cause of action. On the contrary, recoupment always arises out of the same cause of action or matters directly connected therewith, and was recognized at common law. In fact it was a defense going to lessen or defeat the plaintiff's recovery by showing

damages sustained by the defendant from a breach by the plaintiff himself of the very contract upon which his action was based, or fraudulent misrepresentations by which the defendant was induced to enter therein. As it was a pure defense, there could be no excess recovered by the defendant. It is now included in the first class of counterclaims allowed by The Code, and yet, as held in *Hurst v. Everett, supra,* it is still available in some cases as a pure defense.

A true counterclaim, such as that at bar, to be capable of affirmative relief, must be one on which judgment might be had in the action, and must therefore come within the jurisdiction of the court wherein it is pleaded. Therefore, it cannot exceed $200 in a justice's court; and where several counterclaims are pleaded in the same action, their aggregate sum will be taken as the jurisdictional amount. These prin-
(56) ciples are laid down in the leading text-books and sustained by a long line of authorities which it is impracticable to cite.

It simply remains for us to ascertain whether the counterclaims in the case at bar exceed in the aggregate the sum of $200, taking the allegations of the answer as true for the purposes of the demurrer.

The plaintiff demanded the sum of $171.85. Deducting the alleged payment of $33, there remained only $138.85, which was set-off by the defendant's first counterclaim remitted to that amount. The defendant's second counterclaim was for $260, remitted to $200, for which he demanded judgment. But as he had already set off $138.85 it was necessary to remit his second counterclaim to $61.15 to bring it within the jurisdiction. This he did not do, and we cannot do it for him. The demurrer should therefore have been sustained.

Our decision here is not in conflict with that in *Heyser v. Gunter,* 118 N. C., 964, as the facts are essentially different. In that case it is distinctly stated on page 965 that "the plaintiff sued for the $200 advanced and defendant pleaded *payment* and also a counterclaim for $200, waiving and releasing all in excess of $200." There was only one counterclaim, as the plea of payment was in no sense a counterclaim. It is true the plaintiff claimed a recoupment of $125 for additional expense in excess of the contract price in moving the timber, but as he owed the defendant a greater amount, his payment of the $125 that should have been paid by the defendant, was equivalent to a payment to the defendant, lessening his claim to that amount. This was admitted by the defendant, who remitted the additional sum of $114.46 for jurisdictional purposes. The statement of account in the opinion of the Court might appear as setting off independent claims, but such
(57) was not the intention. It is simply the method usually employed by business men to arrive at the balance due. If a man were to deposit $5,000 in bank and draw divers checks thereon amounting to

$4,900, at the end of the month he would receive a statement from the bank showing the deposit of $5,000 on one side and the amounts of the various checks on the other, resulting in a balance of $100 due the depositor. If suit were brought for the balance before a justice of the peace, it could not be contended that the deposit and the different checks constituted mutual causes of action upon which independent actions might be brought.

In the case at bar the demurrer must be sustained, and the judgment is therefore

Reversed.

Cited: Bank v. Riggins, 124 N. C., 538; *Bank v. Wilson, ibid.,* 562, 570; *Satterthwaite v. Ellis,* 129 N. C., 72; *Smith v. French,* 141 N. C., 7.

JOHN R. PENDER, RECEIVER OF JOHN P. MALLETT AND C. B. MEHEGAN, v. JOHN P. MALLETT, C. B. MEHEGAN AND S. MALLETT AND THE EDGECOMBE HOMESTEAD AND LOAN ASSOCIATION.

(Decided 18 October, 1898.)

Pleading—Receivers—Fraudulent Deed by Insolvent Husband.

1. If a pleading is argumentative and evidentiary, the remedy is by motion for a repleader and not by a demurrer.
2. An amended or substituted complaint filed by leave of court may be different from or even antagonistic to the original complaint, *provided*, the effect of the change is not to confer jurisdiction, or evade defenses (as Statute of Limitations) which could have been pleaded to the original complaint.
3. A receiver is the hand of the court, and does not represent the debtor alone, and can bring an action by order of court to set aside fraudulent conveyances of the debtor.
4. Where an insolvent husband has conveyed property to his wife in fraud of his creditors, it may be recovered in her hands, the husband being joined as defendant, if the wife is not a free trader. If she has invested the proceeds in other property the fund may be followed.

APPEAL from an order in the cause made by *Brown, J.,* at June (58) Term, 1898, of the Superior Court of EDGECOMBE County.

The action was brought by the plaintiff as receiver, for the purpose of recovering certain property which was alleged to belong to the firm, in failing circumstances, composed of John P. Mallett and C. B. Mehegan, defendants, and to have been fraudulently placed in possession

of defendant, Mrs. S. Mallett, wife of one of the firm and sister of the other. The complaint also claimed a debt, alleged to be due from the defendant loan association to John P. Mallett. There was a demurrer filed to the complaint. By leave of court, an amended complaint was filed 11 October, 1897, eliminating the loan association from the action. At April Term, 1898, a second demurrer was filed, which was overruled, and defendants allowed until 20 May, 1898, to answer, and, on motion of plaintiff, an order was made for the examination of the defendants before the clerk at his office on 23 May, 1898.

The defendants excepted to the order and judgment, and appealed. The court notes the exception, but is of opinion that no appeal now lies, and the clerk is ordered not now to send up any transcript, and also to proceed to take said examination unless otherwise ordered by Supreme Court.

The defendants applied to the Supreme Court for a *certiorari* for the purpose of reviewing said orders, and obtained the same. The certificate declared that "the *certiorari* will issue, but it will not suspend the order of examination of defendants"—being applicable only to the judg-
(59) ment overruling the demurrer—and this was held, in this case, *Pender v. Mallett,* 122 N. C., 163.

On 7 June, 1898, the time fixed for proceeding with the examination of defendants, they appeared before the clerk, and Mrs. S. Mallett moves to dismiss the proceedings, among other grounds, because the order for the examination provided for its being taken after answer filed. The motion was overruled, and defendants except and appeal to the judge of the Superior Court, and contended that the examination could not be proceeded with until the appeal was decided by the judge.

The plaintiff contended that the clerk should proceed with the examination, noting defendant's exception, and that the appeal, without taking the examination, would be premature.

The clerk decided that the defendant's contention was correct, and refused to proceed with the examination. The plaintiff excepted and appealed to the Superior Court judge.

At June Term, 1898, this cause coming to be heard upon appeal from clerk by defendants, the court decided that the appeal will not lie from an order directing the examination of parties, and directed the clerk to proceed with the examination.

To this order the defendants object and except, for that the court holds that they cannot appeal from the decision of the clerk in this matter. For that the court failed to pass upon the question of law raised in the appeal in this action. For that, as a question of law, the plaintiff is not entitled to this examination.

Appeal by defendants to Supreme Court.

G. M. T. Fountain for defendants (appellants). (60)
Jacob Battle and Gilliam & Gilliam for plaintiff.

CLARK, J. Under The Code, sec. 581, the defendant may be examined before pleadings filed to procure information in framing the complaint as was the case in *Holt v. Warehouse Co.*, 116 N. C., 480, where it is held that an appeal from such order was premature and would be dismissed; or the defendant may be examined after answer filed to procure evidence in the cause, *Helms v. Green,* 105 N. C., 251; *Vann v. Lawrence,* 111 N. C., 32; and in the latter case the Court held that an appeal from such an order would be premature, pointing out that trials would be needlessly prolonged and costs extravagantly swelled if an appeal could lie to this Court "upon every isolated question of practice or the admissibility of evidence, competency of witnesses, or the like."

The examination in this case not having been asked to procure evidence in framing the complaint, his Honor, Judge Bryan, properly held, at Fall Term, 1897, that the order to examine the defendants before answer filed was premature. At April Term, 1898, Judge Brown overruled the demurrer and gave the defendants till 20 May to file answer, and ordered examination to be taken 23 May. The issue would regularly have been joined by filing the answer at April term, and as by the grace of his Honor time was given till 20 May, he was within the practice by setting the examination for 23 May, a date after issue should be joined, and the former order of Judge Bryan, made at a different stage of the cause, was not *res judicata.* The defendants appealed at April Term, 1898, which lay from overruling the demurrer, though not from an order directing examination of witnesses, and this was held in this case, (61) *Pender v. Mallett,* 122 N. C., 163. The appeal would ordinarily stop all proceedings in the lower court, including proceedings under orders from which, if considered alone, an appeal would be premature. But in this cause, upon the case as presented, we directed that the writ of *certiorari* should not suspend the order of examination of the defendants—a matter which rested in the discretion of this Court. The Code, sec. 957.

This brings us to the consideration of the demurrer, from overruling which an appeal lay, but as to which we find no error. The first two grounds of first demurrer for misjoinder are eliminated by the omission of the parties and causes of action objected to in the second or substituted complaint filed by leave of court, and the finding of fact by Judge Brown that there has been a discontinuance as to them. The third ground of demurrer that the complaint was argumentative and evidentiary is not ground for demurrer, but, if true, would have sustained a motion (if made before answer or demurrer) for a repleader and to make the com-

plaint more explicit. *Daniel v. Fowler,* 120 N. C., 14. As to the first additional ground of the amended demurrer, the second complaint is not for a different cause of action and antagonistic to the first, but merely a different mode of stating the same cause of action, and if it were as the demurrer alleges, the second complaint is in effect a substituted complaint by leave of the court and might be different or even antagonistic to that stated in the original complaint, for this is not the case of an amendment of summons, or even of the complaint, to confer jurisdiction by charging an entirely new cause of action or evading defenses to the original action, which would not be admissible. *Gilliam v. Ins.* (62) *Co.,* 121 N. C., 369. The second additional ground of demurrer cannot be sustained. The receiver is the hand of the court, bringing this proceeding under its orders, and is not the representative of the debtors alone, and can maintain an action to set aside fraudulent transactions of the debtors. 24 A. & E., 699, notes; *Porter v. Williams,* 59 Am. Dec., 523, and notes. As to the last ground of demurrer, the defendant S. Mallet is now a free-trader and sued as such. It is immaterial that the property came into her hands before she was made a free-trader. But even if she were not a free-trader, the action concerns property she claims as her separate property, and she can be sued in regard thereto, no matter when she acquired it, her husband being joined with her as defendant. The Code, secs. 178, 424 (4). It cannot be allowed that when an insolvent husband (or his firm as here charged) makes over his property to his wife in fraud of his creditors, she cannot be sued for the recovery thereof because she is a married woman. If in such case the specific property (money, for instance) has been invested in some other shape, the fund may be followed. *Edwards v. Culberson,* 111 N. C., 344, and cases there cited.

No error.

Cited: Reynolds v. R. R., 136 N. C., 348.

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(63)

MARY S. W. BIRD v. ALLEN GILLIAM AND WIFE.

(Decided 18 October, 1898.)

Petition to Rehear—Undevised Interests in Land.

1. *Filing* and *docketing* in reference to petitions to rehear are not convertible terms, but mean different things, as used in Rules 52 and 53, published in 119 N. C., 929.

2. The petition is said to be *filed* when it is received by the clerk, and this must be done within twenty days, at farthest, from the beginning of the next term; it is docketed when the clerk enters it upon the records at the order of the justice, who grants the rehearing.

3. An undevised interest in land descends to the heirs at law of the testator and may be conveyed by deed.

PETITION to rehear case, determined at September Term, 1897, reported in 121 N. C., 326, where the facts are stated. The petition is filed by the defendants and brings to the attention of the Court certain mistakes in the record, which are adverted to in the opinion of *Justice Montgomery;* it likewise calls attention to the fact that whatever interest in the land was not disposed of by the will of John Swain descended to his children, Mary and William Swain, his only heirs at law, and that when William conveyed to Mary, the remainder in fee by inheritance was joined with the life estate by devise, and her deed conveyed to defendant Allen Gilliam a fee simple, and left no estate in her to descend to her niece, the plaintiff.

R. B. Peebles for petitioners.
F. D. Winston, contra.

MONTGOMERY, J. This case is before the Court upon a petition (granted) to rehear it. A motion was entered by the counsel of the appellant to dismiss the petition upon the alleged ground that (64) it was not filed in time under the rules of this Court.

His contention was that the words *filing* and *docketing* as they appear in connection with petitions to rehear cases under our rules are convertible terms, meaning one and the same thing. A reading of Rules 52 and 53, published in 119 N. C., beginning at page 929, will show that they are entirely different things. Rule 52 requires the petition to be *filed* at the same term or during the vacation succeeding the term of the court at which the judgment was rendered, or within 20 days after the commencement of the succeeding term. It appears in that rule, also, that the justice to whom the petition is submitted orders the docketing of the petition in cases wherein it is granted. Under Rule 53, the petition is required to be sent to the clerk of this Court, "who shall endorse thereon the time when it was received and deliver the same to the justice designated by the petitioner, who shall be a justice who did not dissent from the opinion; but the petition shall not be *docketed* unless said justice shall endorse thereon that the case is a proper one to be reheard; and notice of the action had shall be given to the petitioner by the clerk of this Court, and if *docketed* to the opposite party also." The petition is

said to be *filed* when it is received by the clerk; it is *docketed* when the clerk enters it upon the records at the order of the justice who grants the rehearing. The opinion was delivered at the September Term, 1897, and the next succeeding term was begun on the first Monday in February, 1898—the 7th day of the month. The petition was filed (received by the clerk) on Sunday, 27 February, 1898. It was filed in time. The first day of the period allowed is to be excluded from the count, and
(65) the last also, because it was Sunday; and this brings the filing within the time limited. The motion must therefore be disallowed and the petition heard on its merits. *Barcroft v. Roberts,* 92 N. C., 249.

Upon the original hearing of the case the only matter for decision was the construction of a clause in the will of John Swain, which was in the following words: "After all my debts are paid the land whereon I now live and in my possession I leave to my wife during her natural life, and at her death I leave the same land to my daughter Mary during her natural life, and give the same land to the heirs of her body, but if my daughter Mary should have no lawful heirs of her body the said land at her death shall go back to my son William and the heirs of his body."

The appeal having been taken in *forma pauperis,* the record was not printed. In looking into the written record we found in a statement of facts agreed upon and signed by the counsel of both plaintiff and defendant one in the following terms: "That Mary Susan Whitaker Bird, who is the same person as Mary Susan Whitaker, named in the summons, is the sole surviving heir at law of John Swain, the testator named in said will, and of Mary Swain and William Swain in said will, and she is also their next of kin." Upon a reëxamination of the record, brought about by a statement in the petition to rehear the case, we find another admitted fact not contained in the first statement of facts agreed, in these words: "It is admitted that Mary Swain and William Swain were the only children of John Swain, and that Mary Susan Whitaker Bird, who was living at the time the will was made, was the niece of the said John Swain and a first cousin of Mary Swain and William Swain, and
(66) that John Swain had no other nieces or nephews." This admitted fact is entirely separate from the others, and was made and agreed upon after the first statement of facts agreed was signed by counsel, as we were informed by counsel on the argument upon the rehearing. On the first hearing it escaped our notice, and quite naturally, we think. It now being apparent that upon the death of John Swain, the testator, William and Mary were his only children surviving him, they were as matter of law his only heirs at law notwithstanding the statement in the agreed facts that Mary, a niece, was in that relation to him.

It follows, therefore, that whatever estate remained undisposed of by the will of John Swain descended to Mary and William, his only children

and heirs at law, and that the deed from William to Mary and from Mary to defendant passed a fee simple interest in the land mentioned in the will to the defendant Allen Gilliam.

There was error in the former judgment and opinion of this Court, and the judgment of the court below is

Affirmed.

Cited: Pitchford v. Limer, 139 N. C., 15.

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(67)

D. W. BRITTON, ADMINISTRATOR, v. MARY E. RUFFIN, ADMINISTRATRIX.

(Decided 18 October, 1898.)

Warranty of Title in Deed—Ouster—Defeat of Title.

1. Two things necessary to support an action upon a covenant of warranty of title, viz., failure of title and ouster of possession, actual or constructive.
2. A covenant of seizin is broken upon the execution of the deed, where there is a defect of title.

CIVIL ACTION to recover damages for breach of warranty of title contained in a deed from J. B. Ruffin and wife to John C. Britton and Josiah Mizzle, tried before *Brown, J.,* at May Term, 1898, of the Superior Court of BERTIE County.

Other issues had been submitted and passed upon by the jury at previous term, not necessary to be stated, as the case turned upon the finding of the jury at the present term upon the single issue submitted:

"Did Britton and Mizzle obtain title to the timber by possession under the deed from J. B. Ruffin and wife to them, dated August, 1874, before the surrender to Wynns in 1890?" Answer: "No."

The plaintiff's intestate had bought of defendant's intestate the timber trees standing and growing upon the land and took a deed therefor with a covenant of warranty of title.

It was admitted that the defendant, owing to the defective description in the deed under which he claimed, had no title to the land upon which the timber trees stood. But the jury find that before the plaintiff quit work in 1890, upon the demand of the owner, the plaintiff had cut all the timber that he was entitled to under the terms of the (68) deed.

Upon the finding of the jury, the defendant moved for judgment that she go without day.

The plaintiff moved for judgment for a penny and the costs, which was allowed by the court.

Defendant excepted, and appealed.

Francis D. Winston for appellant.
Battle & Mordecai for appellee.

FURCHES, J. This appeal makes the fifth time this case has been here. From the reports of these various decisions, a full history of this case and the grounds of complaint and defense are fully known to the profession, and we do not propose to undertake a restatement of them here. It is sufficient to state that the plaintiff bought timber trees, standing and growing on the land, and took a deed therefor with a covenant of warranty of title. This was in August, 1874, when the plaintiff entered upon the land and commenced cutting, using and appropriating the said timber. This he continued to do at such times as suited his convenience, until 1890, when he alleges that he surrendered his claim upon the demand of another, who claimed under a superior or paramount title. And it is admitted that the defendant, owing to the defective description in the deed under which he claims to hold, had no title to the land upon which said timber trees stood. But the jury find that before the plaintiff quit work in 1890, upon the demand of the owner, the plaintiff had cut every stick of timber (and more, too) that he was entitled to under the terms of his deed; that he left no timber on the land that he was entitled to, if defendant had been the owner of the land at the making of his deed.

(69) To entitle the plaintiff to recover in this action, two things must be established: There must be a failure of title, and there must be an ouster of possession, actual or constructive. It is admitted that the defendant did not own the land upon which these trees stood, and consequently did not own the trees. But it is as necessary that there should be an ouster to constitute a cause of action as it is that there should be a defect of title. *Mizzell v. Ruffin* (this case), 118 N. C., 69; *Herrin v. McIntyre,* 8 N. C., 410; *Coble v. Welborn,* 13 N. C., 388; *Cowen v. Silliman,* 15 N. C., 46.

It is not claimed that there was an eviction and actual ouster in this case. The most that is claimed is that in 1890 the plaintiff, upon the complaint of the owner of the land, desisted from further work in this swamp, and this was considered by the Court to be sufficient to constitute an ouster and to entitle the plaintiff to maintain his action. But this was upon the claim of the plaintiff that he was thus compelled to quit work in this swamp before he got the timber he bought.

But when it turned out, upon the finding of the jury, that the plaintiff had cut and carried off every stick of timber he bought, and more, too,

before 1890, the time he says that he desisted from working in the swamp, he had nothing to surrender; and there is nothing to support his claim of ouster. There could be no ouster when there was nothing from which to be ousted. The land was never conveyed to him and he never had possession of it. He only had the right to go upon the land to cut and carry away the timber. And when this was done, his right to go upon the land ceased.

Suppose A. sells land to B. for the life of C. B. enters upon the land and holds possession of the same until after the death of C., and then the remainderman takes possession. After this B. finds out that A. had no title to the land; could B. maintain an action against A. for (70) a breach of warranty? Would not the entry of the remainderman be only the assertion of his right to enter as the remainderman after B.'s term had expired, and not in derogation of any right B. had acquired by the terms of his purchase? If so, why would not the same rule apply here? What rights had the plaintiff in 1890 when the owner of the land took possession, and after the plaintiff had cut and carried off every stick of timber he would have been entitled to if the defendant had been the owner of the swamp? There being no ouster, the plaintiff's action must fail.

It would have been different if the deed from defendant to plaintiff had contained a covenant of *seizin*, because this would have been broken upon the execution of the deed. This would have at least entitled the plaintiff to nominal damages, which would have carried with it the cost under section 525 of The Code. *Wilson v. Forbis,* 13 N. C., 30.

When this case was here at February Term, 1897 (120 N. C., 87), it seems to have been admitted that there had been a breach of warranty, and this, as we have seen, must include a defective title and ouster. But when it was here at February Term, 1898 (122 N. C., 113), and also in this appeal, ouster is denied; and we have to try the case upon the record in this appeal. Of course, when a breach of warranty is shown or admitted (that is defective title and ouster) the plaintiff is entitled to at least nominal damages.

It was complained of, and excepted to by the defendant, that his Honor reassembled the jury next morning after the verdict had been rendered to the clerk the night before, by agreement, when he instructed them to change their finding. This practice is allowed in the furtherance of justice, when it is perfectly apparent that it can do no harm, (71) and is usually left to the sound discretion of the trial judge. But it is not a practice to be encouraged, as the Court has the undoubted right to set aside the verdict where, in his opinion, it would be a miscarriage of legal justice to let it stand.

But as our judgment is put upon another ground, reaching the legal merits of the case, we do not pass upon the action of the court in recalling the jury.

There were other exceptions which we have not considered and do not pass upon, as we are of the opinion that the defendant's motion for judgment should have been allowed; that as the verdict stands, the defendant was entitled to a judgment that she go hence without further day, and for costs. The Code, sec. 526.

And judgment will be so entered upon this opinion's being certified to the court below.

Error—reversed.

Cited: Eames v. Armstrong, 142 N. C., 513, 515.

HENRY PARKER v. NORFOLK AND CAROLINA RAILROAD COMPANY.

(Decided 1 November, 1898.)

Drainage—Damage by Overflow.

1. Neither a railroad nor an individual can divert water from its natural course and throw it upon abutting lower lands and cause damage.
2. The upper holder may increase and accelerate the flow of the water in its natural course, but cannot divert other waters to the damage of the lower lands.

CIVIL ACTION, tried before *Brown, J.,* and a jury, at Spring Term, 1898, of Superior Court of BERTIE County.

(72) The complaint was that the defendant, when it constructed its roadbed across Long Pond pocosin and Flat pocosin, wrongfully and negligently diverted some part of the waters of those pocosins from their natural course and drainway, and turned them into Wartom Swamp and overflowed and permanently damaged plaintiff's land. An additional complaint was that one branch from the Flat pocosin drained into Wartom Swamp some distance below his land, and that this water has been diverted and made to enter Wartom Swamp above his land—and that this additional has overtaxed the drainage capacity of Wartom Swamp and caused it constantly to overflow plaintiff's land. These complaints are specifically denied by the defendant, who contends that the railroad, instead of injuring the plaintiff's land, has benefited it, as its embankment keeps back waters naturally flowing over plaintiff's lands.

The evidence was conflicting.

His Honor charged the jury: It is the duty of the defendant company to provide an adequate outlet for all the water it diverts from the natural drain or outlet in which such water has been accustomed to flow before such diversion; and if it has failed to do so, it would be liable for such damage as is occasioned to a landowner over whose lands the water is turned.

Defendant excepted.

There was verdict and judgment for plaintiff, and defendant appealed.

George Cowper for defendant (appellant).
Francis D. Winston for plaintiff.

FAIRCLOTH, C. J. The jury by their verdict find that the defendant, in constructing its road, wrongfully damaged the plaintiff's land by diverting the waters of Long Pond and Flat pocosin upon said (73) land, without providing an adequate outlet for said waters.

This case to some extent involves the right of the upper and lower tenants in draining land under common-law principles. That question was settled in *Mizzell v. McGowan,* 120 N. C., 134, in which it was held that the dominant tenant had the right to carry off his surface water by cutting ditches, by which the flow of water, naturally flowing therein, is increased and accelerated, and discharged on the land of the servient tenant, and that this subserviency is one of the natural incidents to the ownership of land. The question of diverting water was not then before the Court.

It has been previously held that neither a railroad nor an individual could divert water from its natural course and throw it upon abutting lower lands and cause damage. *Jenkins v. R. R.,* 110 N. C., 438. It may now be stated that the upper holder may increase and accelerate the flow of the water in its natural course, but cannot divert other waters to the damage of the lower lands. *Carter v. Page,* 30 N. C., 190.

The purchase of the right of way by the defendant company could not confer any more privilege than a private individual purchasing the land would have. *Jenkins v. R. R., supra.*

There was conflicting evidence as to damages, and whatever we might think as a jury, we as the Court have no control over it.

Affirmed.

Cited: Hocutt v. R. R., 124 N. C., 219; *Parks v. R. R.,* 143 N. C., 296.

(74)

WILLIS A. WILCOX v. M. T. LEACH.

(Decided 1 November, 1898.)

Tax Sales—Assignee—Revenue Act of 1895.

1. Where the county becomes the purchaser of land sold for taxes under the Act of 1895, its interest is that of a mortgagee, and it must proceed to collect only by foreclosure—and an assignee of the county can only proceed in the same way.

2. An individual purchaser, or his assignee, may proceed by foreclosure, or demand a fee simple deed from the sheriff or tax collector after the time of redemption is past.

3. Notwithstanding the conclusive presumptions enumerated in the statute in support of the tax title, it is permissible to show in evidence that the plaintiff was the assignee of the county of the certificate executed by the tax collector to the county.

CIVIL ACTION to recover land, tried before *Norwood, J.*, at May Term, 1898, of the Superior Court of HALIFAX County.

The plaintiff read in evidence a deed, of which the following is a copy:

STATE OF NORTH CAROLINA—Halifax County.

Whereas, at a sale of real estate for the nonpayment of taxes, made in the county aforesaid, on 4 May, A.D. 1896, the following described real estate was sold, to wit (describing it.)

And whereas, the same not having been redeemed from such sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of North Carolina necessary to entitle him to a deed of said real estate: Now, therefore, know ye, that we, W. W. Rosser, former tax collector for Brinkleyville Township, Halifax County, North Carolina, who made said sale, and J. H. Norman,

(75) the present tax collector for said township and county, and the successor in office of said Rosser, in consideration of the premises, and by virtue of the statutes of North Carolina in such cases provided, do hereby grant and convey unto Willis A. Wilcox, his heirs and assigns forever, the said real estate hereinbefore described, subject, however, to any redemption provided by law.

Given under our hands and seals this 5 May, A.D. 1897.

W. W. ROSSER, [SEAL.]
Former Tax Collector.
J. H. NORMAN, [SEAL.]
Tax Collector.

It appeared in evidence that the land had been bid in for the county—the sale certificate was made to the county and assigned to the plaintiff. The court instructed the jury that upon the evidence the plaintiff was entitled to recover.

The defendant excepted.

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

Thomas N. Hill and W. A. Dunn for defendant, appellant.
R. O. Burton and E. L. Travis for plaintiff.

MONTGOMERY, J. This case differs in one material respect from the other cases which have been before this Court involving the title to land sold for taxes since the act of 1887 and those subsequent on that subject. In his complaint the plaintiff simply makes the general allegation that he is the owner of the land and entitled to its possession, without setting out specifically the sources of his title. The defendant in his answer sets up various defenses, legal and equitable, most, if not (76) all, of which have been already frequently passed upon by this Court adversely to the defendant, from *Earp v. Sanders* to *Peebles v. Taylor*. The plaintiff in this action introduced the tax deed executed by the tax collector to the plaintiff and also evidence going to show the alleged authority of the maker to execute it, and also evidence of the sale of the certificate which the tax collector had issued to the county, to the plaintiff by the county authorities. The defendant introduced evidence of a similar character. It is stated in the record that "the plaintiff in apt time objected to the admission of any evidence for the defendant or the consideration of any defense set up by him, on the ground that he had not brought himself within the provisions of section 66, ch. 119 of the Laws of 1895, in that he failed to show that all taxes due upon the land in controversy have been paid by him or those under whom he claims. The plaintiff did not waive any of the presumptions and conclusions arising from his tax deed, under chapter 119, Laws of 1895, and other laws of this State, but claimed and asserted them in apt time."

The court, after refusing to give each and all of the special instructions prayed by the defendant, told the jury that upon the evidence the plaintiff was entitled to recover and to respond "yes" to the issue "Is the plaintiff the owner of the land described in the complaint?" That instruction was given doubtless because of the opinion of his Honor that the defendant had not put himself in position under section 66, ch. 119 of the acts of 1895 to defeat the title of the plaintiff. The defendant had made no effort to rebut the presumptions of the law set out in section 66 of the Revenue Act, and that section made conclusive the follow-

(77) ing facts: 1. "That the manner in which the listing, assessment, levy and sale were conducted was in all respects as the law directed. 2. That the grantee named in the deed was the purchaser or his assignee. 3. That all the prerequisites of the law were complied with by all the officers who had or whose duty it was to have had any part or action in any transaction relating to or effecting the title conveyed or purporting to be conveyed by the deed, from the listing and the valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done, except in regard to the points named in this section where in the deed shall be presumptive evidence only." But the plaintiff showed in his evidence, and so did likewise the defendant (which we think they both had a right to prove) that the plaintiff was the *assignee* of the county of the certificate executed by the tax collector to the county. While, as we have said, the grantee named in the tax deed is deemed conclusively to be the purchaser or his assignee, yet we think that under the act it clearly was permissible on the part of the plaintiff, or defendant, to show that the grantee was the assignee of the purchaser, although the deed did not set forth the assignment. So that notwithstanding the defendant was, by the presumptions in section 66 because he did not attempt to rebut them and by the conclusions in that section, prevented from trying to defeat the plaintiff's title, yet as he showed that the plaintiff was the assignee of the county (the purchaser), it is clear that the right and the title of the plaintiff under the deed must be exactly the title and interest which the purchaser (the county of Halifax) had in the land under the tax collector's certificate of purchase. The
(78) assignee, the plaintiff, could have no greater interest or higher title in the land than his assignor, the county of Halifax, had. This being so, it follows that the plaintiff could have only such interest and title against the defendant in and to the land as he made out in the trial.

What title and interest, then, did the county, the assignor of the plaintiff and the purchaser at the sale, have in the land? The answer is, only that of a *mortgagee*. Under section 90 of ch. 119 of the acts of 1895, the only right conferred upon the county in lands sold for taxes when purchased by the county is to foreclose the liens or certificates by proper proceedings in the courts "in all respects, as far as practicable, and in the same manner and with like effect as though the same were a mortgage executed by the owners of such real estate to the owner and holder of such certificates and liens for the amount therein expressed, together with such subsequent and prior taxes due thereon." A county under such circumstances can acquire no fee simple interest in such

lands until they are purchased by the county at the foreclosure sale, as is especially provided in section 90 of the last-mentioned act. And to strengthen this position, if any support were needed, section 91 of the same Revenue Act gives to the assignee of a certificate of sale, originally issued to a county, the right to foreclose in the same manner and with like effect as in a case where such county commissioners may proceed to foreclose.

It is clear from a careful reading of the statute of 1895 on this question that a county which is the purchaser of land sold for taxes must proceed to collect only by foreclosure, and that an assignee of the county must proceed in the same way only; while an individual purchaser or his assignee may proceed by foreclosure or demand (79) a fee-simple deed from the sheriff or tax collector after the time of redemption has passed.

Our conclusion, then, is that the instruction of his Honor was erroneous, and that he should upon the whole evidence have instructed the jury to respond to the issue "No."

Error.

Cited: Collins v. Pettitt, post, 79; *S. c.,* 124 N. C., 726, 729, 736; *Collins v. Bryan, ibid.,* 738, 740; *Whitman v. Dickey, ibid.,* 742; *Huss v. Craig, ibid.,* 744; *Kerner v. Cottage Co.,* 126 N. C., 358.

J. A. COLLINS v. G. W. PETTITT ET AL.

W. A. Dunn and Thomas N. Hill for appellants.
E. L. Travis and MacRae & Day for appellee.

PER CURIAM: The questions presented in this case being the same as those presented in *Wilcox v. Leach,* at this term, for the reasons set out in the opinion in that case there is error.

WILCOX BROS. ET AL. V. CHERRY & SWINDELL AND SMITH-COURTNEY COMPANY.

(Decided 25 October, 1898.)

Conditional Sale.

While parties acting in good faith may make a valid contract of lease with the option of purchase, yet where it is obvious that the contract is put into the form of a lease for the purpose of evading the registration laws, or with other unlawful intention—it will not be upheld as such, to the prejudice of innocent purchasers. *Foreman v. Drake*, 98 N. C., 311, overruled.

(80) CIVIL ACTION heard before *Norwood, J.*, at May Term, 1898, of HALIFAX Superior Court, upon exceptions to report of referee.

The Smith-Courtney Company had furnished Fenner Brothers certain articles of machinery under a contract as claimed by them of renting or hiring—payments to be made monthly and to be concluded in six months. If paid in full in that time, the title to pass, if not, the renting to be terminated at the option of the company. Payment in full was not made within the six months, and the time was extended.

Fenner Brothers becoming indebted to the plaintiffs, Wilcox Brothers, secured them by a mortgage on this property, which was sold by the trustee, and the defendants, Cherry & Swindell, became the purchaser and secured the purchase by a mortgage on the property, which was not paid in full, and this action is brought to foreclose. All parties interested are embraced in the suit.

The referee reported that the original transaction between the Smith-Courtney Company and Fenner Brothers was a conditional sale and had never been registered. His Honor confirmed the report, and adjudged that the title passed from Fenner Brothers to Cherry & Swindell, and decreed a foreclosure to pay their debt to plaintiffs.

Smith-Courtney Company appealed.

Thomas N. Hill and MacRae & Day for appellant.
Gilliam & Gilliam for Cherry & Swindell.
R. O. Burton and E. L. Travis for plaintiff.

(81) DOUGLAS, J. In 1892 Fenner Brothers obtained from the Smith-Courtney Company two lots of machinery, and subsequently executed two paper writings, the essential parts of which are as follows:

"This certifies that J. H. Fenner and D. C. Fenner, doing business under the name of Fenner Brothers . . . have received of Smith-Courtney Company . . . the following articles of personal property, to wit: . . . which we are at liberty to use with care, keeping

the same in good order. We have agreed to hire the said above personal property for the term of six months from this date, and to pay for the same the sum of *six hundred and thirty-four and 94-100 dollars* as *rent* therefor in the following manner: . . .

"It is also further understood that we may at any time within the time above specified *purchase* the said personal property by paying therefor the sum of *six hundred and thirty-four dollars and ninety-four cents,* as the price thereof, and if we do so purchase and pay for the same then and in that case only, the *rent* therefor paid shall be *deducted* from the *price* thereof.

"Said renting may be terminated at the option of said Smith-Courtney Company, or their agents, at any time, if the rent is not paid as above agreed, and at the time above specified."

The second paper is similar to the first, except as to its date, the description of the machinery and the amount of rent. In both papers the amount of rent for six months' use is exactly equal to the purchase price. Neither of them was registered. Thereafter, in December, 1892, Fenner Brothers gave to Wilcox Brothers their note for $5,000 and to secure the same executed to E. L. Travis, trustee, a deed conveying the machinery now in question. In May, 1895, the defendants Cherry & Swindell purchased the property from Fenner Brothers at the price of $2,500, Wilcox Brothers and the trustee joining in the bill of sale. They simultaneously executed to Travis, as trustee for (82) Wilcox Brothers, a new deed of trust conveying the same property to secure the unpaid balance of the purchase money. Of that balance there is now due the principal sum of $514.50, to recover which this action was brought.

The court below held that the two contracts in question executed by Fenner Brothers to Smith-Courtney Company were conditional sales, and were intended as security for the purchase price of the property described in them, and gave judgment accordingly. The Smith-Courtney Company appealed from this ruling, thus directly presenting to us the only point in the case.

We think that this case is directly governed by that of *Mfg. Co. v. Gray,* 121 N. C., 168, the opinion in which met, and still meets our unqualified approval. We are satisfied from a bare inspection of the paper itself that it was intended to be a conditional sale, and was put in the form of a lease to avoid the registration laws, or possibly to work an unjust forfeiture, neither of which can meet our approval. Both are frauds in law. The registration laws are intended to prevent fraud by giving notice to the world of the exact conditions upon which property is held, so that it may not be used as a basis of fictitious credit or fraudulently conveyed to innocent purchasers.

Based upon the highest principles of public policy, they should be beneficially construed; and any mere evasion of their essential provisions must be deemed a fraud in law. We have carefully considered the case of *Foreman v. Drake,* 98 N. C., 311, and in so far as it conflicts with this opinion, it is hereby overruled. In that case the true nature of the transaction was evidently not understood by the court, as
(83) is evident from the following passage in the opinion: "By the terms of the agreement the *feme* defendant had the right at any time during the term of hiring to purchase the property for a price, substantially the sum of money agreed to be paid as compensation for the use of the property. This seems to be a singular stipulation, and suggests a want of good faith in some way, but of itself it cannot change the nature and defeat the purpose of the contract. *There may be some reason for it that we do not see.* It is not suggested, nor does it appear that the whole transaction was a sham and a fraud."

In the case at bar, that it is a "sham" is shown by the evidence and found by the referee and the court below. Fenner, one of the contracting parties, testifies that it was intended as a sale, while Smith, practically the other contracting party, testifies to facts that make it a sale. A contract, from *contrahere contractum,* is a bringing together or meeting of two minds to a common intent, of which the written instrument is the legal evidence. In this case the common intent was evidently a sale of the machinery in such a way as to secure the purchase money. This seems evident to us from the face of the instrument itself, even if we exclude all testimony. We cannot imagine that a business man of common sense would *rent* property upon exactly the same terms upon which he could buy it, and we do not find any rule of interpretation which requires us to place upon a contract a construction which would indicate that at least one of the contracting parties was mentally incapable of contracting.

In *Greer v. Church,* 13 Bush., 430, 433, where the facts were similar to those in this case, the Court says: "If however the writing upon its face shows that the transaction was a sale and not a renting, it is
(84) immaterial what name the parties choose to give it. The sum of $400 for one month's rent of an instrument valued by both parties at $550 is preposterous. . . . There can be no room to doubt that the real transaction was intended to be and was a sale, and that the device of calling it a renting was resorted to in order to secure the payment of the $150 of purchase money not paid in hand." In *Hervey v. Locomotive Works,* 93 U. S., 664, 672, the Court says: "Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts will always look to its purpose rather than to the name given to it by the parties. If that

purpose be to give the vendor a lien on the property until payment in full of the purchase money, it is liable to be defeated by creditors of the purchaser who is in possession of it."

For this position there is abundance of authorities. *Puffer v. Lucas,* 112 N. C., 377; *Clark v. Hill,* 117 N. C., 11; *Barrington v. Skinner, ibid.,* 47; *Mfg. Co. v. Gray, supra;* 6 Am. & Eng. Enc. of Law (2 Ed.), 447.

We do not wish to be understood as saying that parties, acting in entire good faith, cannot make a valid contract of lease with the option of purchase. Such a case is not now before us. The judgment is

Affirmed.

Cited: Thomas v. Cooksey, 130 N. C., 151; *Hamilton v. Highlands,* 144 N. C., 283, 286.

(85)

J. P. LEACH & CO. v. W. R. CURTIN AND FLORENCE L. CURTIN, HIS WIFE, AND B. R. BROWNING AND HOWARD BROWNING, PARTNERS AS B. R. BROWNING & SON.

(Decided 18 October, 1898.)

Mortgages—Rents—Foreclosure.

1. Rents and profits, until entry by the mortgagee, belong to the mortgagor, and are assignable by him.

2. Right of possession of the mortgagor is not terminated by an action simply to foreclose, until some order of the court affecting the right, or demand in *pais.*

3. The holder of a first, third and fourth mortgage, who takes possession under an agreement with the mortgagor to apply the rents and profits to the debts secured by his mortgages, without other specification, is not accountable to the holder of the second mortgage for rents and profits, and under such agreement he may apply a portion as a payment on one of debts, about to become barred by the statute of limitations.

CIVIL ACTION for foreclosure of mortgage, tried before *Norwood, J.,* at Spring Term, 1898, of the Superior Court of HALIFAX County. Action commenced 10 December, 1891.

The complaint asked for a foreclosure of a land mortgage executed by defendants Curtin and wife, and no other relief. The Brownings were included as defendants, as claiming some interest in the land. W. R. Curtin and wife had made four mortgages on the land on different dates: (1) 9 November, 1880—a first mortgage to Browning & Son, to secure $422.46; (2) 15 February, 1881—a second mortgage to Leach

& Company, plaintiffs, to secure $500; (3) 6 April, 1881—a third mortgage to B. R. Browning to secure $800; (4) 4 January, 1885—a
(86) fourth mortgage to Browning & Son to secure $338.29.

Shortly after executing the last mortgage, Curtin and wife, by a paper-writing under seal, dated 10 January, 1885, and executed and delivered to Browning & Son, surrendered to them the possession of the mortgaged land, who were to keep possession and rent it out and collect the rents until they should pay off all the debts which Curtin and wife owed to B. R. Browning & Son and to B. R. Browning—the possession to be returned when the mortgage debts were paid. Under this instrument the defendant Browning & Son took possession of the land and collected the rents up to and including the year 1897, which they applied first to the note dated 4 January, 1885, for $338.29, and the surplus to the note dated 6 April, 1881, for $800, except that the rents of 1885 were credited on the mortgage debt of 9 November, 1880, for $422.46.

At Fall Term, 1893, there was a consent order of reference to David Bell., Esq., for trial under The Code of all issues of law and fact.

The referee having made his report, exceptions to the report were filed by the plaintiffs and by B. R. Browning & Son, defendants.

His Honor, at the present term, tried the case upon the exceptions. Those of the plaintiffs were overruled; those of B. R. Browning & Son were sustained, except one, No. 5, which was withdrawn.

The plaintiff excepts, because the court overruled his exceptions. He also excepts because the court sustained the exceptions of the defendants, and rendered judgment in accordance therewith.

The plaintiff appealed to the Supreme Court.

(87) *Thomas N. Hill for plaintiffs (appellants).*
R. O. Burton and E. L. Travis for appellees.

MONTGOMERY, J. This case is before us on the appeal of the plaintiffs to the rulings of the court below on exceptions filed by both the plaintiffs and the defendants to the findings of the referee. The referee reported, without exception on the part of either side, that the defendants Curtin and wife made four mortgages of different dates on their land; the first to secure Browning & Son a debt of (three notes of $140.82 each) $422.46; the second to secure a debt due to the plaintiffs of $500; the third to secure the defendant B. R. Browning a debt of $800, and the fourth to secure a debt due to the defendants Browning & Son in the sum of $338.29. On 10 January, 1885, the defendants Curtin and wife executed and delivered to the defendants Browning & Son a paper-writing in which they surrendered to them the possession of the mortgaged tract of land. Browning & Son were to keep possession of the land and rent it out, and collect the rents until they should collect enough to pay off

and discharge all the debts which Curtin and wife owed to B. R. Browning & Son and B. R. Browning, the possession of the land to be returned when the mortgage debts should have been paid. Under that instrument the defendants Browning & Son took possession of the land at once, and collected the rents up to and including the year 1897. The present action was begun on 10 December, 1891, and the complaint shows that it was for a simple foreclosure of the plaintiff's mortgage without any demand for a receiver to take charge of the rents. The defendants Browning & Son were brought into the action on the simple allegation in the complaint that they had an interest in the land. The defendants Browning & Son applied the rents, with the exceptions of (88) small credits placed upon the debts secured in the first mortgage, toward the payment of the debts secured in the mortgages junior to the plaintiff's mortgage. The referee found that the defendants Browning & Son had the right to apply the rents which were collected up to the bringing of this suit in that way, but that the rents collected after the commencement of this action should have been applied to the debt of Browning & Son secured in the first mortgage, until it was paid off, then to the plaintiffs' mortgage. His Honor held that the defendants Browning & Son had the right to apply the whole of the rents as they had applied them.

There was no error in the ruling of his Honor. The rents did not belong to the plaintiffs. They could only get them as incident to their right of possession, and possession was not asked for nor demanded by the plaintiffs either *in pais* or in the complaint. As we have said, the complaint was one simply for foreclosure.

If Curtin and wife, then mortgagors, had been in possession they would have been entitled to receive the rents and profits without liability to account to any person until entry made by the mortgagee. Certainly then it follows that the plaintiffs cannot hold to account for the rents, the assignees of the defendants Curtin and wife. *Killebrew v. Hines,* 104 N. C., 182. The referee found that the notes dated 9 November, 1880, due to the defendants Browning & Son under the first mortgage were not barred by the statute of limitations, and his Honor sustained the finding. That ruling of his Honor constitutes one of the plaintiffs' exceptions. Out of the rents of 1885 the defendants Browning & Son in that year made a small payment upon each of the notes secured in the first mortgage. This they had the right to do. The debtors, Curtin and wife, had given them no instructions as to the par- (89) ticular manner in which the rents were to be applied.

There is no error in the rulings of his Honor, and the judgment is Affirmed.

Cited: Credle v. Ayers, 126 N. C., 15.

ELIZABETH ABBOTT AND THOMAS H. ABBOTT, BY HIS NEXT FRIEND, ELIZABETH ABBOTT, v. ROBERT HANCOCK.

(Decided 18 October, 1898.)

Demurrer—Appeal.

No appeal lies from a refusal of the trial judge to hold a demurrer frivolous.

THIS is the plaintiffs' appeal from the judgment of his Honor, *Brown, J.*, refusing to decide that the demurrer filed was frivolous and to render judgment by default against the defendant.

The facts are stated, and are the same as appear in the defendants' appeal at the present term.

The counsel on both sides are also the same.

W. W. Clark, O. H. Guion, W. D. McIver, and D. L. Ward for appellant.

Simmons, Pou & Ward for appellee.

CLARK, J. The demurrer having been overruled, the defendant appealed, as he had a right to do. *Ramsey v. R. R.*, 91 N. C., 418. The plaintiff also appeals because the judge refused to go further and hold the demurrer frivolous. The Code, secs. 247 and 388. This has
(90) been held not appealable. *Walters v. Starnes*, 118 N. C., 842. This is so as to refusing to strike out a frivolous or sham answer, because if the defendant should get the verdict the plaintiff can raise the same point by motion for judgment *non obstante veredicto*, and more delay would be incurred ordinarily by the appeal than by going to trial, and it is true as to a frivolous demurrer, because even if the judge should hold it frivolous the plaintiff would not as a right be entitled to judgment, and the court in its discretion might permit the defendant to answer over. *Dunn v. Barnes*, 73 N. C., 273. It is different as to a motion for judgment for want of an answer, as that is a substantial right which can only be asserted by an immediate appeal. *Kruger v. Bank*, at this term, and cases there cited.

Appeal dismissed.

Cited: Morgan v. Harris, 141 N. C., 360.

GEORGE HOWARD ET AL. v. THE CENTRAL TOBACCO WAREHOUSE COMPANY AND JOHN F. SHACKLEFORD.

(Decided 25 October, 1898.)

Corporation—Confession of Judgment—Surety.

Where there is a confession of judgment by an insolvent corporation, whose president is surety on the note in suit, but not a party to the suit, and the judgment is partially satisfied by the defendant's property sold under execution and bought by the surety, who obtains an assignment of the unpaid portion of the judgment—in the absence of fraud, such transaction gives rise to no equities, which may be invoked in aid of another creditor.

CIVIL ACTION, in the nature of a bill in equity, heard upon demurrer by *Brown, J.,* at a Superior Court of EDGECOMBE County, April Term, 1898.

A decree is asked declaring null and void, as to the debt of (91) plaintiffs, a judgment confessed by the Central Tobacco Warehouse Company in favor of the Pamlico Insurance and Banking Company, and for other relief, upon grounds set forth in the opinion filed.

The demurrer filed to the complaint was overruled by his Honor, and defendants appealed.

John L. Bridgers for defendants (appellants).
W. O. Howard for plaintiffs.

FAIRCLOTH, C. J. We have this case: The defendant warehouse company was indebted to the plaintiff, and also to the Pamlico Insurance and Banking Company by notes, with defendant Shackleford as surety. The warehouse company being insolvent, confessed judgment to the banking company, Shackleford not being a party. The property of the warehouse company was sold by the sheriff and Shackleford became the purchaser. The judgment of the banking company was assigned to one Davis, and after the sale the unsatisfied part of the judgment was assigned to the defendant Shackleford. It is admitted that each debt was a *bona fide* debt, and that there was no actual fraud in any of these transactions, and that the defendant Shackleford was president and a director of the warehouse company.

The plaintiff insists that the confessed judgment in effect discharged the surety on the note, and that it is void, on the authority of *Hill v. Lumber Co.,* 113 N. C., 173. There the judgment confessed by an insolvent corporation was in favor of one of its directors, and it was held to be invalid against other creditors because of the confidential relation between the director and the company, by reason of which he had peculiar knowledge of the affairs and insolvency of the company,

(92) thereby putting the creditors on unequal ground. The question is elaborately considered in the case above cited and need not be repeated.

The plaintiff fails to bring himself within the principle of that case. In the absence of fraud, why may not an insolvent debtor pay one of his creditors in full? Why may not a creditor of an insolvent debtor pursue his remedy and gain advantage by his judgment? It only works out the principle of the diligent creditor. *Blalock v. Mfg. Co.*, 110 N. C., 99. Here the judgment was in favor of a creditor, not one of the officials of the company. The discharge of the defendant as a surety is the result of payment of the debt by his principal, not by any participation of the surety as such, and we are unable to see any ground for holding that the judgment complained of is void, or how the plaintiff acquired any legal or equitable right against the surety. *Electric Co. v. Electric Light Co.*, 116 N. C., 112; *Langston v. Improvement Co.*, 120 N. C., 132.

Error.

Cited: Graham v. Carr, 130 N. C., 274.

MACON BRYAN v. J. W. STEWART.

(Decided 18 October, 1898.)

False Imprisonment—Order of Arrest.

1. An order of arrest, under section 292 of The Code, is a judicial and not a ministerial proceeding, in the issuance of which the judge and the clerk have concurrent jurisdiction.

2. Such order, although erroneously issued, would protect the defendant who procured it to be issued in an action *ri et armis* for false imprisonment simply—although it would not protect him in an action for malicious prosecution, where the want of probable cause, with malice, is alleged and shown.

(93) ACTION for damages for false imprisonment, tried before *Brown, J.*, at February Term, 1898, of the Superior Court of CRAVEN County.

The false imprisonment is alleged to have occurred in an action against the present plaintiff brought by the present defendant in which were stated two causes in the complaint; one a promissory note, the other for embezzlement of certain collateral securities originally lodged to secure

the note, and which had been placed back in Bryan's hands for the purpose of collection and application to the note, but which, as alleged, Bryan collected and appropriated. There was no answer filed in that case, and the court, after giving judgment on the note, found the facts as charged in regard to the embezzlement, but entered no judgment thereon, and the case went off the docket. A *fieri facias* was issued by Stewart upon his judgment upon the note, and was returned *nulla bona*. He then applied to the clerk for a warrant of arrest against Bryan, which was granted, and Bryan was arrested, but subsequently released under *habeas corpus* proceedings, it being held that the clerk was not authorized to issue the warrant of arrest.

Bryan then brought the present action, which it was admitted is not for malicious prosecution nor for abuse of process, but an action for false imprisonment under illegal process. It was agreed below that the court answer the first issue: "Did the defendant wrongfully and unlawfully cause the plaintiff to be arrested and be imprisoned under execution process in the case of J. W. Stewart v. Macon Bryan?" and that only the issue as to damages should be submitted to the jury.

The court found the first issue for defendant, and rendered judgment that he go without day, and recover his costs. Plaintiff appealed. (94)

Simmons, Pou & Ward and W. D. McIver for plaintiff (appellant).

W. W. Clark, O. H. Guion, and Shepherd & Busbee for defendant (appellee).

FURCHES, J. In 1896 the defendant Stewart brought an action against the plaintiff Bryan in Craven Superior Court. The plaintiff Stewart in his complaint (in that action) declared on two causes of action: one, a promissory note, and the other, for embezzling money which Bryan had collected as the agent of Stewart. This complaint was verified and filed at the return term of court, and no answer being filed or other defense made thereto, the court gave judgment upon the note; and after giving judgment upon the note proceeded to find the facts alleged in the complaint constituting the embezzlement, but entered no judgment upon this cause of action, and the case went off the docket.

The plaintiff in that case (Stewart) caused a *fi. fa.* to be issued thereon against the defendant (Bryan), which was returned *"nulla bona."* He then applied to the clerk for a warrant of arrest, which was granted, and the defendant (Bryan) was arrested thereon.

The defendant (Bryan) thereupon applied for relief in *habeas corpus* proceedings, which relief he obtained on appeal to this Court, as will more fully appear from the case as reported in 121 N. C., 46. It is held in that case that the clerk was not authorized to issue the warrant

of arrest and the defendant Bryan was discharged, and this action is brought to recover damages for false imprisonment.

(95) This action was tried at February Term, 1898, of Craven Superior Court upon the following facts, which were agreed upon by counsel, and the further agreement of counsel which appears of record and which will hereafter be set forth.

Issues 1. "Did the defendant wrongfully and unlawfully cause the plaintiff to be arrested and imprisoned under execution process in the case of J. W. Stewart v. Macon Bryan?" Answer: "No."

2. "What actual damage has the plaintiff sustained by reason of such arrest and imprisonment?" Answer: "850."

The following appears of record: "By consent of counsel it is agreed that only the issue of damages be submitted to the jury.

"The defendant offered no evidence.

"By consent it is agreed that the court shall answer the first issue and determine the liability of the defendant. By consent it is also agreed that if the court shall be of opinion that the defendant in any view of the evidence is liable, the court shall give judgment for the amount assessed by the jury, and that if the court shall be of the opinion that the defendant is not liable, the court shall dismiss the action at the plaintiff's cost. Nothing herein contained shall be construed as abridging the right of the court to set aside the verdict for excessive damages. By consent, G. H. Brown, judge. Nothing herein contained shall affect the right of either party to appeal to the Supreme Court. G. H. Brown, judge; L. J. Moore, W. D. McIver; Simmons, Pou & Ward, attorneys for plaintiff. J. E. Shepherd, Clark & Guion, M. DeW. Stevenson, attorneys for defendant."

And in the statement of the case on appeal the following paragraph appears: "It is admitted that it is not an action for malicious

(96) prosecution, nor for malicious abuse of process, but an action for false imprisonment under alleged illegal process."

At common law there were two actions for an illegal arrest—one was where there was no legal excuse or justification for making the arrest, as where it was made without legal process, or, if made under the form of legal process, where the same was absolutely void. This was an action of trespass *vi et armis*. The other was where the process was erroneous but not absolutely void. This was an action of trespass on the case, and was subject to the rules and requirements, as if it were an action for malicious prosecution. Bishop on Contract Law, sec. 211; *Corman v. Emerson,* 71 Fed. Rep., 264; Pollock on Torts, 148.

If the process is absolutely void, it will not protect the defendant who procured it to be issued, nor will it protect the officer making the arrest. But if the process is erroneously issued, but not void, it will protect the

officer making the arrest. Murfree on Sheriffs, sec. 929; Pollock, *supra.* And it will protect the defendant, who procured it to be issued, in an action *vi et armis* for false imprisonment. Though such process, erroneously issued, will not protect the party procuring it to be issued from an action on the case, in the nature of malicious prosecution, where the want of probable cause and malice is alleged and shown. Newell on Malicious Prosecution, 199 and 200; Pollock, *supra,* 148.

Under the present code practice, we are of the opinion that what was formerly an action *vi et armis* and an action of trespass on the case, in the nature of false imprisonment, might be joined with each other in the same action, and declared on in the same complaint. But if this were done, still the allegation on the case in the nature of malicious prosecution, would have to be sustained by evidence of (97) malice and the want of probable cause, to entitle the plaintiff to recover. But by the agreement of the parties, entered of record, the action of trespass on the case, in the nature of an action for malicious prosecution, is eliminated and taken entirely out of consideration in this case, and it is left to be considered as an action of trespass *vi et armis* for false imprisonment alone. This being so, the correctness of the ruling of the court below and the defendant's liability for damages depend upon the question as to whether the process, upon which the plaintiff was arrested, was void or only erroneous. And this depends upon the fact as to whether the clerk who issued it was acting in a judicial capacity or simply in the discharge of a ministerial duty. It would seem the clerk in issuing the ordinary *fi. fa.* would be acting in his ministerial capacity, because the law requires him to do this without any application or request on the part of the plaintiff in the action. And it is held in the case of *Jackson v. Buchanan,* 89 N. C., 72, that the issuance of an order for the seizure of property, in claim and delivery, is a ministerial act. But this order is issued under section 323 of The Code, which requires the clerk to issue the order; while the order of arrest is obtained under section 292 of The Code, and is in the following words: "An order for the arrest of the defendant must be obtained from the court in which the action is brought, or from a judge thereof." Thus it is seen that the *judge* and the clerk have concurrent jurisdiction as to the issuance of an order of arrest, and it seems to us that this fact ought to settle the question.

Suppose this order of arrest had been issued by the *judge,* would it be contended that he was acting as a ministerial officer and performing a ministerial act? And yet the judge and the clerk have the (98) same concurrent jurisdiction. The distinction between an order in claim and delivery and an order in arrest and bail is clearly recognized by the Court in *Jackson v. Buchanan, supra,* on page 76.

That the clerk in issuing the order of arrest was acting in his judicial capacity is sustained in *Austin v. Vrooman,* 14 L. R. A., 145; Bishop, *supra,* sec. 211. It is admitted that the clerk had the right—the jurisdiction—to issue the process under which the plaintiff was arrested. And we are clearly of the opinion that in doing so he acted in his judicial capacity, and not simply as a ministerial officer.

This being so, the *capias* under which the plaintiff was arrested was not void, although it was erroneous. *Tucker v. Davis,* 77 N. C., 330; *Corman v. Emerson, supra;* Pollock, *supra,* 148; Bishop, *supra,* sec. 211. This process having been issued by a judicial officer, in the exercise of the judicial functions of his office, was not void (though erroneous), and was a justification for the plaintiff's arrest in this action.

It was stated by counsel on the argument of the case that it is said in the opinion of the Court in *Stewart v. Bryan,* 121 N. C., 46, that the judgment on which the warrant was issued was void, and that the warrant of arrest was void. Upon reading that case with more care, they will find that they are mistaken in making these statements, but that it is said in that opinion that the judgment on the note is regular and final, and that there was no judgment at all on the count for embezzlement, and, as the warrant of arrest was not authorized, "that the defendant was illegally arrested." It is nowhere said in the opinion
(99) that the judgment was void, nor that the warrant of arrest was void.

The judgment below is

Affirmed.

ELIZABETH ABBOTT AND THOMAS H. ABBOTT, BY HIS NEXT FRIEND, ELIZABETH ABBOTT, v. ROBERT HANCOCK.

(Decided 18 October, 1898.)

Suit by Next Friend—Lunacy—Seduction—Demurrer.

1. The right of action for seduction of infant daughter is in the father, if living, and if the wife sues in her own name because of the insanity of the husband, it is necessary that he should have been declared insane. (The Code, sec. 1831.)

2. Where allegation of insanity of husband is admitted by demurrer, suit may be brought by his next friend though no inquisition of lunacy was had; and the wife may bring the action as such next friend, being regularly appointed under Rule 16 (Superior Court Rules, 119 N. C., 963).

3. The mother is entitled to bring such action in lieu of the father, where it is admitted that the latter is living out of the State.

4. A demurrer does not lie for superfluous parties.

ABBOTT *v.* HANCOCK.

CIVIL ACTION for seduction of plaintiff's daughter, heard on demurrer by *Brown, J.*, at May Term, 1898, of the Superior Court of CRAVEN County.

Previous to filing the complaint, on plaintiff's motion for the appointment of next friend, made before the clerk, it was adjudged that Mrs. Elizabeth Abbott be and she is hereby appointed next friend of Thomas H. Abbott to conduct for him this action in this court against Robert Hancock—signed by the clerk.

The complaint verified by her alleges:

That the plaintiff Elizabeth Abbott is the mother and her coplaintiff, Thomas H. Abbott is the father of Annie May Abbott, who is under age of 21 years and unmarried; that said Thomas H. Abbott is and has been for some time past insane and is confined to the Govern- (100) ment hospital for the insane, known as St. Elizabeth Hospital, and is without the jurisdiction of this court, and she therefore brings this action on behalf of herself and as next friend of her said husband, Thomas H. Abbott.

That prior to this action the father of Annie May has been in the regular employ of the United States Government, in the Revenue Marine Service, and since his insanity has been continued on the payroll.

That the defendant is the husband of the sister of Thomas H. Abbott, and during the month of April, 1897, invited and procured Annie May to accompany him in a trip North with his wife, her aunt, who failed to accompany them on account of ill health; that while in New York the defendant upon threats of leaving her without means in the city and returning home without her, in the event of refusal, procured said Annie May to have illicit intercourse with him, then and there knowing her to be the daughter of plaintiffs and wrongfully intending thereby to injure them and deprive them of her services, did willfully debauch and carnally know her against the will of plaintiffs.

That thereafter in the city of New Bern at his house the defendant, by threats of exposing her, did willfully debauch and carnally know her, the said Annie May, against the will of plaintiffs.

That thereafter and at divers times under continued threats of exposure, coupled with threats that he would have her father's name stricken from the payroll of the Government service, and cause her sister to be discharged as teacher from the public schools in New Bern, he did procure said Annie May Abbott to have illicit intercourse with him and against the will of plaintiffs did willfully debauch (101) and carnally know her.

That during all the acts complained of, the said Annie May was in the actual service of plaintiffs, residing with them at their home in New

Bern, being then and now under age of 21 years and unmarried, and that the plaintiff then was and still is entitled to her attention and service.

That by reason of said several acts complained of, the said Annie May became sick in body and mind and so remained, and her health, mind and capacity to perform said services has been greatly otherwise impaired to the great and lasting damages of plaintiffs in the sum of $10,000.

The plaintiffs moved his Honor to overrule the demurrer, adjudge it frivolous and enter judgment for plaintiff by default.

The court overruled the demurrer, but refused to hold it frivolous, and refused to enter judgment for plaintiff, and gave defendant leave to answer and sixty days time therefor.

Plaintiffs excepted to so much of the judgment as denied their motion to hold the demurrer frivolous and enter judgment for plaintiff by default.

The defendant excepted to so much of said judgment as overruled the demurrer and appealed.

Both parties appealed.

The grounds of the demurrer are adverted to in the opinion of his Honor, JUSTICE CLARK.

Simmons, Pou & Ward for defendant, appellant.

(102) *O. H. Guion, W. W. Clark, Shepherd & Busbee, W. D. McIver, and D. L. Ward for appellee.*

CLARK, J. If the wife were suing here in her own right as a free-trader because of the insanity of her husband, it would be necessary that he should have been declared insane (Code, sec. 1831), but the right of action for the seduction of the infant daughter is in the father (if living). *Scarlett v. Norwood,* 115 N. C., 284; *Hood v. Sudderth,* 111 N. C., 215. The allegation of the insanity of the husband is admitted by the demurrer, and an insane person can sue by his next friend, though there has been no inquisition of lunacy. Code, sec. 180; *Smith v. Smith,* 106 N. C., 498. We know of no reason, nor authority, why the wife cannot be his next friend for the purpose of bringing such action in his behalf. She was regularly appointed next friend by the clerk of the Superior Court in the mode prescribed by Rule 16 of Superior Court (119 N. C., 963), and that appointment cannot be impeached collaterally by demurrer. *Sumner v. Sessoms,* 94 N. C., 371. Nor do we see that the propriety or fitness of the appointment of a next friend can in any way concern the defendant in the action. The next friend is an officer of the court and subject to removal by its order at any time. *Tate v. Mott,* 96 N. C., 19.

It is averred in the complaint and admitted by the demurrer that the father is living out of the State. In *Gould v. Erskine,* 20 Ont., 347, it is held that at common law, in such case, the mother is entitled to maintain the action in lieu of the father. As this action is brought by the mother, individually, as well as by her, as next friend of her husband, *qua cunque via,* the proper plaintiff is before the court. For superfluous parties plaintiff, a demurrer does not lie. *Sullivan v. Field,* 118 N. C., 358; *Tate v. Douglas,* 113 N. C., 190; *Wool v. Edenton,* (103) *ibid.,* 33.

No error.

Cited: Willeford v. Bailey, 132 N. C., 404; *Snider v. Newell,* 132 N. C., 616.

EMMA H. POWELL, EXECUTRIX OF A. H. POWELL, v. THOMAS W. DEWEY AND THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.

(Decided 1 November, 1898.)

Insurable Interest—Void Policy—Partner.

1. A partner, simply as such, where there is no capital invested, and neither indebted to the other, has no insurable interest in the life of his copartner.
2. Where a partner is the beneficiary in a policy upon the life of his copartner, and the policy is assigned to him, and he pays the premiums and receives the insurance money at death of insured, the policy is void, and no action for the insurance money can be maintained by the personal representative of the insured, either against the insurance company or the beneficiary.

CIVIL ACTION for recovery of amount of insurance upon the life of A. H. Powell, deceased, heard by *Brown, J.,* upon agreed facts at February Term, 1898, of the Superior Court of CRAVEN.

A. H. Powell, the insured, and defendant, T. W. Dewey, were equal partners in a general life and fire insurance business in New Bern, N. C. No capital was invested and neither was indebted to the other. Each gave personal attention to the business of the firm. It commenced prior to 1893 and terminated by mutual consent April 20, 1893, and a final settlement had 28 April, 1893.

Said policy was issued 25 February, 1893, and assigned the same day in writing by A. H. Powell to T. W. Dewey, the assignment to be operative and binding on them when approved by the company. It was so approved and returned to Dewey. All premiums (104) were paid by him.

After Powell's death and prior to the payment of the money, the company received a written protest from the plaintiff against the payment to Dewey on 28 October, 1896. The said company thereafter paid defendant Dewey $1,904, the full amount due on said policy on 28 November, 1896.

As a matter of law the court was of opinion that said assignment was valid; that Dewey had an insurable interest in the life of his copartner; that it did not terminate with the copartnership, so as to avoid the assignment and contract of insurance.

That upon all the facts, plaintiff is not entitled to recover—wherefore it is adjudged that defendants go without day and recover costs to be taxed by the clerk.

Plaintiff excepted, and appealed.

Simmons, Pou & Ward and M. DeW. Stevenson for plaintiff (appellant).

W. W. Clark, O. H. Guion, P. H. Pelletier, and Shepherd & Busbee for defendants.

MONTGOMERY, J. This case differs from that of *Albert v. Ins. Co.*, 122 N. C., 92, in one most material respect. In that case the person whose life was insured paid all the premiums, and the Court did not find it necessary to decide whether the beneficiary had an insurable interest in the life of the insured person. In the case before us, at the very time when the policy was issued, in which the life of the plaintiff's intestate was insured, there was an assignment of the policy to the bene-
(105) ficiary (the defendant Dewey), who paid the first and all of the premiums.

The first question that presents itself in the case is, Did the defendant have an insurable interest in the life of Powell, the plaintiff's intestate? The defendant avers that he did, and that the policy was duly and legally assigned to him by the intestate. The ground of this averment is that the plaintiff and intestate were copartners. No particulars of the partnership are set out. There is no averment that the deceased copartner Powell was indebted to the defendant or to the partnership in any amount, or that the deceased was to furnish any labor, skilled or otherwise, as his contribution in lieu of money.

Upon such conditions we are of the opinion that the defendant had no insurable interest in the life of the deceased partner. In the case of *Trinity College v. Ins. Co.*, 113 N. C., 244, this Court said that "under certain conditions a partner has an insurable interest in the life of his copartner," and cites *Ins. Co. v. Luchs*, 108 U. S., 198. There the fact was that Luchs had furnished to the copartnership fund for his co-

partner Dillingburgh, $5,000, which was unpaid. We suppose that was the condition referred to in the opinion in the *Trinity College case,* under which a partner might have an insurable interest in the life of his copartner. It is true that in *Ins. Co. v. Luchs, supra,* the Court said that the continuance of the partnership was also a reasonable expectation of advantage to Luchs and gave him an insurable interest in the life of his copartner. But we are of the opinion that that position is against the weight of authority. The policy being void, then, because the defendant had no insurable interest in the life of Powell, no action could have been maintained on it by the defendant against the (106) insurance company. *Windley v. Burbage,* 108 N. C., 358. Neither can the plaintiff maintain this action, for, looking at it in any view, it has its foundation on the policy, which is void. *Windley v. Burbage, supra.*

The plaintiff's counsel cited us to *Cheeves v. Anders,* 87 Texas, 287, and A. & E., vol. 3, p. 592, to show that the next of kin or the personal representative of the assignor of a void policy could, in an action against the beneficiary in such a policy, recover the amount which had been paid to him by the insurance company. But we cannot see the principle upon which these authorities are based, and the decisions themselves do not give reasons for their existence. Besides, that position has been condemned in *Windley v. Burbage, supra.*

No error.

J. AND E. MAHONEY v. J. P. STEWART.

(Decided 25 October, 1898.)

Administrators—Contracts of Husband and Wife for Wife's Benefit—Mortgages.

1. The general rule is that an administrator must first apply the personal property in payment of debts, before resorting to the real property of the intestate—nor is the rule varied by the fact that the debts are secured by mortgage on the land of the intestate.

2. While the appointment of a receiver and order of injunction may be resorted to by a judgment creditor of an insolvent husband, who survives his wife and who is attempting to dispose of the interest he may have in her estate, yet these proceedings are not applicable to her administrator, where there is no *devastavit,* committed or threatened.

SUPPLEMENTAL PROCEEDINGS, prosecuted by the plaintiffs, judg- (107) ment creditors of the defendant, their insolvent debtor, to subject his interest in his deceased wife's estate, in the hands of her adminis-

trator, M. C. Braswell. The proceedings, issued from the Superior Court of NASH County, were served upon both J. P. Stewart and the administrator, and came on to be heard, upon an application for an order of injunction and for a receiver, before *Brown, J.*, at chambers, Rocky Mount, 1 September, 1898.

His Honor granted the injunction order against both the defendant and the administrator, and both appealed.

The circumstances are fully stated in the opinion filed.

H. G. Connor for appellant.
Jacob Battle for appellee.

FURCHES, J. M. C. Stewart was the wife of the defendant J. P. Stewart, who died intestate in July, 1898, and M. C. Braswell, soon after her death, at the request of the husband, J. P. Stewart, administered on the estate of the deceased wife. At the death of the intestate wife, she was the owner of real estate of the estimated value of about $4,000, and of personal estate of the estimated value of about $5,500, and $5,000 of this consists of a life insurance policy which the administrator has collected since her death. The real estate owned by the intestate wife at the time of her death was bought by her at public sale made by a commissioner under an order of Court; that of the purchase money there remained an unpaid balance of $1,055.81, which prevented her from getting a deed for the same. This sum, at the request of the intestate, T. P. Braswell & Son, paid off in April last, and the intestate and her husband, the defendant J. P. Stewart, executed to them their
(108) promissory note for the same to be due on the first of December next.

For the purpose of enabling the intestate to have said lands cultivated for the year 1898, and for a balance she owed them for advances made last year, she became indebted to said Braswell & Son to the amount of $2,085.14, for which she and her husband executed their promissory note, to be due on the first of November next. To further secure the payment of these notes they executed a deed in trust on the lands of the *feme* defendant to one John M. Sherrod; that these two debts and a debt of $450 due Thomas H. Battle are all the debts the intestate owed, and are all that her estate is liable for, except funeral expenses and cost of administration; that the intestate at the time of her death left her husband, J. P. Stewart, and three minor children, and the said M. C. Braswell has been appointed and has become the guardian of the minors.

But J. P. Stewart, the surviving husband, is insolvent and the plaintiffs have recovered several justice's judgments against him, which they have caused to be docketed, amounting in the aggregate to some $1,200

or more. Upon these judgments they have taken out supplementary proceedings and have had them served on the administrator. In this proceeding the plaintiffs claim that the administrator is about to pay off and satisfy the two notes above specified, due to F. P. Braswell & Son, out of the money collected on the $5,000 insurance policy; that these debts and the debt of T. H. Battle, if so paid out of the personal estate, and the costs and expenses of administration, burial expenses, etc., will consume the whole of the personal estate of the intestate wife; and the insolvent husband, the debtor of the plaintiffs, would get (109) nothing from said personal estate, and the plaintiffs would thereby be *defrauded* of their just debts. The plaintiffs say that the administrator has no right to do this; that the debts to T. P. Braswell & Son and the debt to T. H. Battle, also secured by mortgage, be paid out of the land so mortgaged as *security* for the payment of said debts, thereby relieving the personal assets from the payment of the same; that the insolvent husband might get the personal estate out of which the plaintiffs and other creditors of the insolvent husband might make their debts, which they hold against him.

There is no suggestion that the administrator is insolvent, or that he has not an abundantly good bond. In fact, it was stated and admitted on the argument that the administrator was a good man, was entirely solvent, and that his bond was in the sum of $11,000, and was abundantly good.

Upon these facts, the plaintiffs ask that the administrator be enjoined and restrained from paying these debts secured by mortgage; that he be enjoined from paying the defendant J. P. Stewart anything on his distributive share; and that the defendant J. P. Stewart be enjoined and restrained from receiving, assigning, or disposing of any part or interest he may have in his wife's estate, and for the appointment of a receiver. The court, upon the hearing, granted the orders of injunction as prayed for, and appointed a receiver, and from this judgment the defendant Stewart and the administrator appealed.

Injunctions are usually and, so far as we remember only resorted to in cases of administration to protect legal rights of parties interested in the estate, where there is likely to be a misapplication—a *devastavit*—by an insolvent administrator or executor. But this pro- (110) ceeding does not seem to be based on such considerations as these, but to enjoin and restrain a solvent administrator from paying the debts due by his intestate's estate, and to prevent him from distributing the residue after paying debts and costs of administration, under the statute of distributions. We do not think the court is invested with this power. The administrator is admitted to be abundantly solvent, and if he makes

a misappropriation of his intestate's estate, he commits a *devastavit,* and both he and his bond will be liable to those interested.

There are two grounds suggested for this interference of the court in the course of this administration. One is that the notes of T. P. Braswell & Son and T. H. Battle are not the debts of the intestate. But this position was virtually abandoned on the argument of the case by the learned counsel for the plaintiffs. He says in his brief that "J. P. Stewart's wife left a considerable personal estate and owed nothing except the debts due to T. P. Braswell & Son and T. H. Battle, which could only be paid out of the land and crop specifically charged." "The indebtedness against the *feme covert,* Martha C. Stewart, in favor of T. P. Braswell & Son, $2,080.14, $1,055.81, $3,137.95, and interest, expressly charged by the trust deed, etc." The "real estate with the crops is abundantly sufficient to pay the debts due to T. P. Braswell & Son and T. H. Battle, these being all the debts the intestate owed."

And these concessions on the part of the plaintiffs that they were the *debts of the intestate* are fully sustained by *Farthing v. Shields,*
(111) 106 N. C., 289, and *Jones v. Craigmiles,* 114 N. C., 613, and cases cited in these opinions.

The other is that they were secured by mortgage. But these notes being a part of the indebtedness of the intestate, they are none the less so because she gave security for their payment. A mortgage to secure the payment of a debt is not the debt, but it is only a security. It does not pay the debt, nor change its nature. These notes still being the evidences of the debts, and as it appears were made by the intestate for her own benefit, it follows that they should be paid out of her personal estate—the primary fund for the payment of debts of intestate's estate. *Pate v. Oliver,* 104 N. C., 458, 468.

But while it is admitted that the general rule is that personal assets must be first exhausted in the payment of debts before real estate can be resorted to by the personal representative, it was contended that this case does not fall under the general rule, for the reason that the intestate secured these notes by mortgage. And this contention seems to be based upon *Moore v. Dunn,* 92 N. C., 67, which was cited as authority for this position. If *Moore v. Dunn, supra,* should be construed to hold what the plaintiff claims it does, it would be in conflict with the well established principles of our law, and in conflict with all our decisions. We cannot give it this construction. Were we to do so, we would be compelled to declare it an error and to overrule it.

But we do not think it necessarily calls for that construction. It must mean to be applied in cases where the land is originally charged with a sum of money or a debt: As where land is devised or conveyed subject to the payment of a sum of money or a debt; or, as in cases of owelty

of partition, and probably in other cases. In *Moore v. Dunn,* (112) *supra,* the claim of the plaintiff grew out of the surrender of a life estate in land charged with an annuity, which was afterwards attempted to be secured by a mortgage on a part of the land. In this view of the case, *Moore v. Dunn, supra,* may be sustained.

In the argument before us, the appointment of the receiver and the order of injunction were not resisted so far as they relate to the said J. P. Stewart; and it may be that they were proper, so far as he is concerned, as a means of preserving what comes or would have come into his hands, from being wasted, but not as a means of putting into his hands what does not belong there.

Therefore, the order appointing a receiver and of injunction is continued so far as it applies to the defendant J. P. Stewart. But it was erroneously granted as to the administrator, M. C. Braswell, and his administration, and as to these it is dissolved and vacated. But the plaintiffs will be taxed with the costs of this appeal.

Modified and affirmed.

Cited: Slater v. Stewart, post, 113; *Meares v. Duncan, post,* 204; *Baptist University v. Borden,* 132 N. C., 489.

W. L. SLATER ET AL. v. J. P. STEWART ET AL., APPELLANTS.

(Decided 25 October, 1898.)

THIS case, from EDGECOMBE County, is governed by the decision in *Mahoney v. Stewart,* at this term, from Nash County.

H. G. Connor for appellants.
Jacob Battle for appellee.

FURCHES, J. The facts governing this case are substantially the same as those in the case of *Mahoney v. Stewart,* at this term. This was admitted by counsel on the argument here. (113)

This being so, this case is governed by that case. Therefore, the injunction and order appointing a receiver are continued as to the defendant Stewart, but are dissolved and vacated as to the administrator Braswell and the administration of his intestate's estate.

The judgment appealed from will be so modified, but the plaintiffs will be taxed with the costs of this appeal.

Modified and affirmed.

IN THE MATTER OF THE WILL OF NANCY EVANS, DECEASED, MARY FRIAR, AND J. B. BODDIE, PROPOUNDERS, IRA T. EVANS, SALLIE A. BARNES AND HUSBAND, C. E. BARNES, AND FANNIE ENROUGHTY AND HUSBAND, W. N. ENROUGHTY, CAVEATORS.

(Decided 25 October, 1898.)

Wills—Undue Influence, Evidence of.

Where a testatrix, having two children, a daughter Mary, who lived with her, and a son Ira, who did not—executed a will in 1882, in existence at her death in 1895, but not found afterwards, which gave one-half of the estate to Mary and the other half to a trustee for the children of Ira—he being dissipated—and a few years before her death, she expressed to some of her friends a desire to change her will, and the following are the strongest expressions appearing in the evidence: When her son handed her the will, she said, "Son, why don't you do what I told you?" He said, "It is yours, not mine." She took it and said, "The hot stove wasn't gone anywhere." To another witness she said she wanted him to write one for her, and he agreed to do so—she said, "She would have to run away from Mary, who would not let her go." She said she had a will made, but it was not hers, that it was Mary's will—and never mentioned the matter again to that witness but once.

Held, that the evidence was not sufficient to allow the jury to find that the testatrix believed the contents of the will to be different from what they really are, or to prove any other circumstances which tend to show that it was not her will when made, or any fraud on the part of Mary Friar (her daughter).

(114) ISSUE of *devisavit vel non*, tried before *Bryan, J.*, and a jury, at Spring Term, 1898, of NASH Superior Court, in a proceeding to set up and prove the last will and testament of Nancy Evans, deceased, alleged to have been destroyed after her death in 1895.

The alleged copy of the alleged will of 1882 propounded in the probate court is as follows:

Item 1. To my daughter, Fannie Enroughty, I give one feather bed.

2. To my daughter, Sallie Ann Barnes, I give one loom, which she now has in her possession.

3. To my daughter, Mary Friar, I give all of my other personal property of every description.

4. It is my will and desire that the lot on which I now live to be equally divided between my daughter Mary Friar and the children of my son, Ira T. Evans; but for fear that my son, Ira T. Evans, shall spend his part, I give, devise and bequeath to my friend I. B. Boddie in trust and to the use of the children of my son, Ira T. Evans, four hundred dollars.

5. But as my daughter, Mary Friar, occupies the said house and lot, and not wishing to deprive her of a house by selling said house and lot,

I have valued the house and lot at eight hundred dollars in lieu of selling the same. I charge the lot with four hundred dollars to the use of the children of my son Ira T. Evans; and if my daughter, Mary Friar, shall pay to I. B. Boddie the said sum of four hundred dollars to the use of the children of my son, Ira T. Evans, then she is to hold the undevised house and lot in fee simple forever, free and dis- (115) charged.

6. I do nominate, constitute and appoint I. B. Boddie executor, this my last will and testament. NANCY (her × mark) EVANS.

Witness: E. S. F. GILES,
JOHN T. MORGAN.

The issue transferred by the clerk for trial:

"Is the paper-writing a true copy of the last will and testament of Nancy Evans, or not?"

The caveators requested his Honor to submit the following issues instead of the above:

(1) Did the said Nancy Evans die leaving a last will and testament?

(2) Is said paper-writing a true copy of the same?

(3) Was said paper-writing destroyed after the death of said Nancy Evans?

This was refused by his Honor, who submitted the issue certified by the clerk.

Caveators excepted.

The evidence was voluminous and somewhat conflicting, but was all admitted without objection and recapitulated to the jury. The strongest expressions occurring therein and urged by the caveators are cited in the opinion of the *Chief Justice,* as not contravening the special instruction given by the court at the instance of the propounders, and excepted to by the caveators, as follows:

There is no evidence before the jury that there was any undue influence or coercion of Nancy Evans on the part of Mary Friar, or any other person, in regard to the execution of the will.

This exception, with others, made by the caveators to the charge of the court is regarded as untenable.

The jury responded "Yes" to the issue submitted. Judgment (116) was rendered establishing the paper-writing transmitted to this Court by the clerk, and every part thereof to be a true copy of the last will and testament of Nancy Evans, deceased, and ordering a *procedendo* to the clerk, etc.

From which judgment the caveators appealed.

Jacob Battle and Cook & Cooley for caveators (appellants).
F. S. Spruill, H. G. Connor, and B. H. Bunn for propounders.

FAIRCLOTH, C. J. This was a proceeding to set up and prove the last will of Nancy Evans, the propounders alleging that the will was made in 1882 and was in existence at her death in 1895, and was destroyed by her son Ira after her death. The caveators contend that the execution of the will was procured by the undue influence of her daughter, Mary Friar, one of the beneficiaries; the will gave one-half of the estate to said Mary and the other half to a trustee for the children of said Ira, and that the testatrix before her death desired to change her will. All the evidence was admitted without objection, and there are several exceptions to the rulings and charge of his Honor. They are all untenable, and the only one that we had seriously to consider was the 10th, in relation to the averment of undue influence at the execution of the will.

Mary cared for her mother, and Ira was dissipated, they being her only children. A few years before her death, the testatrix expressed to some of her friends a desire to change her will. The following are the strongest expressions found in the evidence: When her son
(117) handed her the will, she said, "Son, why don't you do what I told you?" He said, "It is yours, not mine."

She took it and said, "The hot stove wasn't gone anywhere." To another witness she said she wanted him to write one for her, and he agreed to do so. She said, "She would have to run away from Mary. . . . Mary would not let her go. . . ." She said, "She had a will made, but it was not hers, that it was Mary's will." She never mentioned the matter again to that witness, but once. The court told the jury: "There is no evidence before the jury that there was any undue influence or coercion of Nancy Evans on the part of Mary Friar or any other person in relation to the execution of the will."

The declarations of the testatrix, made after the will was executed, fail to show a single word or act of Mary Friar tending to show any undue influence in making the will, and if she had made the will favorable to Mary it was her deliberate act, and for aught that appears she made it as she wanted it, at that time. If the testatrix afterwards desired to make a change, it was her privilege to do so. The verdict excludes the contention that the will was changed or destroyed, and finds that the script propounded was a true copy.

Our conclusion is that the evidence was not sufficient to allow the jury to find that the testatrix believed the contents of the will to be different from what they really are, or to show *any other* circumstances which tend to show that it was not her will when made, or any *fraud* on the

part of Mary Friar, and that the court properly so instructed the jury. *Reel v. Reel,* 1 Hawks, 248; *Howell v. Borden,* 3 Dev., 446; 27 A. & E., 505, 6. There is no error.

Affirmed.

Cited: In re Shelton's Will, 143 N. C., 224.

(118)

S. B. HARPER v. COMMISSIONERS OF NASH COUNTY ET AL.

(Decided 1 November, 1898.)

Death of Plaintiff.

Cause of action for injury to the person, not causing death, does not survive the death of injured person.

CIVIL ACTION, heard before *Bryan, J.,* at Spring Term, 1898, of NASH Superior Court, to recover damages for personal injuries received by him from the breaking down of a county bridge, on demurrer.

Demurrers filed and sustained. Plaintiff appealed; pending the appeal plaintiff died. Motion to make his administrator party plaintiff. Motion denied. The Code, sec. 1491.

C. M. Cooke for plaintiff (appellant).

F. S. Spruill, H. G. Connor, and Jacob Battle for defendants.

DOUGLAS, J. The plaintiff brought his action on 17 August, 1897, to recover damages for personal injuries received by him from the breaking down of a county bridge. The defendants severally demurred to the complaint, which demurrers were sustained by a judgment of the Superior Court rendered on 2 May, 1898. The plaintiff appealed, and has since died. His administrator now asks to be made a party plaintiff and to be permitted to maintain the action.

This motion must be denied, as the cause of action does not survive the death of the plaintiff, and therefore the action necessarily abates.

The right of the plaintiff himself to sue for personal injuries of any kind is entirely separate and distinct from the right of his (119) personal representative to sue for personal injuries resulting in death. The former existed at common law, while the latter is purely of statutory origin. At common law, and until the passage of the act of 9 and 10 Victoria, ch. 93, known as Lord Campbell's Act, no cause of action whatever arising from injuries to the person, no matter what their

result, survived the death of the injured party. Those that now survive do so purely by statutory power. Section 1490 of The Code provides: "Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, *except as hereinafter provided,* shall survive to and against the executor, administrator or collector of his estate." And in section 1491: "The following rights in action do not survive: . . . (2) Causes of action for false imprisonment, assault and battery, or other injuries to the person, where such injury does not cause the death of the injured party." This provision applies directly to the case at bar, and of course no action can be maintained where the cause of action has ceased to exist. *Hannah v. R. R.,* 87 N. C., 351. The cause of action provided in sections 1498 and 1499 of The Code is not before us, and any liability of the defendants thereunder must be determined in a separate action. The motion is denied, and the action abates.

Cited: Strauss v. Wilmington, 129 N. C., 100; *Morton v. Tel. Co.,* 130 N. C., 302; *Bolick v. R. R.,* 138 N. C., 372.

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(120)

D. Y. COOPER v. D. B. KIMBALL.

(Decided 18 October, 1898.)

Mortgage—Agricultural Lien.

1. A mortgage on a crop not expressed to be for advances to be made and not recorded in thirty days after its execution has no rights as an agricultural lien by virtue of The Code, sec. 1799, and its amendment, Laws 1889, ch. 476.

2. An agreement after default, between mortgagor and mortgagee, that the mortgagor was to remain in possession as tenant, would confer a landlord's lien upon the mortgagee.

CIVIL ACTION, tried before *Bryan, J.,* and a jury, at May Term, 1898, of the Superior Court of VANCE County.

The complaint alleges that on 12 July, 1897, at a foreclosure sale under a deed of trust of the lands of H. F. Plummer and wife, the plaintiff became the purchaser of a 500-acre tract, and thereafter, within a very short time, by oral agreement, rented the land to said H. F. Plummer for the remainder of the year 1897 for one-fourth of the crops.

That upon the maturity of said crops grown upon the land, the defendant, without plaintiff's consent and without notice to him, removed

the crops from said land and applied the same to his own use, and refused to surrender the same to the plaintiff upon demand.

Also, that the defendant has received from H. F. Plummer, plaintiff's tenant, and the subtenants on said land, $278.68, the proceeds of cotton and tobacco grown upon the land, to which the plaintiff is entitled on account of said rents.

The answer of Kimball, defendant, denies the allegations of the complaint, and alleges that on 31 March, 1897, H. F. Plummer, with consent of his wife, executed to this defendant a mortgage on the (121) interest of said Plummer and wife on the crops to be made during said year on said land to procure from defendant advances and supplies to cultivate their crops; on the credit thereof the defendant furnished them from time to time money and supplies to the amount of $314.40, of all of which it is averred the plaintiff was aware.

That defendant's lien or mortgage on said crops was delivered to the clerk for probate and registration some time before the sale, but was by some oversight of the clerk not delivered to the register for registration until five minutes after the filing for record of the plaintiff's deed from the trustee.

It is denied that plaintiff rented to Plummer the said land for the remainder of the year 1897, or that there was any surrender to plaintiff of said land by Plummer or wife until after the crops of 1897 were gathered, and it is averred that there could not have been any renting or surrendering of said land by the Plummers to the plaintiff after the execution and registration of defendant's lien and mortgage to the prejudice of defendant's rights in said crops.

The defendant denies the removal of any seed cotton of the crop of 1897, but admits the removal, with consent of the Plummers, of a lot of corn in the shuck, not exceeding 55 barrels, worth not exceeding $96.25, and admits that 17 barrels of the corn was removed, after he understood the plaintiff to object to the removal, but alleges that his money entered into the production of said crops, and that he was advised and believed that he had the right to receive and remove said corn and apply it to his own use.

There was evidence in support of the pleadings on both sides. (122)

The issues submitted to the jury were:

1. Is the plaintiff the owner and entitled to the possession of the property described in the complaint?

2. Does the defendant wrongfully withhold the possession of the same, or any part thereof?

3. What is the value of the crops taken and removed by the defendant from the Plummers land?

4. What damage has plaintiff sustained?

His Honor charged the jury as follows:

The contention of the plaintiff is that he bought the land under a trust deed, and took a deed at once, dated 12 July, 1897, and registered 12 July, 1897, at 12:25 p. m.; that his deed was registered before Kimball's lien. That after buying said land Plummer rented the land and agreed to pay one-fourth of the crop.

The contention of defendant is that he had a lien on Plummer's interest in the crops, and that although the lien was not registered within 30 days after its execution, yet that it was registered before the surrender of the land and agreement to pay rent to Cooper, and that he is entitled to a lien in preference to Cooper.

If the plaintiff has satisfied the jury by a preponderance of the evidence that the contention made by him is true, the jury should answer the first issue "Yes," if the defendant took the rent, one-fourth of the crop, or the proceeds of it.

The defendant in apt time prayed certain special instructions, the first of which was:

"If the jury believe the evidence, the defendant had a *bona fide* mortgage and lien on H. P. Plummer's interest in the crops of 1897 for $314.20."

His Honor gave this special instruction, but added "as between the parties thereto," and declined to give the rest. As the case
(123) was finally decided irrespective of these, it is unnecessary to state them.

The jury found all the issues in favor of plaintiff, and assessed his damages at $95.

The defendant excepted at the trial, and does except and assign as error the charge of his Honor as given in that:

1. His Honor instructed the jury that if you believe the plaintiff's contention he has the prior lien.

2. Whereas, as defendant contended, if the jury believe that defendant's claim and debt are *bona fide,* plaintiff is not entitled to recover.

Judgment for plaintiff, and appeal by defendant.

T. T. Hicks for defendant (appellant).

A. C. Zollicoffer and T. M. Pittman for appellee.

CLARK, J. The land was sold on 12 July, 1897, under the deed of trust, the purchaser immediately, during the preparation of the deed, entertained negotiations with the mortgagor, giving him the option to buy back the property or pay rent, his decision to be made in ten days, and he continued in possession in consequence. The trustee's deed to the purchaser was filed for registration the same day, and a few moments

thereafter the defendant filed in the same office a mortgage on the crop, which had been executed on 31 March, 1897. This is not expressed to be for advances to be made, and, besides, it was not recorded within thirty days after its execution, and therefore has no rights as an agricultural lien by virtue of The Code, sec. 1799, and its amendment, acts 1889, ch. 476, and *Killebrew v. Hines,* 104 N. C., 181, has no application. It is simply a mortgage which had no effect as to (124) third parties till its registration, and at that time the land with the growing crop thereon had already passed by the filing of the trustee's deed to the plaintiff. *Jones v. Hill,* 64 N. C., 198, cited in 104 N. C., at page 195. The sale and conveyance to the purchaser were a most effective assertion of ownership and possession as against third parties, and the mortgagor so recognized it also, as against himself, by treating with the purchaser for the renting or purchase of the property and remaining in possession under an option given him by the purchaser. Indeed, there being no agricultural lien, or recorded mortgage on the crop, even if there had been no sale and conveyance to the purchaser, an agreement after default between the mortgagor and the mortgagee that the former was to remain in possession as tenant, would confer a landlord's lien upon the mortgagee. *Jones v. Jones,* 117 N. C., 254, cited and approved in *Ford v. Green,* 121 N. C., 70. The plaintiff is entitled to recover. The Code, sec. 1754.

No error.

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(125)

IN RE BURWELL'S WILL—FROM VANCE COUNTY.

(Decided 18 October, 1898.)

Appeal—Motion to Dismiss.

A motion to docket and dismiss an appeal (under Rule 17) may be made at the beginning of the call of the district to which it belongs, or at any time thereafter during the term.

MOTION to dismiss under Rule 17 in the Supreme Court; motion allowed.

Thomas M. Pittman for appellee.
No counsel for caveator (appellant).

CLARK, J. This is a motion by the appellee to docket and dismiss, under Rule 17, an appeal which the appellant should have docketed "before the court begins the call of causes from the district" (formerly

"during the first two days of the call") to which it belongs. Amended Rules 5 and 17, 121 N. C., 694, 695. This motion can be made at, or at any time after, the beginning of the call of the district if the appeal has not then been docketed. The objection is made that this motion is made after the week assigned to that district has passed and is too late. The objection is invalid. Under the rule the appeal should be docketed before the beginning of the call of the district, but it can be docketed thereafter at any time during that term, and the motion to docket and dismiss can also be made at said term at any time after the beginning of the call of the district, the only limitation being that the appeal, if not docketed in the prescribed time, must be docketed at said term and before the appellee has moved under this rule (17) to docket and
(126) dismiss. *Packing Co. v. Williams,* 122 N. C., 406, and cases there cited.

Motion allowed.

J. L. ALLEN v. W. BASKERVILLE.

(Decided 1 November, 1898.)

Deeds.

A deed, previous to the act of 1879 (The Code, sec. 1280), conveying land to certain trustees of an incorporated academy *and their successors perpetually* does not convey a fee simple estate.

ACTION to recover land, tried before *Robinson, J.,* at October Term, 1897, of the Superior Court of WAKE County.

The plaintiff claimed title under the heirs of one James S. Purefoy.

The defendants claimed title through the appointment of certain persons (now dead) named in a deed dated 1 January, 1850, from said James S. Purefoy, as trustees of the Forestville Female Academy (an unincorporated institution) and their successors.

The only point in the case is whether by the deed a fee simple passed. His Honor instructed the jury that it did not, and directed a verdict for the plaintiff.

Defendant excepted.

Verdict and judgment for plaintiff. Defendant appealed.

W. N. Jones for defendant (appellant).
Battle & Mordecai and Douglass & Holding for plaintiff.

(127) CLARK, J. This conveyance was executed before the act of 1879, now The Code, sec. 1280, and hence the word "heirs" was indispensable to convey a fee. There is no allegation that it was omitted

by mistake, as was the case in *Fulbright v. Goder,* 113 N. C., 456. The *cestui que trust,* "The Forestville Female Academy," was not incorporated, but if the conveyance had been to the trustees named and their heirs, it may be that the incorporation could now be taken out and the courts certainly would not let the trust fail for want of trustees. New trustees could be appointed upon application. But in the absence of the word "heirs" from both the premises and *habendum,* and of the averment of its omission by mistake (*Vickers v. Leigh,* 104 N. C., 248), the court could not enlarge the conveyance into a fee, either by a warranty in fee or by a covenant for quiet enjoyment. *Anderson v. Logan,* 105 N. C., 266; *Batchelor v. Whitaker,* 88 N. C., 350; *Stell v. Barham,* 87 N. C., 62; *Register v. Rowell,* 48 N. C., 312; *Buel v. Young,* 25 N. C., 379; *Wiggs v. Sanders,* 20 N. C., 480; *Roberts v. Forsyth,* 14 N. C., 26. In truth, the words in the warranty, "to the trustees aforesaid and their successors perpetually," are not sufficient as a warranty in fee. Here, neither the trustees held a conveyance in fee (as in *Holmes v. Holmes,* 86 N. C., 205), nor did the *cestui que trust* have any corporate existence. The liberal rule laid down in *Moore v. Quince,* 109 N. C., 85, therefore, cannot apply. The Code, secs. 3665 and 3667, apply only to religious societies and not to educational institutions.

The statute of limitations has no application. The last trustee died within less than seven years before this action was brought, even if the conveyance had been color of title after such death.

No error.

Cited: Keith v. Scales, 124 N. C., 510.

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(128)

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

(Decided 25 October, 1898.)

Parties—Petition to Rehear Granted.

Where it appears that other parties are necessary to a final determination of the action, this Court will remand the cause to the end that such interested parties may be brought in.

Allen & Dortch and R. O. Burton for petitioner.
Aycock & Daniels, contra.

MONTGOMERY, J. The case is before us on a petition to rehear. The action was begun on the part of the plaintiff to compel the defendant to

specifically perform his contract to purchase from the plaintiff a certain piece of real estate in the city of Goldsboro. The defendant in his answer admitted his agreement to purchase and said he was ready and willing to pay the price agreed on if he could be sure of getting a good title to the property, and he averred that the plaintiff had no such title. Whether or not the plaintiff had a title in fee absolute to the property depends upon the construction of certain clauses in the will of James F. Kornegay, deceased. The plaintiff insists that he took a title in fee upon the death of the testator (his father), and the defendant contends that the estate of the plaintiff is a fee defeasible upon his mother's survival of him.

The argument on the rehearing has at least satisfied us that the rights of the widow, Francis E. Kornegay, are so vitally involved in this action as that it would be proper to have her made a party to the action. A decision in the case between the parties as now constituted would (129) not conclude the rights of Mrs. Kornegay, and the question sought to be decided would not be settled thereby, and, if acted upon by others in the purchase of real estate devised to the plaintiff under the will of the testator (as it probably would be) might result in litigation between the purchasers and the widow, and thereby subject them to annoyance and costs, and loss of time, if nothing more.

We therefore have determined, in order that the rights of all persons interested may be disposed of in one final judgment, to remand the case to the Superior Court of Wayne County to the end that Frances E. Kornegay may be made a party defendant with the right to answer. This course has been adopted before by this Court, in the case of *Finlayson v. Kirby,* 121 N. C., 106. Remanded for the purpose mentioned in this opinion.

Remanded.

MAGGIE E. LYNE v. WESTERN UNION TELEGRAPH COMPANY.

(Decided 25 October, 1898.)

Damages—Negligence.

1. Damages may be recovered for mental anguish and suffering occasioned by negligence in delivering the message notifying one of the serious illness of a relation.

2. It is not necessary to disclose the relation of the parties in the message in order to sustain the action.

CIVIL ACTION for damages, tried before *Timberlake, J.,* at April Term, 1898, of the Superior Court of WAKE County.

Damages were claimed by the plaintiff Maggie E. Lyne, wife of Gregory Lyne, deceased, for negligence in the delivery of a message informing her of the critical condition of her husband from (130) an accident resulting in his death.

The circumstances are fully stated in the opinion.

There was a verdict and judgment for plaintiff. Exceptions and appeal by defendant.

Robert C. Strong for defendant (appellant).
Shepherd & Busbee for plaintiff.

FURCHES, J. The plaintiff is the widow of R. G. Lyne, who was called by her "Gregory." The plaintiff alleges that at 9 o'clock p. m. on 23 October, 1897, J. B. Lyne, a brother-in-law of plaintiff and a brother of her husband, sent her the following telegram: "Richmond, Va., Oct. 23, 1897—To Mrs. R. G. Lyne, care Mrs. Mattie Wortham, Raleigh, N. C.: Gregory met accident; not live more 24, 26 hours. J. B. Lyne." That this telegram was received at the office of the defendant in Raleigh, N. C., and that it was not delivered to her until 1 o'clock p. m., 24 October; that this delay in the delivery of the telegram was caused by the negligence of the defendant and its agents; that by and on account of said negligence, she was unable to reach the city of Richmond until the morning of 25 October, and not until after the death of her husband; that said negligence caused her great pain and mental suffering, for which she demands damages in this action.

The defendant admitted receiving the message, denied all allegations of negligence, sets up contributory negligence on the part of the plaintiff and denies her right to recover, and especially denies her right to recover damages for mental anguish and suffering. (131)

It appeared on the trial that the message was received at the Richmond office at 10:10 p. m., 23 October, and at the Raleigh office at 10:28 of the same day; that it was put in the hands of Eugene Cole, one of the messenger boys of the defendant for delivery; that he did not know the address or residence of Mrs. Wortham; that he examined the city directory and did not find it there; that he then went to the hotels in the city and failed to find it on their registry; that he then went to the postoffice, where he was in the habit of going for such information, and found the general delivery window closed; that he saw a light in the office, but did not go to the back door to inquire for the address of Mrs. Wortham, but returned with the message, undelivered, to the Raleigh office of the defendant.

It was in evidence that the delivery messengers of the defendant were in the habit of going to the postoffice for such information, and that

when it was after office hours and the general delivery window was closed, they were in the habit of going to the back door of the postoffice and making the inquiry there; that one of the clerks of the postoffice was in there at the time the messenger went to the postoffice, and if he had gone to the back door and inquired, the postoffice clerk would have given him the address of Mrs. Wortham; that Mrs. Wortham resided at 110 Salisbury Street, within a few hundred yards of the defendant's Raleigh office, but had only resided there a few months, and her residence was not known to the defendant. There was other evidence in the case which we deem it unnecessary to give or refer to, as the case turns upon what we have given and the instructions of the court.

There were some exceptions to evidence, and, without discussing
(132) these, it is sufficient to say they have been considered and that we are of the opinion they cannot be sustained.

There are quite a number of prayers for special instructions. Some of them were given by the court, and some were refused, except as covered by the charge of the court. And we are of the opinion that the charge of the court gave all the defendant's prayers for instruction which the defendant was entitled to, and that the charge was a correct exposition of the law. It is not necessary that the court give its charge in the language of the prayers, even when the prayers are proper, if they are given in substance. *Thompson v. Tel. Co.*, 107 N. C., 449.

The defendant contended that it was not guilty of negligence in delivering the telegram; that the residence of Mrs. Wortham was not known to defendant and that defendant had exercised due diligence in its endeavor to ascertain the same. But it must be admitted that there is some evidence of negligence, or a want of due diligence. This is disclosed by the defendant's witness Cole, who testified that he went to the postoffice to obtain this information, and that the general delivery window was closed, but that he saw a light in the postoffice and did not go to the back door to inquire. When it is in evidence that the defendant was in the habit of going to the back door for such information, in case the general delivery window was closed, and when it was shown by one of the clerks of the postoffice that he was in the office at the time the messenger was there, and could have given him the desired information (the address of Mrs. Wortham) if the messenger had made the inquiry—this was not only some evidence, as in *Wittkowski v.*
(133) *Wasson*, 71 N. C., 451, but such evidence as should go to the jury.

The evidence seems to have been clearly and correctly submitted to the jury upon proper instructions from the court, and the verdict of the jury is binding upon us. We cannot review or reverse the finding.

It was contended by the defendant that the plaintiff could not recover damages for her mental anguish and suffering, even if it should be found that the defendant was guilty of negligence in delivering the message. But the doctrine has been so firmly settled in this Court that she can, that we only feel called upon to cite *Young v. Tel. Co.*, 107 N. C., 370; *Thompson v. Tel. Co., ibid.*, 449, and *Sherrill v. Tel. Co.*, 109 N. C., 527.

The defendant further contended that if it be held that a plaintiff may recover for mental anguish and suffering, that the plaintiff in this case cannot do so, for the reason that the telegram does not disclose the relation of the parties—does not disclose that "Gregory" was the husband of the plaintiff, and that as the telegram does not show this, it cannot be shown in evidence.

We cannot sustain this contention. The relation of the parties was not disclosed in *Sherrill v. Tel. Co., supra*—"Tell Henry to come home, Lou is bad sick." Nor was it disclosed in *Telegraph v. Adams*, 75 Texas, 531, and it was held in that case that the plaintiff could recover for mental anguish and suffering. That case contains a very clear and interesting discussion of the matter. The telegram in that case is as follows: "To F. E. Adams, Athens: Clara come quick, Rufe is dying." The same contention was made in that case that the defendant makes in this, and the court say, among other things, "that the rule insisted on by appellant is too restricted to be safely applied to communications sent by the electric telegraph. . . . When such com- (134) munications relate to sickness and death, there accompanies them a common sense suggestion that they are of importance, and that the persons addressed have in them a serious interest."

We only quote briefly from this opinion, and recommend it to the attention of the profession. It seems to be sustained by the decision in *Telegraph Co. v. Lavender*, 40 S. W. Reporter, 1035. From these opinions and that of *Sherrill v. Tel. Co., supra*, we have no hesitation in holding that the plaintiff is entitled to recover for mental pain and suffering if entitled to recover at all.

Having examined the record carefully, and finding no error, the judgment is

Affirmed.

Cited: Cashion v. Tel. Co., post, 270; *S. c.*, 124 N. C., 464; *S. v. Rhyne, ibid.*, 853; *Kennon v. Tel. Co.*, 126 N. C., 235; *Bennett v. Tel. Co.*, 128 N. C., 104; *Mfg. Co. v. Bank*, 130 N. C., 609; *Meadows v. Tel. Co.*, 132 N. C., 42; *Bright v. Tel. Co., ibid.*, 324; *Hunter v. Tel. Co.*, 135 N. C., 466; *Green v. Tel. Co.*, 136 N. C., 497; *Helms v. Tel. Co.*, 143 N. C., 394.

E. P. EDGERTON v. B. F. AYCOCK.

(Decided 1 November, 1898.)

Rule in Shelley's Case.

The rule in *Shelley's case*, when applicable, is a rule of law without regard to the intent of the grantor or devisor, and is recognized as well-settled law in North Carolina.

CIVIL ACTION for the price of land, tried before *Timberlake, J.*, at April Term, 1898, of WAYNE Superior Court.

The plaintiff contracted to sell the land to the defendant,
(135) tendered him a fee-simple deed, and demanded the price agreed.

The defendant refused to pay the price and take the deed, contending that the title which plaintiff had acquired only amounted to a life estate.

His Honor held as a matter of law that the deed under which the plaintiff claimed from Nathan Edgerton and wife, dated 2 February, 1872, conveyed to him the fee, and rendered judgment in favor of plaintiff. Defendant excepted and appealed.

The controlling words of the deed are stated in the opinion.

Aycock & Daniels for plaintiff.
No counsel contra.

FAIRCLOTH, C. J. The controlling words of the deed from Nathan Edgerton to E. P. Edgerton are these: "Do lend to the said E. P. Edgerton, during his natural life" a certain tract of land and in the *habendum:* "To have and to hold the same with the appurtenances thereunto belonging, to the said E. P. Edgerton, his natural life, and at the death of the said E. P. Edgerton, we . . . have given, granted, aliened, released and confirmed, and by these presents do give, grant, alien, release and confirm unto the lawful heirs of the said E. P. Edgerton and their heirs, executors, administrators and assigns, the above described premises," etc., and the only question presented is whether this deed, at common law, under the rule in *Shelley's case* conveys a fee-simple title to the grantee, the vendor of the defendant.

In England, from an early date, it was held that these and similar expressions, in wills and deeds, passed an estate in fee to the first
(136) taker (E. P. Edgerton here) as a rule of law, without regard to the intent of the grantor or devisor.

In North Carolina the same rule was adopted by this Court at its earliest existence, and has been uniformly so held in a list of decided

cases too numerous to refer to now, including the late case of *Chamblee v. Broughton,* 120 N. C., 170. The rule has been so long and so well settled that it admits of no discussion at this day.

Affirmed.

Cited: Marsh v. Griffin, 136 N. C., 335; *Pitchford v. Limer,* 139 N. C., 15; *Sessoms v. Sessoms,* 144 N. C., 124.

LAURA D. ROBINSON v. B. J. ROBINSON.

(Decided 25 October, 1898.)

Husband and Wife—Divorce from Bed and Board—Injunction Order.

Before filing pleadings, *feme* plaintiff may apply for injunction order to restrain defendant husband from interfering with her separate property or from collecting her rents.

ACTION for divorce, pending in Superior Court of WAKE County, and heard before *Bryan, J.,* at chambers, 26 September, 1898, upon application by plaintiff for an injunction order to restrain defendant husband from interfering with her separate property or from collecting her rents.

Application refused. Plaintiff appealed.

Douglass & Simms for plaintiff (appellant).
S. G. Ryan and Armistead Jones for defendant.

FAIRCLOTH, C. J. The plaintiff institutes this action for divorce from bed and board, and, before filing her complaint, she files affidavits and asks the court for an injunction restraining her husband from interfering with her separate property or from renting or collect- (137) ing the rents for the same, and for alimony *pendente lite.*

The unanswered affidavits of the plaintiff, after setting out the reasons and causes for leaving her husband's house and separating from him recently before this action begun, also alleged that the plaintiff is the owner in fee of a certain house and lot in the city of Raleigh, and that the defendant exercises control over said house and lot without her permission, and has rented out the same to a tenant now in possession, collecting and appropriating the rent to his own use and refusing to pay over to or allow the plaintiff any part of said rent. The affidavits also allege that the defendant has possession of certain personal property belonging to the plaintiff, refusing to allow her the possession or the use of the same.

We will not pass upon the motion for alimony *pendente lite,* as the pleadings when filed and the trial may or may not show that she is entitled to it.

We think his Honor should have made an order restraining the defendant from interfering with the plaintiff's property. The wife's property is her separate estate, and the husband has no control over or right to interfere with it, except the right of ingress, egress and regress to it, when she is in actual possession of her real estate. *Manning v. Manning,* 79 N. C., 293; *Cecil v. Smith,* 81 N. C., 285. And the wife is entitled to recover her separate property and also the income derived therefrom. *Manning v. Manning, supra.*

We are at liberty to enter here (The Code, sec. 957) such judgment as should have been entered in the Superior Court. And it is now ordered by this Court that the defendant B. J. Robinson is re-
(138) strained and forbidden to exercise any control over or interfere with the house and lot of the plaintiff, described in her affidavits, or to receive the rents or income therefrom, until the hearing and the further order of the Superior Court. In the meantime, this action will proceed in the Superior Court according to the course and practice of that court.

It is further ordered that the clerk of this Court issue a copy of this judgment, directed to the sheriff of Wake County, commanding him to deliver a copy of this order to the defendant B. J. Robinson, and to make due return of his action in this matter in the Superior Court.

The judgment of his Honor was erroneous to the extent above indicated. Judgment reversed and order issued.

Reversed.

C. H. BELVIN, CASHIER OF THE NATIONAL BANK OF RALEIGH, v. THE RALEIGH PAPER COMPANY, J. N. HOLDING, LESSEE, W. W. VASS ET AL.

(Decided 20 November, 1898.)

Mortgages—Lessee of Mortgaged Property—Improvements on Same—Fixtures—Practice.

1. A mortgagee is entitled to everything conveyed that belonged to the mortgagor at the time, and to any improvements placed upon the property since that time, that the mortgagor would be entitled to if the property had not been mortgaged; but the mortgagee is not entitled to improvements that the mortgagor would not have been entitled to, if the property had not been mortgaged.

2. The general rule is that whatever improvements a mortgagor puts upon the land becomes additional security for the debt. This is where the improvements—the fixtures—would belong to him.

3. Where a lessee, or tenant for life or term of years, puts such improvements upon the leased property, for the purposes of manufacturing or for trade, while there under the lease, the law does not impress upon such fixtures the character of land, and the tenant is the owner, and may remove them.

4. It may be expressly stipulated as a part of the contract of lease, that such added fixtures are to belong to the lessee, with right to remove them. And when the nature of the estate proves that their erection was for a temporary purpose, and not for the purpose of making them a part of the freehold, they do not become so in contemplation of law, and may be removed.

5. Where the lessee of a mortgagor owns the fixtures which, instead of removing, he sells to the mortgagor, they will inure to the benefit of the mortgagee; but if at the same time and as part of the same transaction the mortgagor conveyed them to a trustee to secure the purchase money agreed to be paid, then the mortgagee can derive no benefit from the transaction. And if the lessee in acquiring the added fixtures paid for them only in part, and gave a lien on them for the balance of the purchase money, then the mortgagor obtains the reversionary interest only and the lien must first be satisfied.

6. Section 1255 provides for the payment of debts incurred and torts committed by corporations and its agents while under mortgage. It has no applicability to liabilities of third parties operating on their own account.

7. A failure to object to an order of reference, at the time it is made, is a waiver of the right to a trial by jury. *Driller Co. v. Worth*, 117 N. C., 515.

CIVIL ACTION for foreclosure, receiver, and injunctive relief, (139) heard before *Timberlake, J.*, at February Term, 1898, of WAKE Superior Court.

The action was converted into a creditor's bill and various persons holding claims against the defendant corporation made themselves parties plaintiffs and filed complaints in the cause, which was referred by order of court to A. C. Zollicoffer, Esq., as referee.

The report and exceptions thereto came on to be heard before his Honor at this term, and to his rulings and judgment both sides excepted and appealed. (140)

Both appeals were argued at the same time, and opinions in both filed by *Furches, J.* *Montgomery, J.*, dissenting from that part of the opinion which decides that the improvements put upon the land by the lessee of the mortgagor do not inure to the benefit of the plaintiff.

Shepherd & Busbee and J. B. Batchelor for Belvin, plaintiff (appellant).

B. B. Winborne for Raleigh Paper Company, defendant.

Douglass & Simms, E. C. Smith, Battle & Mordecai, and Jones & Tillett and R. O. Burton for various creditors.

FURCHES, J. The plaintiff Belvin is the cashier of the National Bank of Raleigh, and the defendant, the Raleigh Paper Company, is a corporation. The defendant corporation, on 14 January, 1890, executed a mortgage to the plaintiff Belvin on its plant at the Great Falls of the Neuse, to secure some $13,000; and on 5 June, 1893, the defendant paper company executed a second mortgage to Belvin, including the same property, and some other property not included in the first mortgage, but subject to the first mortgage, to secure an additional indebtedness of $9,000. The greater portion of this indebtedness still remains due and unpaid.

In April, 1893, the paper company leased this property to the defendant J. N. Holding, and on 9 October, 1893, this lease was surrendered, and the paper company then leased said property to the defendant Holding and N. T. Cobb for the term of six years, and in the month of March, 1894, Cobb sold and assigned all his interest in said lease and property to the defendant Holding. By the terms of this lease
(141) said Holding and Cobb were to put certain improvements on said property, including an additional building, a one hundred horsepower engine, and other machinery to be used in manufacturing paper, this being the business in which said company was engaged. But by the terms of the lease, said improvements and machinery, so put on the corporation property by the lessees, were to be and remain their property, and they were to have the right to remove the same unless the paper company paid for said property and improvements.

Before the execution of the second mortgage to the plaintiff Belvin, the lessee Holding had bought a 100-horsepower engine of Ellington, Royster & Company, and this, it seems, was included in this second mortgage, subject to the payment of the balance due thereon, which was stated to be $1,500. It is stated that this indebtedness to Ellington, Royster & Company was secured by mortgage (though this mortgage is not set out in the record as the other mortgages are), but no exception in the case seems to dispute this lien, except as to the amount which plaintiff says should only be $1,500.

The defendant Holding, on 16 October, 1894, bought of M. P. Pegram other machinery amounting to $6,000 and gave Pegram a mortgage on said machinery to secure the notes given for said property, which was registered in Wake County on 24 December, 1894; that after the registration of this mortgage, this machinery was put up upon the property so leased to the defendant Holding by the "Raleigh Paper Company." Besides the engine bought of Ellington, Royster & Company, and the machinery bought of Pegram, the defendant Holding erected on said property a large brick building adjoining, but not attached (as the referee finds) to the original buildings on said property, when it

was leased to Holding; that on 2 January, 1896, the defendant (142) Holding sold to the paper company all the machinery and improvements he had put upon said property, during the term of said lease, for $18,500, to which sum there seems to be added $1,500, amount still due on the engine, for which the paper company executed to said Holding ten promissory notes for $2,000 each, amounting to $20,000, and at the same time, and as a part of the same transaction (as found by the referee), the paper company executed to the defendant W. W. Vass a deed of trust on all this property (improvements and machinery) so conveyed to the paper company, to secure the payment of the ten notes given by said paper company for said improvements and machinery. These notes have not been paid, nor has a large part of the Pegram debt been paid. Besides these debts, there is a large amount of debts made by said Holding while operating this plant as lessee, a part of which is also claimed to be a lien on the original plant, or upon the property sold by Holding to the paper company. But we will first consider the rights of Belvin under these two mortgages, the rights of Pegram under his mortgage, and the rights of Vass under his mortgage or deed of trust.

It would seem that Belvin is entitled to everything conveyed, in either of his mortgages, that belonged to the paper company at the time said mortgages were made, and to any improvements placed upon said property since that time by the paper company, or by any one else that the paper company would be entitled to, if the property had not been mortgaged; but that he is not entitled to improvements put upon said property that the paper company would not have been entitled to if the property had not been mortgaged.

The general rule is that whatever improvements a mortgagor (143) puts upon the mortgaged property inures to the benefit of the mortgagee, or, more correctly speaking, is additional security for the debt. But this is upon the idea that the mortgagor is at least the equitable owner of the fee in the land; that he is entitled to the absolute legal as well as equitable title upon payment of the debt, and that such improvements are his and are made for his benefit, and that they increase the value of his property. Under the law, when the mortgagor puts such improvements upon the land, they become a part of the land, and he cannot remove them, and thereby impair the security for the mortgaged debt, any more than he could dispose of a part of the land itself. *Wharton v. Moore,* 84 N. C., 479; *Moore v. Valentine,* 77 N. C., 188; *Jones v. Hill,* 64 N. C., 198; *Foote v. Gooch,* 96 N. C., 265; *Horne v. Smith,* 105 N. C., 322. This is where the improvements—the fixtures—would belong to the mortgagor. The mortgagee is only entitled to this additional security, when the fixtures become a part of the soil, or a part of the land belonging to the mortgagor; and if it is not a part of

the land of the mortgagor, and does not and never did belong to the mortgagor, it cannot belong to, or inure to the benefit of the mortgagee.

The law with regard to fixtures is very different under different relations and circumstances. Thus we have seen that where a fee simple owner puts improvements, called fixtures, on his land, the law at once fixes them with the character of land. But where a tenant for life, or lessee, or tenant for a term of years puts such improvements upon the leased property, for the purposes of manufacturing or for trade, while there under the lease, the law does not impress upon such improvements (fixtures) the character of land, and the tenant putting them
(144) there is the owner of them, and may remove them from the land. They are considered and treated as personal property. *R. R. v. Deal,* 106 N. C., 112; *Overman v. Sasser,* 107 N. C., 432; *Woodworking Co. v. Southwick,* 119 N. C., 611. Therefore, as a matter of law, these improvements were never a part of the land—never belonged to the mortgagor, and cannot inure to the benefit of Belvin under his mortgage. But in this case it is not necessary to rely upon this principle of law, so firmly established in our courts, as it is expressly stipulated, as a part of the contract of lease, that this property is to belong to the lessee and that he is to have the right to remove the same.

There were many cases cited to sustain the contention of Belvin and to show that he is entitled to the improvements (the fixtures) put on the property by Holding. But upon examination it is found that they do not conflict with the doctrines stated in this opinion. The cases most relied on for this contention were *Wharton v. Moore,* and *Moore v. Valentine, supra.* These cases are not in conflict with this opinion, but in fact sustain the views we have here expressed. In *Wharton v. Moore,* the improvements were made by a fee simple purchaser, and, when made, the law attached them to, and made them a part of the land. In *Moore v. Valentine,* the same principle obtains. The improvements (the fixtures) were placed on the land by a fee simple purchaser who sustained the relation of a mortgagor, and the law attached them to the land and made them in law "a part of the land." Indeed it is said in *Moore v. Valentine, supra:* "If he had taken a lease, say for five years, his right to remove the engines and appurtenances would have been beyond any question." In both of these cases, the nature of the estate proves
(145) that the erection of the fixtures was for a temporary purpose, and not for the purpose of making them a part of the freehold. In such cases, the fixtures may be removed, and they do not in contemplation of law become "a part of the land," and as the fixtures erected by the lessee Holding "did not become a part of the land" in contemplation of law, and as they were expressly made Holding's personal property by the terms of the contract—the lease—we see no ground upon which

Belvin is entitled to them under his mortgage. This must be so, unless he is entitled to them by reason of the conveyance, made by Holding to the paper company on 2 January, 1896. We have seen that these fixtures belonged to Holding, and, being his, he has the right to convey them; and having conveyed them to the paper company (the mortgagor) they would have become a part of the realty and inured to the benefit of the mortgagee Belvin, if it had not been that, at the same time and as a part of the same transaction, the paper company conveyed them to Vass, trustee, to secure the purchase money the paper company agreed to pay Holding for the property. *Morgan v. Dickerson,* 85 N. C., 466; *Howell v. Howell,* 29 N. C., 491; *Bunting v. Jones,* 78 N. C., 289.

The conveyance of Holding to the paper company and the assignment of the paper company to Vass, trustee, being parts of the same transaction, the title never *"rested" in the paper company,* and the improvements did not become a part of the land mortgaged to Belvin, and he can derive no benefit from this transaction.

It now becomes necessary to ascertain the rights of Vass under (146) his assignment. It has been seen that Holding was the owner of this property and had the right to convey the same (subject to other claims that will be discussed further on) and as it is not disputed but what Holding, through the paper company, conveyed whatever interest he had in said fixtures to Vass, trustee, it follows that Vass holds the same subject to the terms of said trust. But to determine what his rights are, it is necessary to consider the rights of the other claimants.

It seems not to be disputed that Ellington, Royster & Co. are entitled to be paid the balance of their claim out of the sale of the 100 horse-power, engine, etc., sold to Holding by them. But this property only can be applied to the payment of their claim.

The next claim to be considered is that of M. P. Pegram for what is known as the "Oats Machinery." This property was in Lincoln County when Holding bought it. The sale was made, on time, at the price of $6,300, for which Holding executed his promissory notes and secured their payment by a mortgage on the property so bought by him. This mortgage was registered in Wake County on 24 December, 1894, and before the property was moved to, and put up as a part of the machinery of the paper company. Therefore, when Holding conveyed to the trustee Vass (through the paper company) on 2 January, 1896, he only had the reversion after paying the residue of the mortgage debt to Pegram. Therefore, the Pegram mortgage debt must first be paid out of the property so mortgaged to Pegram.

This gives to Vass, trustee, all the fixtures put upon the lands of the "Raleigh Paper Mills Company" by Holding, under the lease, to be paid out *pro rata* upon the debts therein secured, but subject, first, to the pay-

ment of the debt of Ellington, Royster & Co. out of the sale of the 100-horsepower engine, etc., conveyed to Holding by them; and, (147) secondly, to the payment of the balance of the debt due M. P. Pegram out of the sales of the property sold by the Bank of Charlotte to Holding, and by him mortgaged to said Pegram. The residue he will pay out upon the debts secured in the trust deed to him, as is above stated.

The next claim to be considered is that of Daniel M. Hicks. This claim can only be sustained against the mortgages of Belvin, if it can be sustained at all, under section 1255 of The Code. *Coal Co. v. Electric Light Co.,* 118 N. C., 232; *R. R. v. Burnett,* at this term. This statute has been amended by the act of 1897, but the amendment does not affect this case, as it was commenced before the passage of the statute. It appears from the findings of the referee that the material furnished by Hicks was necessary and was used in the manufacture of paper at the mills of the Raleigh Paper Company; that this company is the corporation that executed the two mortgages to Belvin. Thus far the claim seems to fall within the provisions of the statute as construed by this Court. But it is contended that the debt was not made by the corporation; that it is not the debt of the corporation and that the corporation is not liable for it; that Holding had no authority to make this debt for the corporation; that it was his debt, made for his benefit, and not for the corporation. And the referee found that Holding was not authorized to make this debt for the corporation, and that the corporation received no benefit from it. But it appears that Holding had been elected and was secretary and treasurer of the Raleigh Paper Mills Company, and that the company, by a vote of the directors on 9 October, 1893, had authorized Holding to carry on the business in the name of the company. It appears that at the time the drafts were given, upon (148) which the judgments were recovered, the attorney of Hicks knew that Holding was carrying on the business of the concern for himself, and not for the corporation. But it does not appear that Hicks knew this when he sold him the goods.

The statute provides for debts made by a corporation or its agents. And it would seem that the authority Holding had from the corporation, as its secretary and treasurer, to conduct the business in the name of the company, was *prima facie* sufficient evidence of agency to authorize the plaintiff to sell to him as agent. But the case does not stop here. Hicks brought suit against the company. Holding, as secretary and treasurer of the corporation, accepted service and judgment was rendered from which there was no appeal. Holding was secretary and treasurer of the corporation, and, as such service of process might have been made on him. And as service might have been made on him, he had

the right to accept service for the corporation. These facts appearing, we are unable to see why section 1255 of The Code does not apply, and thereby remove the mortgage lien out of the way of the Hicks judgment, where there was no appeal. This judgment does not create a lien, but it puts the mortgages out of the way of its enforcement, as the mortgages conveyed nothing as against it. *R. R. v. Burnett, supra.* And as the court has taken charge of the property of the corporation, and thereby prevented the plaintiff Hicks from enforcing his judgments, these judments must be satisfied before there is any application of the assets to the Belvin mortgages. The other judgments, appealed from, were not allowed, and the judgment of the court below, on these judgments, is not appealed from. These judgments, from which there was an appeal, do not fall under the ruling of the Court upon the (149) final judgments.

This may seem to be hard measure as to the corporation, and as to Belvin. But they have no right to complain of Hicks. It may be the result of misplaced confidence, but if so, the corporation authorized it by making Holding its secretary and treasurer, and by authorizing him to carry on the business in the name of the corporation. And Belvin allowed it by sitting by and permitting the corporation to do this, instead of foreclosing his mortgages, as he might have done. By doing this, he took the chances and they have turned out to his disadvantage.

We are not disposed to interfere with the rulings of the court as to costs, except as expressly stated in these opinions. The judgment of the court upon the appeal of the plaintiff Belvin will be modified in accordance with this opinion. And as it appears that Holding was to pay the balance due on the 100-horsepower engine, estimated at the time by Holding to be $1,500, this amount, or whatever turns out to be still due on said engine, should be deducted from whatever may be found to be due Holding from the trust fund under the Vass mortgage. That is, this amount should be charged against him in distributing the assets of the trust, if anything shall be found to be due him.

The case will be recommitted to the referee Zollicoffer to reform his report in accordance with this opinion and the opinion filed in this case in the appeal of the North Carolina Car Company, *infra.*

The plaintiff Belvin will pay the costs of this appeal out of the proceeds of sale under his mortgages and the Vass mortgage—each fund paying its *pro rata* proportion.

Modified and affirmed.

Cited: Vass v. Brewer, 122 N. C., 229; *Williams v. R. R.,* 126 N. C., 921.

APPEAL OF DEFENDANT—THE NORTH CAROLINA CAR COMPANY.

(150) FURCHES, J. In this appeal, the defendant, The North Carolina Car Company, insists that it was entitled to have the issues, arising upon its exceptions, tried by a jury under chapter 237 of the acts 1897. Upon examination of this statute, so far as it relates to the trial by jury, in cases of reference, it is almost identical with section 421 of The Code, and must receive the same construction that has been given to that section. The order of reference is as follows:

"This action coming on to be heard at this April Term, 1897, of the Superior Court of Wake County, it is ordered that this action be referred to A. C. Zollicoffer, Esquire, to hear and determine all questions and issues of fact and law, and all pleas in bar arising in said action, and to state all necessary and proper accounts between parties. This order is made by the court and not by consent."

It seems to us that this was a proper case for an order of reference. This the car company does not dispute, but, under the terms of the order and the statute of 1897, it insists that it was entitled to have the issues arising upon its exceptions submitted to a jury for trial, without objecting to the order of reference. But if the statute of 1897 is substantially the same as section 421 of The Code, this contention has been decided against the defendant car company. *Driller Co. v. Worth,* 117 N. C., 515, where it is held that a "failure to object to an order of reference, at the time it is made, is a waiver of the right to a trial by jury." This case has been cited with approval in *Collins v. Young,* 118 N. C., 266; *State v. Mitchell,* 119 N. C., 784. Holding as we do, that the

(151) statute of 1897, in this respect, is the same as section 421 of The Code, we find no error in the court for overruling this motion. This motion being properly refused, it was the duty of the judge to pass upon and find the facts, which it did. Code, sec. 422. And these findings of fact are as binding on us as if they had been found by a jury. We cannot review them. *Dunavant v. R. R.,* 122 N. C., 999; *Collins v. Young, supra; Cotton Mills v. Cotton Mills,* 115 N. C., 475.

This brings us to the question of lien, and, if a lien, to what extent, and upon what property?

These questions the learned counsel did not press in his argument before us. And upon examining the findings of fact by the referee (and the findings of fact by the referee were expressly adopted by the court as its findings), we readily see why he did not. The referee finds as facts that the defendant car company made the contract for this work, and for furnishing the material charged for in its complaint, with Holding as lessee of the paper company, and not as the agent of the paper company; that it knew at the time it made the contract and at the time

it did the work that Holding was the lessee, and that he was having the work done for himself and for his own benefit, and not for the paper company. This being so, the car company has no debt against the paper company; and there can be no lien, without a debt. *Baker v. Robbins,* 119 N. C., 289; *Boone v. Chatfield,* 118 N. C., 916. As the car company has no debt against the paper company and no lien on the property of the paper company, of course the plaintiff Belvin's mortgage cannot be affected by this claim.

According to the findings of the referee, the car company has a cause of action against the defendant Holding. But the action of the car company is not against him.

Under the findings of fact by the referee, the car company has (152) no lien on the property of the Raleigh Paper Mills Company, under section 1255 of The Code, nor under any other statute.

There may be other claims against the paper company that were not specially called to our attention, and to which we have not given a separate treatment, as the record is very voluminous and they may have escaped our attention. If there are such, they will be considered as falling under the principles we have laid down in discussing this claim of the car company, and will be governed by them.

The case will be recommitted to Mr. Zollicoffer to reform his report in accordance with this opinion and the opinion of the court filed in the plaintiff's appeal; and when so reformed, it will be confirmed, and judgment rendered according to the reformed report. The car company will pay the costs of this appeal.

Modified and affirmed.

MONTGOMERY, J., dissenting: I cannot concur in that part of the opinion which decides that the improvements put upon the land by the lessee of the mortgagor do not inure to the benefit of the plaintiff, as an additional security to his mortgage debts. I can state the reason for my dissent in a very few words. The legal title to the land was in the plaintiff mortgagee when the lessee of the mortgagor made the improvements. The mortgagor, the paper mills company, made the lease to Holding, the plaintiff not having been a party thereto. If the paper mills company, the mortgagor, had made the improvements after the execution of the mortgage certainly the improvements would have become an additional security for the plaintiff's debt. (153) *Wharton v. Moore,* 84 N. C., at p. 483; *Moore v. Valentine,* 77 N. C., 188. How then can the lessee of the mortgagee stand in a different or better position than does his lessor, the mortgagor? "If the mortgagor or any one standing in his place, enhance the value of the premises by improvements they become additional security for the debt

and he can only claim the surplus, if any, upon such sale being made after satisfying the debt." 2 Washburn Real Property. In *Rice v. Dewey,* 54 Barb., 455, it was decided that "Where lands sold and conveyed by the mortgage are charged with the mortgage debt, improvements *that constitute a part of the realty,* irrespective of the question by whom made, are equally subject to the lien of the mortgagee as the land upon which they are made." And that case is cited as authority by this Court in Vol. 84 of our Reports at p. 484. The lessee's contract and the benefits reserved to himself under it should have been ratified at least by the plaintiff who held as we have said, the legal title to the land. That is not a hard rule. It, to my mind, was the most natural course that would have suggested itself to the lessee. The improvement erected by the lessee was a brick building 125 feet long by 32 feet wide with an extension 32x45 feet. The referee indeed found that it could be removed without injury to the old building (upon one wall of which it partly rested) or to the freehold. But that finding is of no consequence as bearing upon the view I have taken of the matter.

(154)

SALLIE A. HOOKER AND OTHERS, CHILDREN AND LEGATEES OF MRS. A. E. MONTAGUE, v. B. F. MONTAGUE, EXECUTOR OF MRS. A. E. MONTAGUE, AND THE NORTH CAROLINA BAPTIST ORPHANAGE, THOMASVILLE.

(Decided 6 December, 1898.)

Wills—Rule in Shelley's Case.

Executory trusts do not come within the operation of the rule in *Shelley's case.*

CIVIL ACTION involving the construction of Mrs. A. E. Montague's will, heard before *Timberlake, J.,* at February Term, 1898, of the Superior Court of WAKE County.

The testatrix died in Wake County 27 March, 1893, leaving property, both real and personal, and constituting her son, B. F. Montague, her executor.

One of her daughters, Zollie Montague, has since died, unmarried, leaving a will, the ulterior beneficiary named therein being the Baptist Orphanage at Thomasville, N. C.

The clause of Mrs. A. E. Montague's will, the subject of construction, is:

"Item 3rd. That all my property—real, personal, and mixed—be converted into money and divided equally between my children, share and

share alike, with this restriction, however, that the share or shares falling to my daughters under this will be placed in the hands of my son, B. F. Montague, as trustee for each of them, and that he shall hold the same for and during the natural life of each one respectively, and pay each of them the yearly interest or profit arising from said fund during the life of each and to their individual heirs at law after the death of each of my said daughters, respectively.

The plaintiffs contend that Zollie took but a life estate under (155) this clause of her mother's will, with remainder to her heirs, and that they were her heirs and entitled to the remainder. The Baptist Orphanage claims that Zollie took the entire interest, which she had a right to dispose of by will, and had willed it to the Orphanage. The amount involved is about $1,500.

His Honor held that by the terms of her mother's will, Zollie's share vested in her absolutely, or in fee, with the right to dispose of the same absolutely, or in fee. Judgment accordingly.

Plaintiffs excepted and appealed.

Argo & Snow for plaintiffs (appellant).
W. N. Jones for defendant.

DOUGLAS, J. We are of the opinion that the devise in question does not come under the rule in *Shelley's case,* so as to vest in Zollie Montague the absolute title to her portion of the fund arising from her mother's will. The will of Zollie Montague is not now under consideration, as it is admitted that it legally disposes of all property of which Zollie had a right to dispose. The contest arises solely under the will of the mother, Mrs. A. E. Montague, whom we shall hereafter call the testatrix. The third item of her will is as follows:

"That all my property, real, personal and mixed, be converted into money and divided equally among my children, share and share alike, with this restriction, however, that the share or shares falling to my daughters under this will, be placed in the hands of my son, B. F. Montague, as trustee for each of them, and that he shall hold the same for and during the natural life of each one respectively, and pay each of them the yearly interest or profit arising from said fund, during the life of each, and to their individual heirs at law after the (156) death of each of my said daughters respectively."

Item 4. "I appoint my son, B. F. Montague, my sole executor to execute this will as he may deem best."

It will thus be seen that B. F. Montague was both executor and trustee, but when the duties of one ceased and of the other began, it is difficult to determine. In any event, he had the absolute custody of the property,

and was charged with responsible duties in the management thereof. He was required to sell the property, real and personal, convert it into money, apportion the fund between the legatees, paying to each son his share and retaining the shares of the daughters, invest the shares of the daughters so as to produce an income, pay to each the profit arising from her share during her entire life, and then after her death to pay to her "individual heirs" something, but whether the principal or only the interest does not clearly appear. All this he was to do "as he may deem best."

No part of the principal could go into the hands of Zollie, whose share we are now particularly considering, but must be retained and managed by her brother. For the purposes of this trust, when he ceased to be executor he became *eo instanti* trustee, and in our opinion held the legal title along with the actual possession and the right of possession.

It is said that "The testatrix does not even give the custody of the estate to B. F. Montague, but provides that it be *placed in his hands* as trustee. What is the difference? Surely no one else had the "custody."

Again it is said that "the relations of B. F. Montague with regard to this fund were *in the nature* of a guardian or manager of the estate."

This means nothing to our mind beyond an executory trust. If
(157) he was a mere manager, he must have been an agent for some principal; but for whom? He was not Zollie's agent, for he was neither her appointee nor subject to her direction; neither was he her guardian, for she was apparently of lawful age. A trust loses none of its essential attributes by being denominated a *quasi* guardianship of a special fund.

It is a well established principle that executory trusts do not come within the operation of the rule in *Shelley's case;* and it is difficult to distinguish this case from that of *Saunders v. Edwards,* 55 N. C., 134. There the will provided that: "As to my property, my will and desire is, that after my death, it may all be equally divided among my children, share and share alike, but in the distribution it is my will and desire that the portions falling to my daughters, Jane Boykin, Amanda Edwards and Eugenia Blackwood, should be secured and settled upon them, the said daughters and their children respectively; and the more effectively to carry into execution this my will and desire, in regard to the division that may fall to my daughters aforesaid, I give and bequeath such lots and divisions as may fall to them from the equal division of my property as aforesaid, unto by beloved friend, Ashley Saunders, to hold in trust for the sole use and benefit of them, my said daughters *and their heirs forever,* to him and his heirs in trust as aforesaid." The court held that this was manifestly an executory trust and did not come

within the rule in *Shelley's case,* and that the daughters took only a life estate with remainder over to their children.

In the leading case of *Ham v. Ham,* 21 N. C., 598, 600, relied upon by the Court, the general rule is expressly qualified by holding that "the words 'heirs of the body' are held to be words of limitation *unless* there be some clause or restriction added, whereby it (158) plainly appears that the words 'heirs of the body' are *intended as words of purchase.*" This qualified deference to the intention of the testator is shown in numberless cases throughout the books, only a few of which need be cited: *Allen v. Pass,* 20 N. C., 77; *Moore v. Leach,* 50 N. C., 88; *Thompson v. Mitchell,* 57 N. C., 441; *Faribault v. Taylor,* 58 N. C., 219; *Pless v. Coble, ibid.,* 231; *Newkirk v. Hawes, ibid.,* 265; *Ward v. Jones,* 40 N. C., 400; *Jenkins v. Jenkins,* 96 N. C., 254; *Crawford v. Wearn,* 115 N. C., 540; *Francks v. Whitaker,* 116 N. C., 518.

In *Pless v. Coble, supra,* it was held that "where a testator in a residuary clause gave the surplus of his property to a son and daughter, in these words, 'and my desire is that such surplus be equally divided and paid over to my son A and my daughter M, my will and desire is that my daughter M's equal part, in this last devise, to her bodily heirs, equally to be divided between them,' the daughter took an estate for life, with remainder to her children." A long list of cases from other jurisdictions to the same effect may be found in the exhaustive brief of Judge Greene in *Moore v. Stone's Executors,* 19 Grat., 130, 199.

The rule in *Shelley's case* is purely a technical rule, and being contrary to the general spirit of the law, inasmuch as it tends to defeat the intention of the testator, should be strictly construed. In the case at bar, we think that the trust, being executory, does not come within the rule, and that Zollie Montague took only a life estate in the interest or profits of the fund, the principal going in remainder to the heirs of Zollie, who are also the heirs of her mother. Whether they take directly from Zollie or through the will is immaterial to this (159) discussion.

The intention of the testatrix is plain to us, and we think is legally effectuated.

However noble may be the object of Zollie's bounty, it was not the object of the bounty of the testatrix. She was seeking to provide for her own children, and not for the children of others. She wished those to inherit her property who inherited her blood, and she fondly hoped that the results of her thrift and economy might be enjoyed by those she cradled in lap and heart. As it was her property, we do not feel at liberty to thwart her will, guided by a mother's love and within the letter and spirit of the law. We think the judgment should be

Reversed.

FURCHES, J., dissenting: This action depends upon the construction of the will of Mrs. A. E. Montague, mother of plaintiffs and defendant B. F. Montague. The third item of the will is as follows:

"That all my property, real, personal and mixed, be converted into money and divided equally between my children, share and share alike, with this restriction however, that the share or shares falling to my daughters under this will be placed in the hands of my son, B. F. Montague, as trustee for each of them, and that he shall hold the same for and during the natural life of each one respectively, and pay each of them the yearly interest or profit arising from said fund, during the life of each, and to their individual heirs at law after the death of each of my said daughters respectively." "Item 4. I appoint my son, B. F. Montague, my sole executor to execute this will as he may deem best."

(160) So it depends upon the proper construction of these two "items," as it is not contended that there are any other parts of the will that can affect the construction of them.

Zollie Montague was one of the daughters of the testatrix, referred to in the third item of her will. Zollie Montague died in August, 1895, never having married, and without leaving issue of her body. Before she died, she made and executed a last will and testament, by which she willed a remainder of her estate to the Baptist Orphanage at Thomasville.

The plaintiffs are the brothers and sisters of the testatrix, Zollie Montague, and they contend that under the will of the mother, A. E. Montague, the said Zollie only took a life estate and had no interest to dispose of by her said will, and that the plaintiffs are entitled to same, under the will of the mother, A. E. Montague, or as her next of kin and distributees.

It will be observed that the estate is given to the daughter Zollie, and not to B. F. Montague as trustee. It was to be "divided *equally* between my children, *share and share alike* . . . however, that the share or shares falling to my daughters under this will *be placed* in the hands of my son B. F. Montague, as trustee, for each of them." The testatrix does not even give the custody of the estate to B. F. Montague, but provides that it *"be placed"* in his hands as trustee. So, if this had been real estate, the Statute of Uses and Trusts could not have operated to carry the legal estate to the *cestui que* trust, for the reason that there was no legal estate in the trustee. It is true that the Statute of Uses and Trusts has nothing to do with the matter under consideration, but it is used in the discussion to show that B. F. Montague had no legal estate in this fund. This distinguishes this case from *Payne v. Sale,* 22 N. C., 455, cited and relied upon for the plaintiffs. In

(161) that case, the estate was given to the trustee who held the legal

estate, and their *cestui que* trust had the equitable estate. And the remainder after the determination of the life estate was a legal and not an equitable estate, and the rule in *Shelley's case* could not operate. The relations of B. F. Montague with regard to this fund were in the *nature* of a guardian or manager of the estate.

Seeing that this estate was given to Zollie and that she was the legal owner of the same, the rule in *Shelley's case* applies, as is held in *Ham v. Ham,* 21 N. C., 598, which seems to be the leading case on this subject; and Judge Battle, in republishing this volume of the Reports says that this has been considered the settled law of the State ever since that decision. *Ham v. Ham* has been followed in *Sanderlin v. Deford,* 47 N. C., 74, *Worrell v. Vinson,* 50 N. C., 91, and in other cases. In *Worrell v. Vinson,* there was a trustee named, and that case is similar, in almost every respect, to the case now under consideration. And the Court there held that the circumstance of a trustee being named made no difference; that if it were held that the party named as trustee had taken the legal estate, it was but the naked legal estate, and the legatee at once took the legal and equitable estate and became the absolute owner, under the doctrine of *Ham v. Ham* and *Worrell v. Vinson, supra.*

Under the light of these authorities I think we should affirm the judgment of the court below.

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

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STATE EX. REL. W. H. J. GOODWIN v. CARALEIGH PHOSPHATE AND FERTILIZER WORKS.—TWO CASES.

(Decided 25 October, 1898.)

Pleadings—Amendment of—Appeal.

1. Amendment of pleadings matter of discretion, provided the amendment does not assert a cause of action wholly different from that set out in the original complaint, nor change the subject of the action, nor deprive the defendant of defenses he would have had to a new action.

2. If the amendment comes within the exception—the exception should be noted—appeal would be premature at that stage.

ACTION to enforce penalty for sale of fertilizers without having the tags required by law affixed to the bags, heard before *Timberlake, J.,* at March Term, 1898, of WAKE Superior Court.

Motion to file amended complaint.

Motion allowed. Defendant excepted and appealed.

Edward C. Smith for defendant (appellant).
Douglass & Simms for plaintiff.

CLARK, J. It was held in this case (121 N. C., 91) that the allowance or refusal of a motion to amend pleadings is a matter within the discretion of the presiding judge and no appeal lies. But this is subject to the exception that the amendment of the complaint does not assert "a cause of action wholly different from that set out in the original complaint, does not change the subject of the action nor deprive the defendant of defenses he would have had to a new action." *Parker v. Harden,* 122 N. C., 111, quoting *King v. Dudley,* 113 N. C., 167, and cases cited in Clark's Code (2 ed.), pp. 223, 224. Even when it is claimed that it has that effect, the remedy is not an immediate appeal, but to
(163) note an exception and appeal from the final judgment if it is adverse, so in any aspect this appeal would be dismissed. In *Gillam v. Ins. Co.,* 121 N. C., 369, the Court approved a refusal of leave to amend the complaint in that case, for the above reasons, but the granting permission to amend is not ground for exception that the complaint would set up a cause of action that is barred by the statute of limitations, as that is matter of defense to be set up in the answer to the amended complaint, if the defendant shall choose to plead that defense. In *Sams v. Price,* 121 N. C., 392, it is held "where the cause of action is changed by an amended complaint the defendant has a right to set up in the answer thereto any legal defense, including the statute of limitations, just as if the action had been commenced at the date of the amended complaint."

So the court was in its discretion in allowing the amendment, and the defendant can neither appeal at this stage, nor has he suffered any damage that entitled him to note an exception. If so advised, it is open to him to plead the statute of limitations as if the action was commenced at the date of the amended complaint, and the plaintiff will consider then whether he will prosecute the action further, if that defense is sustained by the trial judge. It would insufferably increase the length and expense of litigation if appeals can be taken from such rulings as this in anticipation of the probable effect of the ruling. It may be the defendant may not set up the statute of limitations, or should it be sustained when set up, the plaintiff may not appeal. In either event, this appeal will have been unnecessary, and at all events is nothing more than an inquiry speered at the Court as to the effect of the amendment (*Ely v. Early,* 94 N. C., 1; *Kron v. Smith,* 96 N. C., 390), and which can be presented on appeal from the final judgment if adverse to the
(164) defendant, and in no wise calls in question the power of the court to allow the amendment.

Appeal dismissed.

MAX PRETZFELDER v. THE MERCHANTS INSURANCE COMPANY OF NEWARK; THE NORTH BRITISH AND MERCHANTS INSURANCE COMPANY; THE WESTERN ASSURANCE COMPANY, OF TORONTO, CANADA; THE VIRGINIA FIRE AND MARINE INSURANCE COMPANY; THE ROCHESTER GERMAN INSURANCE COMPANY.

(Decided 22 November, 1898.)

Issues—Insurance—Rehearing.

1. Where the issues submitted include every phase of the controversy, an exception to the refusal to submit additional issues will not be entertained.
2. Where an appraisal fell through by no fault of plaintiff, he is relegated to his right of action.
3. It is not allowable to rehear a cause by raising the same points upon a second appeal.

CIVIL ACTION to recover loss by fire upon policies issued by the fire insurance companies, defendants, tried before *Coble, J.*, and a jury, at Spring Term, 1898, of GUILFORD Superior Court.

The attempt to adjust the loss by appraisal having failed, the plaintiff instituted this action, embracing all the companies in one action so as to apportion the damages among them.

The following issues were submitted:

"1. Did the defendants make the contracts of insurance alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff's stock of goods damaged in the manner (165) as alleged? Answer: 'Yes.'

"3. If so, what was the amount of the damage? Answer: '$1,650, with interest at 6 per cent from 15 July, 1890.'

"4. Did the defendants demand an appraisal or arbitration under the policies? Answer: 'Yes.'

"5. Was the failure of the appraisers to make an award caused by the plaintiffs, or any of them? Answer: 'No.'"

Additional issues were asked for by defendants, but his Honor excluded them, and defendants excepted.

The exceptions taken and noted on the trial on the part of defendants were very numerous—the material portion of which are discussed and overruled in the opinion.

Upon the verdict as rendered, his Honor rendered judgment in favor of plaintiff for the sum awarded, $1,650, and apportioned the loss among the defendants *pro rata* according to the amount of insurance in their respective policies.

Defendants appealed.

John W. Hinsdale and J. T. Morehead for defendants (appellants). R. R. King, A. L. Brooks, and J. E. Boyd for plaintiffs.

CLARK, J. The first exception, for failure to submit additional issues, is without merit. Every phase of the dispute as to the facts could have been passed upon under the five issues submitted by the court. *Willis v. R. R.*, 122 N. C., 906; *Patterson v. Mills,* 121 N. C., 258; *Coley v. Statesville, ibid.,* 301. The additional issue asked for, which was most pressed, was, "Did defendants waive proof of loss?" Upon the issues
(166) found and the undisputed evidence, that was a question of law, for the demand alleged by the defendants, for a reference of the loss to appraisers, under a provision in the policy, was a waiver of proofs of loss, which became useless if the appraisers were to view the loss themselves and adjust the damages. *Allemania Fire Ins. Co. v. Pitts. Exp. Soc.,* 11 Atlantic Rep., 572; 2 May on Ins., sec. 468; *Dibbrell v. Ins. Co.,* 110 N. C., 193 (at p. 206 and bottom of p. 209). After the appraisal fell through, without plaintiff's fault, as the jury find, the plaintiff with propriety might, and probably should, have furnished proofs of loss, but not being compelled to do so, the failure is rather a technicality than a meritorious defense, and should not work a forfeiture of all right of recovery for the goods insured and damaged.

When this cause was here on the former appeal it was held that if the appraisal fell through by no fault of the plaintiff, he is relegated to his right of action. It is there said (116 N. C., at pp. 496, 497): "The arbitrators were appointed but disagreed and refused to go on, and finally broke up without making an award. Subsequent attempts to agree upon another board failed. The parties were thus relegated to their legal rights, and the action can be maintained. *Brady v. Ins. Co.,* 115 N. C., 354. Indeed, as was intimated in that case, we think the proper rule is laid down in *Ins. Co. v. Holking,* 115 Pa., 416, that where the arbitrators or a majority of them fail to agree upon an award, the plaintiff (unless he is shown to have acted in bad faith in selecting his arbitrator) is not compelled to submit to another arbitration and another delay, "but may forthwith bring his action in the courts." The defend-
ants recognize that this was so held, but ask the Court to "recon-
(167) sider and reëxamine" the point in the light of additional authorities and evidence. The proposition to rehear a cause by raising the same points upon a second appeal cannot be entertained. It was the duty of the judge below to following the ruling made here. If there was additional testimony, it was all submitted to the jury upon the fifth issue: "Was the failure of the appraisers to make an award caused by the plaintiffs, or any of them?" which was found in the negative.

In this appeal there are 64 exceptions, but all of them which are worthy of any consideration are embraced in the three propositions we have discussed; indeed, many of them are repetitions in slightly different words of those three exceptions.

If fatal errors have been committed on a trial, they can be surely summed up in less than 64 assignments. It would simplify an appeal and give more time for argument on the really serious exceptions if counsel, who naturally in the hurry of a trial, take, out of abundant caution, numerous exceptions, should in the cool and deliberate moments of making out their statement of case on appeal sift out and abandon those they find trivial or untenable. This would aid the Court to a just consideration of the appeal by directing its attention to what counsel deem the fatal errors only, which in the vast majority of cases can be presented by a very few exceptions. Certainly it can never be necessary to attempt to convince an appellate court that 64 fatal errors, each justifying a new trial (and none other should be presented here) have been committed below. More than eight and a half years have elapsed since this loss was sustained, and we find no error that would justify further delay of settlement. The learned brief of appellant's counsel is well indexed, which is commendable, but there is no index to the transcript, which is required by the rules of this Court, 19 (3) (168) and 20. *Alexander v. Alexander,* 120 N. C., 472, 474.

Affirmed.

Cited: Kendrick v. Ins. Co., 124 N. C., 321; *Bradley v. R. R.,* 126 N. C., 739; *Hendon v. R. R.,* 127 N. C., 112; *Wright v. R. R.,* 128 N. C., 79; *Kramer v. R. R., ibid.,* 270; *Vanderbilt v. Brown, ibid.,* 499; *Setzer v. Setzer,* 129 N. C., 297; *Perry v. R. R., ibid.,* 334; *Jones v. R. R.,* 131 N. C., 135; *Ray v. Long,* 132 N. C., 893; *Hatcher v. Dabbs,* 133 N. C., 241; *Carter v. White,* 134 N. C., 470; *Sigman v. R. R.,* 135 N. C., 182; *Perry v. Ins. Co.,* 137 N. C., 405; *S. v. Matthews,* 142 N. C., 623; *Green v. Green,* 143 N. C., 410; *Holland v. R. R., ibid.,* 437; *Tuttle v. Tuttle,* 146 N. C., 487.

W. H. PULLY AND J. A. LONG v. JOHN C. PASS.

(Decided 9 November, 1898.)

Contribution—Set-off.

1. Where one of two makers of a note pays it he has the right of contribution from the other.
2. If the maker who has paid the note transfers it to a third person who is indebted to the other maker and who brings suit upon the indebtedness, the note is a good set-off in that suit to the extent of one-half its value, provided the transfer was made before suit brought.

CIVIL ACTION upon a money demand, tried before *Adams, J.*, at Fall Term, 1897, of the Superior Court of PERSON County.

The defendant pleaded set-off, which was excluded by the court. Defendant excepted and appealed from the judgment rendered. The nature of the set-off appears in the opinion.

W. D. Merritt for defendant (appellant).
Boone & Bryant for plaintiff.

DOUGLAS, J. This is an action brought to recover the balance found due upon a settlement in March, 1896, between the plaintiff Pully and the defendant, and subsequently assigned by the plaintiff Pully to his coplaintiff Long.

The following is taken from the statement of the case: "The defendant set up several counterclaims, among others a certain bond in (169) words and figures, to wit: $220. . . . One day after date, with 8 per cent interest from date until paid, we promise to pay J. S. Merritt, the sum of two hundred and twenty dollars for value received. Witness our hands and seals, this 27 May, 1892. C. B. Brooks (Seal). W. H. Pully (Seal).

"It is admitted that Pass came to the possession of said bond for value on 16 December, 1896. C. B. Brooks then testified as follows: The bond set up as counterclaim in this action was executed by myself and Pully to Mr. Merritt for $220. I paid the bond and took it up. Merritt testified to the same as Brooks. Brooks further said he was owing Pass and transferred the bond to him about 16 December, 1896, for the sum of $150, same being the amount due by Pully on said note, including interest from 27 May, 1892, at 8 per cent up to date of transfer. After this evidence the defendant's counsel again offered to introduce said bond in evidence. Plaintiff objected; objection sustained, and defendant excepted. His Honor submitted the issues of the jury after

charging them on all matters of law, to which there was no exception. The jury returned a verdict for plaintiff J. A. Long, finding the defendant indebted to him in the sum of $482.34."

The only question before us is the admissibility of the bond, which we infer from the argument of counsel was excluded purely on the ground that, having been paid by one of the makers, it was thereby extinguished. The exact relation that Brooks and Pully bore to each other does not appear; but it is not denied that as between them Pully was primarily liable for the amount claimed by the defendant to be due on the bond. We do not think that the payment of the bond in full by Brooks defeated his right of recovery or contribution, as (170) the case might be, from his coöbligor. Admitting that the original debt was extinguished by the payment by Brooks, that very payment at once vested in him a right of action against Pully to the extent of Pully's primary liability, and this right or debt Brooks could assign to Pass, as he appears to have done. *York v. Landis,* 65 N. C., 535. This assignment to Pass, having taken place before the bringing of this action, gave him a valid set-off, as the assignment to Long of the balance due on an open account possesses none of the qualities of commercial paper.

We are therefore of opinion that the defendant was entitled to maintain his set-off, and for that purpose to introduce the bond as evidence of the payment of the original debt.

For the exclusion of such evidence a new trial must be ordered.

New trial.

HENRIETTA WATKINS AND M. B. JOHNSON AND WIFE, ELVIRA C. JOHNSON, v. BRANTLEY WILLIAMS.

(Decided 9 November, 1898.)

Deeds Absolute and Mortgages.

1. Whenever a transaction is substantially a security for debt, it becomes a mortgage in a court of equity, and the debtor has a right to redeem.
2. Where, upon the fact of a transaction, it is doubtful whether the parties intended to make a mortgage or a conditional sale, courts of equity incline to consider it a mortgage, because by means of conditional sales, oppression is frequently exercised over the needy.

CIVIL ACTION to recover land, tried before *Robinson, J.,* at (171) February Term, 1898, of CHATHAM Superior Court.

The plaintiffs complained that the absolute deed under which the defendant held the land from their deceased father, Daniel S. Watkins, with the attendant circumstances, was in fact a mortgage, and that it was satisfied.

His Honor held it to be a mortgage, and the jury found there was nothing due on it. Judgment for plaintiff. Appeal by defendant.

Statement of facts are contained in the opinion.

Murchison & Calvert for defendant (appellant).
H. A. London for plaintiffs.

FAIRCLOTH, C. J. The plaintiffs are the only heirs at law of D. S. Watkins, who died intestate in October, 1882. It appears from the record that said Watkins, in June, 1882, had executed a mortgage on the lands in controversy, about 207 acres, to Hadley & Dixon to secure a debt of $50 due them and payable 1 December, 1882, and that he applied to the defendant, his brother-in-law, to take up said mortgage.

Carson Johnson testified that he was a justice of the peace in 1882, and was asked by defendant to go with him to Watkins' house to prepare a deed, and further testified that "when they got together they discussed a mortgage of $50 made by Watkins to Hadley & Dixon. Watkins wanted Williams (the defendant) to take up this mortgage and hold it after being assigned to him. Williams objected to having the mortgage transferred to him, and suggested a deed to him from Watkins. (172) That was agreed upon with the understanding that Watkins should have time to redeem his land. Williams suggested two years, but four years was agreed upon as the time that Watkins was to have to redeem. Watkins expected to get a legacy from Wales. There was a deed written by me, signed by Watkins and his wife and probated by me, and at the same time another paper-writing, according to the agreement, was drawn up by me and signed by Williams and probated by me, and delivered to Watkins."

At another part of the trial the same witness said: "The paper which I wrote at the time I wrote the deed provided that when Watkins paid back the money that Williams was out to Hadley & Dixon, then Williams was to reconvey to Watkins. No money was paid at that time, nor did Williams claim that Watkins owed him anything. I have been tax assessor and we put the land at $700 or $800."

The condition of the bond to reconvey the land to the plaintiff was: "On receiving the sum amounting in the aggregate, to wit, one certain mortgage made to Hadley & Dixon, taken by Alfred McPherson, tax claims bid in by J. M. Stedman, together with whatsoever amount accruing or arising for the support of the family of D. S. Watkins to the date three years hence from the date of this instrument, which will be 23 October, 1885."

Soon after the death of Watkins, the defendant took possession of the land and of Watkins' papers, including the aforesaid bond. The de-

fendant was notified at the trial to produce the bond, and on failing to do so, the parol evidence of Carson Johnson, above recited, was admitted in evidence, and after the plaintiff rested his case the defendant introduced the bond. His Honor charged the jury that the deed and paper-writing (bond), construed together, constitute a mortgage, if they believed the evidence, and that they should answer the first issue (173) "Yes." Defendant excepted.

We think the instruction was correct, and that conclusion ends the case. The jury say on the second issue that nothing is due the defendant on the mortgage, the defendant having been in possession and receiving rents and profits since 1882.

We find no copy of the deed in the record, nor any extracts from it, so we are ignorant of the recited consideration. We must infer it to be the assumption of the $50 due Hadley & Dixon, otherwise the deed would be without consideration and the grantee would hold the legal title in trust for the grantor.

The plaintiffs insist that the written evidence alone discloses an agreement that their father retained the right to redeem, which is denied by defendant. It is difficult to resist the plaintiff's contention. It is plain that the granfor so understood and intended it, and if the grantee did not, he failed to disclose to the grantor any other purpose. The defendant's bond requires no material payment to be made, except the amount of Hadley & Dixon's $50 mortgage and the taxes then due. It discloses a great disproportion between that amount and the value of the land. Upon the face of these papers alone, we should hold that they constitute a mortgage, as was held upon very similar facts, and that time of payment is not of the essence of the contract, on the principle that "Once a mortgage always a mortgage." *Robinson v. Willoughby,* 65 N. C., 520; *Mason v. Hearne,* 45 N. C., 88; Adams' Eq., 112. The contract being in writing, his Honor properly held its nature and effect to be a matter of law for his decision. Whenever a transaction is substantially a security for debt, it becomes a mortgage in a court of equity, and the debtor has a right to redeem. Coote on Mortgages, 22; Fisher (174) on Mortgages, 68. The contract may be in several instruments and the agreement (as between the parties) may be in writing or oral. *Robinson v. Willoughby, supra; Streator v. Jones,* 3 Hawks, 423.

The writings here indicate a mortgage; and the parol proof, admitted as above stated, does not contradict, but sustains that view. When a deed is absolute on its face, nothing else appearing, the plaintiff must show by strong and satisfactory proof that a security was intended, and that the provision for redemption was omitted by reason of the ignorance of the draftsman, mistake of the parties, or undue advantage taken of the necessities of the debtor. *McDonald v. McLeod,* 36 N. C., 221;

Waters v. Crabtree, 105 N. C., 394. A mortgage is a *security* for money loaned, and the like. There may be neither a present loan nor an antecedent debt, but the grantee may undertake to assume some outstanding liability of the grantor, or to pay off some claim against the grantor, so that an obligation to reimburse him would rest upon the grantor, and the conveyance may be intended to indemnify the grantee and to secure the performance of the grantor's future continuing obligation, in which case it would clearly be a mortgage. 3 Pomeroy Eq. Jur., sec. 1195, note 1; 1 Jones' Mortgages, sec. 244.

Since *Streator v. Jones,* 10 N. C., 423, two principles have been established and uniformly followed, when bills are preferred to convert a deed absolute on its face into a mortgage or security for debt: (1) It must appear that the clause of redemption was omitted through ignorance, mistake, fraud, or undue advantage. (2) The intention must be established, not by simple declarations of the parties, but by proof of
(175) facts and circumstances *dehors the deed* inconsistent with the idea of an absolute purchase; otherwise, the solemnity of deeds would always be exposed to the "slippery memory of witnesses." *Kelly v. Bryan,* 41 N. C., 283.

The plaintiff makes no attempt to shelter himself under the first proposition, but he insists, and we think has shown, that he is protected by the second proposition.

Again, where, upon the face of a transaction it is *doubtful* whether the parties intended to make a mortgage or a conditional sale, courts of equity incline to consider it a mortgage, because, by means of conditional sales, oppression is frequently exercised over the needy. *Poindexter v. McCannon,* 16 N. C., 377; 3 Pomeroy Eq. Jur., sec. 1195.

The oral evidence not only sustains the writings, but shows the *facts*—understanding and circumstances, so fully that our conclusion seems to be irresistible.

Affirmed.

Cited: Porter v. White, 128 N. C., 43; *Fuller v. Jenkins,* 130 N. C., 555; *Helms v. Helms,* 135 N. C., 176; *Bunn v. Braswell,* 139 N. C., 141.

A. J. PERKINS v. GEORGE W. THOMPSON.

(Decided 9 November, 1898.)

Deeds, Delivery of—Evidence.

1. A deed signed, properly acknowledged and registered, and found in possession of the grantee, is presumed to have been delivered; but the presumption is not conclusive and may be disproved by proper evidence.
2. Hearsay evidence is inadmissible for the purpose.

CIVIL ACTION to recover land, tried before *Robinson, J.*, at May Term, 1898, of the Superior Court of ORANGE County.

The plaintiff claimed to be the owner of the land, and alleges (176) that the deed from himself to the defendant had never been delivered, but was surreptitiously obtained by the defendant from plaintiff's wife.

The deposition of plaintiff, a nonresident, was read in evidence, in which he stated "he had learned from friends that Thompson had taken up with his wife, and they were living together as man and wife, and she had had two illegitimate children by said Thompson."

The evidence was objected to by defendant, but allowed by the court, and defendant excepted.

There was a verdict and judgment for plaintiff, and appeal by defendant.

Graham & Graham for defendant (appellant).
James B. Mason for plaintiff.

MONTGOMERY, J. The deed, if it was *delivered,* conveyed the land in it described to the defendant. He got possession of the deed in some way and had it registered, although more than a dozen years had elapsed after the plaintiff had acknowledged its execution before a justice of the peace. The usual issues in actions for possession of real estate were submitted, the responses to which by the jury depended upon the fact whether or not there had been, in law, a delivery of the deed.

The plaintiff offered on the trial his own deposition, in which he deposed, among other things, that in 1879 he got into trouble with the United States Government on account of his having participated in illicit distilling, and that he expected to flee the State to prevent conviction and punishment; that he made the deed to Thompson, the defendant, to save the land therein conveyed, to his wife and children; that he was tried for the offense with which he was charged, convicted, (177) imprisoned and served his term; that afterwards he left the State —in 1881—leaving the deed in his trunk with his other papers, and that he never said anything to Thompson about the deed after it was signed.

Basil Andrews, a witness for the plaintiff, testified that when the plaintiff left the State in 1881, the plaintiff's wife was in possession of the land, and that she and her children remained in possession until the defendant married her in 1891, and for several years she rented out the land to other persons.

D. M. Durham, a justice of the peace, testified that the plaintiff acknowledged the execution of the deed before him, and that his wife's signature and private examination were had afterwards at the plaintiff's request, and that he does not know what became of the deed after the wife's acknowledgment and privy examination.

The defendant then moved, under the act of 1897, "for nonsuit of plaintiff, as the evidence showed a nefarious transaction in which the plaintiff had endeavored to defraud the Government, and that the acknowledgment of the execution of the deed in August, 1879, before a justice of the peace included signing, sealing and delivery; and the fact of delivery had been judicially determined and could not be controverted or impeached in this action to recover the land; also, the statement of Durham, the justice of the peace, that the deed was left with him by A. J. Perkins to take the acknowledgment of Mrs. Perkins, showed a delivery by Perkins."

The motion was overruled by the court, and in that ruling there was no error. The presumption was that the deed had been delivered.
(178) Its delivery was presumed not only because it had been registered, but also because it was found in the possession of the grantee signed by the grantor and duly acknowledge before a justice of the peace. In *Whitmond v. Shingleton*, 108 N. C., 193, it is said that "the deed in question was in possession of the grantee, and such possession, with proof of the signing by the grantor, is evidence from which the jury may presume a delivery," and in Tiedman on Real Property, p. 813, the law is declared to be, "if the deed is found in the possession of the grantee a delivery and acceptance are presumed."

The contention of the defendant, however, is that upon the plaintiff's evidence the presumption is conclusive, it appearing that the plaintiff left the deed with the justice of the peace to take the acknowledgment and privy examination of the plaintiff's wife, and that that act was such a parting with the possession of the deed as constituted a delivery to the defendant. The contention cannot be sustained. The justice who took the probate had no instruction from the plaintiff to deliver the deed to the defendant, or to do anything further with it after it was acknowledged by the grantors. There are no set rules or forms laid down as to what constitutes a delivery of a deed, but in all cases the grantor must do or say something going to show that he intends the deed to become operative before the title can pass. The deed not having been

left after its execution with the justice of the peace as an escrow, nor to be delivered unconditionally to the register of deeds or to the grantee or to some person for him, the powers and duties of that officer ceased with the discharge of his official duties. With the actual delivery of the deed, he, as an officer authorized to take the acknowledg- (179) ment of deeds, had no concern.

In *Rollins v. Rascoe,* 111 N. C., 79, to which we were referred by the defendant's counsel, it appears that the grantor had parted with the deed by delivering it to the deputy clerk of the Superior Court with instructions to have the same proved by the subscribing witness before the clerk of the court, who was absent from his office, and to have the same registered. In *Hall v. Harris,* 40 N. C., 303, the Court, in discussing the matter of the delivery of the deed, said: "The law does not depend upon the accidental use of mere words 'trusted to the slippery memory of witnesses.' It depends upon the act that a paper signed and sealed is put *out of the possession* of the maker."

In the case before the Court, the justice who took the acknowledgment had no further connection with the deed, and, according to the plaintiff's evidence, the plaintiff kept the deed in his trunk after his wife had acknowledged it, for years, and never mentioned the matter to the grantee afterwards.

In *Ellington v. Curry,* 49 N. C., 21, which the defendant's counsel also cited, the deeds had been signed and sealed by the grantor, and witnessed, and had been ordered to registration by the *grantor* himself.

But the defendant further contends, in his motion to nonsuit the plaintiff, that the fact of delivery had been judicially determined and could not be controverted or impeached in this action to recover the land, and cited as authority for the position the case of *Redmon v. Graham,* 80 N. C., 231. We have read that case with care. It does not disclose the nature of the pleadings and the precise purpose of the action. It does appear, however, that the impeachment of the delivery was attempted to be made collaterally. The action of the probate (180) judge was declared by the Court to be a judicial act and the fact of delivery determined therein. In the suit before us, however, the plaintiff in the amended complaint alleges that the defendant came into possession of the deed unlawfully and fraudulently, and that it was never delivered by the plaintiff to the defendant; and there is a prayer for general relief. The motion to dismiss having been properly overruled, the defendant then put in evidence tending to show the delivery of the deed to him by the plaintiff. The theory of the plaintiff was that the defendant got possession of the deed surreptitiously after the plaintiff left the State, through unlawful intimacy with the plaintiff's wife and undue influence which he thereby exerted over her. On the question of

delivery, his Honor received, under objection of the defendant, a part of the deposition of the plaintiff, which in substance was that the plaintiff in 1894 had written to his attorney (Mr. Mason) that he was surprised at the claim of Thompson on the land, and that he was mad, and had learned from friends that Thompson, the defendant, had taken up with his wife; that they were living together as man and wife, and that she had had two illegitimate children by him (the information was received years before). Other parts of the deposition of like tenor were introduced and received over the objection of the defendant. This evidence tended to prove that the defendant had been unlawfully cohabiting with the plaintiff's wife, and that through that influence he had procured her to deliver to him the deed which the plaintiff had left in his trunk on his departure from the State. It was hearsay testimony on a most
(181) vital point and ought not to have been received; and for the error in the admission of the testimony there must be a

New trial.

LUCY BAIRD v. C. S. WINSTEAD.

(Decided 9 November, 1898.)

Wills—Dower.

1. An estate for life to the widow of the son of testator, conditional upon the death of the son without issue, is defeated by his death, leaving issue.
2. The son of a testator having acquired the land and intermarried with the plaintiff prior to 1860, she is barred by right of dower, by the sale of the land to the defendants, during his life, by his assignee in bankruptcy.

CIVIL ACTION to recover land, tried before *Robinson, J.*, at April Term, 1898, of the Superior Court of PERSON County.

The plaintiff Lucy Baird, widow of Thomas A. Baird, claimed a life estate in the land under the will of William Baird, father of her husband, dated in 1856. Her marriage occurred prior to 1860 and the title of her husband under the same will vested prior to 1860. His interest was sold during his lifetime at sale in bankruptcy, and purchased by defendants, who claim under the assignee's deed.

His Honor decided that the plaintiff, upon the death of her husband, leaving issue, was not entitled to any life estate in the land, and the plaintiff submitted to a nonsuit and appealed.

The clauses of the will of William Baird relied upon by the plaintiff are recited in the opinion.

Winston & Fuller for plaintiff (appellant).
J. W. Graham for defendants.

(182)

CLARK, J. Clause 5 of the will gives the residue of the estate absolutely "to be equally divided" between the testator's six sons, therein named, Thomas being one of them. In clause 7 there is a condition or defeasance, "should my son Thomas die without leaving issue, then I desire that his share as above shall be equally divided among his brothers, and if any of his brothers be then dead, the children of the dead brothers shall take their dead father's share; if, however, Thomas should leave a widow, I desire her to have the use of the property during her life or widowhood." The estate of Thomas was absolute unless defeated by his dying without issue, and only if thus defeated did the reservation of a life estate to the widow take effect as a limitation upon Thomas' entire share going to his brothers. Should he die leaving issue, it was evidently contemplated (The Code, sec. 2180) that the estate should go in usual course unless devised or sold by him, to his issue with the right of dower in his wife. Thomas died leaving issue, and the only contingency in which the widow could claim a life estate in the property has not arisen. The defendants hold the realty under purchase at a sale thereof by the assignee in bankruptcy of Thomas, who intermarried with the plaintiff and also acquired the land prior to 1860. She is, therefore, also barred of right of dower therein. *Sutton v. Askew,* 66 N. C., 172. In holding that the plaintiff could not recover, there was

No error.

Cited: Sain v. Baker, 128 N. C., 258; *Whitfield v. Garris,* 134 N. C., 32.

(183)

SARAH OWENS v. SOUTHERN RAILWAY COMPANY.

(Decided 1 November, 1898.)

Verdict of Jury—Poll of the Jury.

On a poll of the jury, the dissent of one is as fatal as that of all.

CIVIL ACTION for damages for personal injury, tried before *Robinson, J.,* and a jury, at June Term, 1898, of GUILFORD Superior Court.

Plaintiff offered evidence tending to prove that she was a passenger on defendant's train, and that while alighting at High Point from the platform, the train gave a sudden jerk, and she fell and was badly hurt.

The answer alleged contributory negligency, and defendant offered evidence tending to prove it.

The jury responded "No" to the issue as to whether the plaintiff by her negligense had contributed to her injury. Upon a poll of the jury, taken by leave of the court upon this issue, one of the jury answered, *"I think she was to blame in part."* The juror was then asked: "Did you not consent in the jury room that the answer to this issue should be *'No'?"* He replied, I did.

The verdict was then received and recorded, and the jury separated—to which the defendant objected, and the objection being overruled, excepted.

Judgment for the plaintiff and appeal by defendant.

F. H. Busbee for defendant (appellant).
C. M. Stedman and L. M. Scott for plaintiff.

CLARK, J. Any juror may dissent from a verdict, to which he has agreed in the jury room, at any time before it is received and entered up, and this is true even of a sealed verdict. *Weeks v. Hart,* 31 N. Y., 181; *Root v. Sherwood,* 6 Johns N. Y., 68; *Rathbaner v. State,*
(184) 22 Wis., 468; *Bishop v. Mugler,* 33 Kan., 145; 2 Thomp. Trials, sec. 2635.

In the present case, the verdict was rendered as to the second issue (contributory negligence) "No." Before it was entered and before the jury was discharged, the court, at the request of defendant, permitted them to be polled; whereupon one of the jurors responded to the second issue: "I think she (plaintiff) was to blame in part." This was certainly not a response of "No." He was then asked if he had not consented in the jury room that the issue might be answered "No." To this he replied, "I did."

It was error to permit the verdict to be received after the juror's dissent, in part, at least, without ascertaining whether notwithstanding he adhered still to the assent given in the jury room. The force of this would be better seen if each of the jurors on being polled had responded as this juror did. On a poll of the jury each "tub stands on its own bottom," and the dissent of one is as fatal as that of all. Unanimity in the verdict of a jury is still required in this State, though abolished in some other jurisdictions, and the judge should have directed the jury to retire and consider further of their verdict. For the reception of the verdict under these circumstances over the objection of the defendant, there must be a

New trial.

Cited: Smith v. Paul, 133 N. C., 68.

(185)

THE DURHAM CONSOLIDATED LAND AND IMPROVEMENT COMPANY v. W. A. GUTHRIE, W. M. MORGAN, L. A. CARR AND S. T. MORGAN.

(Decided 22 November, 1898.)

Estoppel.

Where the matters of difference between the parties have heretofore been passed upon by the court and jury, the judgment is *res adjudicata* and amounts to an estoppel.

CIVIL ACTION for specific performance of contract for conveyance of land, also for money paid by plaintiff to use of defendants, and for money received by defendants belonging to plaintiffs—tried before *Robinson, J.*, and a jury, at March Term, 1898, of the Superior Court of DURHAM County.

The defendants pleaded *res adjudicata* in an action tried between the same parties at January Term, 1895, wherein judgment was rendered against the plaintiffs, which was affirmed on appeal by the Supreme Court at February Term, 1895.

The following issue was submitted by his Honor to the jury:

"Is the plaintiff estopped and concluded to prosecute this action by the pleadings, records, opinions, and judgment of Supreme Court; and judgment and decree of this court at January Term, 1895, in the former action between same parties?" Answer: "Yes."

Upon this finding the court rendered judgment in favor of defendants, and plaintiff appealed.

The facts are stated in the opinion.

Manning & Foushee for plaintiff (appellant).

Winston & Fuller, Graham & Graham, and Boone & Bryant for defendants.

FURCHES, J. On and before 1 October, 1890, the plaintiff and (186) the defendants were land speculators, buying and selling land for a profit, in and near the town of Durham. As such, the defendants had purchased, but not paid for, one lot in the town of Durham from one Hicks, one tract of land lying near the town of Durham containing about 47 acres from one Ferrell, and another tract of about 26 acres from one Fowler. On 1 October, 1890, the plaintiff and the defendants made and entered into the following contract and agreement as to the above described lands:

"Durham, N. C., 1 October, 1890. We will let you take the property at its actual cost to us and on the same terms we bought it, which are

about as follows: Cash payment, $2,500—$4,275 on one year from date of purchase—and $1,600 in 18 months from date of purchase. About $3,000 of these time payments is at 6 per cent interest, the balance at 8 per cent. You are to be at all expense of advertising and selling the property, and putting it in proper condition for sale to the best advantage, by opening streets and making whatever improvements are necessary to sell the property on one year from date, and after deducting the actual expenses only from the proceeds of sale, the remainder of proceeds is to be equally divided between us and yourselves.

(Signed) T. S. MORGAN,
For Guthrie, Carr & Morgan."

"Accepted: R. H. WRIGHT, *Secretary and Treasurer.*"

The plaintiffs, soon after the date of this contract of 1 October, 1890, entered upon and took possession of these three parcels of land, rented out the town lot, cut and hauled wood from the other tracts, and did other work thereon, which the defendant alleges greatly damaged
(187) the market value thereof. Not long after the date of the contract of 1 October, 1890, the plaintiff corporation, by its president, J. S. Carr, paid the defendants $2,500, which they say they used in part payment for lands mentioned in said contract. The plaintiffs declined to pay anything more, although payment was demanded, and abandoned their contract. And the defendants, some time in February or March, 1892, took possession of said lands, the plaintiff not having sold the same, and, as defendants allege, not having tried to sell them. And the defendants have since sold a part of said lands, and still hold a part of them unsold.

The plaintiff having abandoned said contract, on 25 September, 1893, commenced an action against the defendants to recover the $2,500 and interest so paid by the plaintiff, alleging in their complaint that it was for money loaned to the defendants and paid for their benefit. The defendants answered this complaint, admitted the receipt of the $2,500, but denied that they borrowed the same, or that it was paid by the plaintiff for them or for their benefit, set up the contract of 1 October, 1890, and alleged that the $2,500 was paid on that contract. The defendants in their answer also claimed damages of the plaintiff for waste and damage to said lands, which they set up by way of counterclaim.

To this answer the plaintiff replied, admitting the contract, denying the counterclaim, and alleging that said contract was void for uncertainty of description and by reason of the statute of frauds.

Upon these pleadings the case proceeded to trial at January Term, 1895, of Durham Superior Court, when the following issues were submitted to the jury:

"1. Are the defendants indebted to the plaintiff; if so, in what (188) amount? Answer: 'No.'

"2. What is the value of the timber and rents received by the plaintiff from the land described? Answer: '$330.'"

From the judgment pronounced thereon, the plaintiff appealed to this Court, where the judgment below was affirmed (116 N. C., 381). The opinion of this Court was certified down, and final judgment entered in the Superior Court of Durham County at October Term, 1895. After the judgment against the plaintiff was affirmed, the plaintiff paid the amount of the defendant's recovery upon their counterclaim, amounting at the time it was paid, principal and interest, to $341.93.

On 21 August, 1895, the plaintiff commenced this action, based upon the said contract of 1890, which is attached to the complaint as exhibit "A" and made a part of the complaint. In this action the plaintiff alleges that the defendants, since they took possession of said land in 1892, have sold one tract thereof for $453.68, more than they were to pay for the whole of said lands, under exhibit "A"; and demand judgment for this amount, $453.68, and for $341.93 recovered by the defendants in the former action, on defendant's counterclaim; and that defendants be required to convey to them that part of said land still owned and unsold by defendants.

To this last action the defendants answer and, among other things, plead the record and judgment in the former action as an estoppel of record, against the plaintiff's right to recover, if it ever had one. And upon the trial the court submitted the case to the jury upon this plea, instructing them that if they found from the evidence that the parties to this action were the same as those in the former action, terminated in 1895, and that they covered the same matter in dispute between the parties in this action, that the plaintiff was estopped thereby (189) to prosecute this action, and they would answer the issue submitted to them "Yes." The jury answered the issue "Yes." Judgment for the defendants, and appeal by the plaintiff.

It seems to us that a statement of the facts in this case is an answer to plaintiff's right of action, and shows that it is not entitled to a judgment in its favor.

As the case comes to us, it is only necessary for us to consider the plea of estoppel—*res judicata*. And we must admit (and we do it with regret) that our opinions are not in harmony as to what amounts to an estoppel of record—whether the precise question must have been in issue and decided, or whether it must only appear that it might have been presented and decided. But it is not necessary that we should enter into a discussion of this much discussed question, and we do not do so, as we

find that, according to all our decisions from *Falls v. Gambill,* 66 N. C., 455, to *Wagon Co. v. Byrd,* 119 N. C., 461, the plaintiff was estopped in this case.

There is no error, and the judgment must be

Affirmed.

J. F. MEADOWS ET AL. v. R. H. MARSH ET AL.

(Decided 22 November, 1898.)

Parties.

Persons in interest are necessary parties to a final adjudication, and a cause may be remanded to make parties.

CONTROVERSY without action, submitted to *Timberlake, J.,* at Superior Court of GRANVILLE County, July Term, 1898.

(190) CASE AGREED.

R. H. Marsh, guardian, Joe F. Meadows and wife Susan, John Meadows and wife Kate, and R. W. Winston, who are parties to a matter which might be the subject of an action of which this court would have jurisdiction, submit the following facts to the court, and ask its decision upon the same, to wit:

One A. Crews and wife owned a house and lot in Oxford, N. C. On 28 September, 1883, they borrowed of John F. Cannady two thousand dollars ($2,000), executing a bond and deed of trust upon said property to N. B. Cannady, trustee, now deceased. On this bond was due, 25 July, 1898, eighteen hundred sixty-three and 48/100 dollars ($1,863.48). Thereafter, to wit, on 20 December, 1889, said Crews and wife borrowed of R. H. Marsh, guardian, four hundred and fifty dollars ($450), executing a bond and deed of trust on same property to Robert W. Winston, trustee. There was due on this bond to Marsh on 25 July, 1898, five hundred seventy-six and 23/100 dollars ($576.23). Since said time they have put other deeds of trust upon said property, and the total indebtedness on account of such trust deeds is about thirty-two hundred dollars ($3,200).

Failing to pay any of said bonds, the trustee, Winston, was requested to sell the said property under the second trust. He was requested to cut the same into four lots, and this he did. He advertised the sale more than thirty days, according to law, and on the sale day at the courthouse door in Oxford, N. C., sold two of said lots, to wit, the residence lot and a ninety-foot lot on College Street, to Susan J. Meadows and Kate Meadows, respectively, for the price and sum of twenty-three hun-

dred dollars ($2,300) for the residence lot, and four hundred (191) and fifty-five dollars ($455) for the vacant lot. During the progress of the sale one of the bidders asked if there was a first deed of trust on the property, and if it was to be paid out of the proceeds of the sale, or if the purchaser bought subject to the first indebtedness? The trustee and Mr. Marsh, thinking that the property would bring more if sold free of the first encumbrance, had the auctioneer to announce in a loud tone of voice, so as to be heard, and it was heard by all bidders, that the sale was to be made for cash, and the cash was to be used in paying off the amount due under the first deed of trust, and next under the second deed of trust. With this understanding the lots were offered, cried out, and bought by the said above parties.

The cost of making said sale in the advertisement, auction fees, and commissions was forty-eight dollars ($48). Total amount realized was $2,755. Amount for distribution, $2,707. After paying off the second mortgage of $576.23, there is in the trustees' hands the sum of $2,130.77 for further distribution. The first mortgage has not been canceled, but is held to await the decision of the court.

Bond under the third deed of trust is jointly due and owing to A. A. Hicks and Rhodes Hunt, and is in excess of $267.29, the residue after paying the first and second deeds of trust.

Now, the point at issue is this: Said trustee is willing to pay said money to any person entitled to the same; but he does not wish to pay it to R. H. Marsh, guardian, the present owner of said first bond and deed of trust, without an indemnifying bond or without an order of court. These are all the facts. The sale was open and fair, and the property brought good prices. Two lots now remain unsold. Shall said trustee pay said excess over the second deed of trust to (192) R. H. Marsh, guardian, or to whom shall he pay it? Or, if the court should be of opinion that the said land could not, or ought not to be sold under the terms offered on day of sale, then that the said sale be set aside and a new sale ordered.

R. H. Marsh and Robert W. Winston, being each duly sworn, states that the facts set forth in the foregoing affidavit and statement and affidavit, of their own knowledge are true, and those stated upon information and belief they believe to be true; that the foregoing certificate is real and procedure in good faith in order to determine the rights of the parties.

(Signed) R. W. WINSTON,
ROBERT H. MARSH.

Sworn to and subscribed before me, this 26 July, 1898.

J. M. SIKES,
Clerk Superior Court.

JUDGMENT.

The court having read and considered the foregoing statement of facts agreed and controversy without action, adjudges and directs: That said trustee pay the costs of sale, to wit, forty-eight dollars, which is adjudged reasonable; second, the actual amount due under the first deed of trust; third, the amount actually due under the second deed of trust, and if so much is due under the third deed of trust as to absorb the balance, he will pay over the residue under said third deed of trust (third).

The court is of the opinion that the arrangement to sell and pay off the first deed of trust was equitable and fair, and for the best
(193) interests of all the parties. E. W. TIMBERLAKE,
Judge Presiding.

July Term, 1898, Oxford, N. C.

From the foregoing judgment, Robert W. Winston, trustee, appealed.

Winston & Fuller and B. S. Royster for appellant.
No counsel contra.

FAIRCLOTH, C. J. This is a controversy without action under The Code. The facts need not be stated except to say that A. Crews and wife made several deeds of trust to secure creditors, and the second trustee sold a part of the property and realized more than enough to pay the debt secured to him, and he asks the court to give him directions. Crews and wife are not parties to this proceeding. The proceeding is remanded to the end that the trustors and other interested persons may be made parties and allowed to plead or answer.

Remanded.

Cited: Tyler v. Capehart, 125 N. C., 70.

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(194)

GEORGE ELLIS v. W. B. HAMPTON.

(Decided 9 November, 1898.)

Malicious Prosecution.

Where two parties have been arrested on a criminal charge and both being acquitted, one of them institutes an action for malicious prosecution, while evidence of malice towards both is competent as going to show the prosecutor's state of mind towards the plaintiff at that time, yet for the purpose of ascertaining the punitive damages to which the plaintiff is entitled to recover, the defendant's words and acts towards the plaintiff are only to be considered, and the jury should be so instructed.

ELLIS *v.* HAMPTON.

CIVIL ACTION for damages for malicious prosecution, tried before *Robinson, J.,* at March Term, 1898, of Superior Court of DURHAM County.

The plaintiff and Adolphus Mangum had been jointly prosecuted and acquitted. There was evidence of malice towards both on part of defendant. Among the exceptions made by the defendant to his Honor's charge was one to the instruction upon express malice.

Verdict and judgment against the defendant, who appealed.

The instruction excepted to is stated in the opinion.

Manning & Foushee and Graham, Green & Graham for defendant (appellant).

Winston & Fuller and Boone & Bryant for plaintiff.

MONTGOMERY, J. The plaintiff, together with Adolphus Mangum, was arrested on the charge made by the defendant, that in 1894 the plaintiff aided and abetted Mangum in unlawfully and willfully removing and disposing of certain crops grown by Mangum, as tenant of defendant, on the defendant's land, before Mangum had paid (195) for advances of supplies made to him by the defendant to make the crop, without the knowledge and consent of the defendant and without giving him notice as required by section 1759 of The Code. The plaintiff and Mangum were acquitted of the charge, and the plaintiff brought this action for damages against the defendant for alleged malicious prosecution. There was evidence received tending to show ill will and malice from the defendant toward Mangum. On this point his Honor instructed the jury that "in addition to malice, which may be inferred from want of probable cause, the jury will consider all the evidence offered by the plaintiff to show express malice on the part of the defendant towards both the plaintiff and Mangum, whom the defendant prosecuted with the plaintiff in the same warrant."

In *Brooks v. Jones,* 33 N. C., 260, it was held that in actions for malicious prosecution the plaintiff must show particular malice as *contra* distinguished from general malice, a disposition to do wrong—malice against mankind—on the part of the defendant towards him. The Court in that case said: "This particular malice may be proved by positive testimony of threats or expressions of ill will used by the defendant in reference to the plaintiff, or it may be inferred from the want of probable cause and other circumstances." However, in *Thomas v. Norris,* 64 N. C., 780, apparently a different rule is laid down. There evidence of malice on the part of the defendant against another person, who was arrested under the same warrant with the plaintiff, was received as evidence of malice toward the plaintiff also. We will not enter into

(196) a discussion of any seeming inconsistency between the rules of evidence laid down in the two cases. It is not necessary to a proper determination of the correctness of that part of his Honor's charge which we are considering. We can only say that we cannot carry any further the rule laid down in *Thomas v. Norris, supra.* The charge of his Honor went further: The effect of the instruction of the court was that the jury might estimate the punitive damages in favor of the plaintiff by their taking into consideration each and all of the defendant's words and acts which tended to show malice and ill will on the part of the defendant toward not only the plaintiff, but also toward Mangum. The jury were substantially instructed to add to the damages (punitive) which the plaintiff was entitled to recover for the malicious prosecution of himself by the defendant, those which the defendant might have been liable for for having prosecuted Mangum with malice. At the most, his Honor should, under the ruling in *Thomas v. Norris, supra,* have told the jury that they might consider the evidence going to show malice against Mangum as tending to show malice against the plaintiff also; but that they must not consider the particular acts and words done and spoken by the defendant showing malice against Mangum to enhance the punitive damages to which the plaintiff might have been entitled for the injury done to himself. The evidence of malice on the part of the defendant toward Mangum was only competent as going to show the state of his mind at that time towards the plaintiff.

For the error pointed out in the charge there must be a

New trial.

Cited: Kelly v. Traction Co., 132 N. C., 374.

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(197)

JOHN W. STROTHER AND WIFE, MINNIE L. STROTHER, v. THE ABERDEEN AND ASHEBORO RAILROAD COMPANY.

(Decided 9 November, 1898.)

Torts, Liability of Railroad Company—Damages—Evidence—Admissions of Husband—New Trial Upon One Issue.

1. A railroad company is liable in damages for an insulting proposition made by its conductor to a passenger on his train.
2. An immodest remark by the passenger to the conductor will not justify the tort of the conductor, but may be considered in mitigation of damages.
3. The husband of a plaintiff in an action for tort is not a necessary party, and if joined as a mere formal party, in the absence of proof of agency, his admissions made prior to suit are inadmissible as evidence.

4. The admission of incompetent evidence, of slight importance, is ground for new trial, when it appears the appellant suffered prejudice thereby.

5. An appeal by plaintiff upon exceptions applying to the *quantum* of damages, the defendant not appealing, presents an instance where the new trial should be confined, if allowed, to that issue only.

CIVIL ACTION for a tort tried before *Robinson, J.*, at June Term, 1898, of the Superior Court of GUILFORD County.

The tort complained of was an insulting proposition made by the conductor of defendant's train upon which the female plaintiff was a passenger.

The conductor, examined as a witness for defendant, testified that the proposition was induced by an immodest remark made to him by his passenger.

The defendant was allowed to prove by this witness, over plaintiff's objection, that before suit brought he offered to the husband to give $20 to say no more about it, and that Strother said he would see me in the morning, but did not come.

Plaintiff excepted, and, from a verdict and judgment for $50, (198) appealed.

J. T. Morehead for plaintiff (appellant).
Douglass & Simms and Shaw & Scales for defendant.

CLARK, J. This action was brought by the wife for a tort, an insulting proposition made to her by the conductor of the defendant corporation, while a passenger on its train. The sufficiency of the cause of action is not controverted, for the defendant does not appeal, and besides it is amply sustained by *Daniel v. R. R.*, 117 N. C., 592, especially authorities cited at page 608, and *Williams v. Gill*, 122 N. C., 967.

The plaintiff appeals for errors alleged as to the second issue, the *quantum* of damages. The first exception is that the court admitted evidence, over the plaintiff's objection, of admissions or *quasi* admissions from the silence of the husband. The husband was not required to be made a party by The Code, sec. 178. *Schuler v. Millsaps*, 71 N. C., 297. He has no interest or share in the recovery (Const., Art. X, sec. 6) and is only a formal party, and his prior admissions are not thereby made competent against the real party in interest. 2 Taylor Evidence, secs. 741, 742; 1 Greenleaf Evidence, 173. It is true that the husband when joined as a necessary party is *pro hac vice* agent of his wife, and she is bound by the acts of counsel selected by him, in the absence of collusion (*Vick v. Pope*, 81 N. C., 22), and therefore his admissions after action brought would be evidence against her, but this is on the ground of agency and not of his being a party to the record, and hence

(199) his admissions made, as in this case, before action brought, being before the agency began, are not admissible. *Towles v. Fisher,* 77 N. C., 437.

There are many cases holding that the admission of irrelevant or even "incompetent evidence of slight importance is not ground for new trial unless it appear that the appellant has suffered prejudice by its admission." *Glover v. Flowers,* 101 N. C., 134; *Patterson v. Wilson, ibid.,* 594; *S. v. Shoemaker, ibid.,* 690. But here, the evidence erroneously admitted was prejudicial, being an offer of the conductor to pay $20 and the failure of the husband to promptly and indignantly reject it. All this was before suit brought, when in no sense was the husband (in the absence of evidence to that effect) the agent of the wife, and the inference sought to be drawn is his *quasi* admission that it was not grossly inadequate. This evidence was not made competent by the husband's being afterwards made a formal party to the action.

The other exception that the judge erred in instructing the jury that if the woman opened the way by an immodest or improper remark to the conductor, it might be considered in fixing the damages, cannot be sustained. Such conduct on her part, if proved, did not justify the conduct of the conductor, but certainly she is not entitled to the same award of punitive damages as one who gave no license by imprudence in speech or conduct.

The only appeal being by the plaintiff upon exceptions applying to the verdict upon the second issue, the defendant not having appealed, this is clearly a case where the new trial should be confined to that issue. *Mining Co. v. Smelting Co.,* 122 N. C., 542; *Rittenhouse v. R. R.,* 120 N. C., 544; *Nathan v. R. R.,* 118 N. C., 1066; *Pickett v.*
(200) *R. R.,* 117 N. C., 616; *Blackburn v. Ins. Co.,* 116 N. C., 821; *Tillett v. R. R.,* 115 N. C., 662; *Jones v. Swepson,* 94 N. C., 700; *Boing v. R. R.,* 91 N. C., 199; *Price v. Deal,* 90 N. C., 290; *Jones v. Mial,* 89 N. C., 89; *Lindley v. R. R.,* 88 N. C., 547; *Crawford v. Mfg. Co., ibid.,* 554; *Roberts v. R. R., ibid.,* 560; *Allen v. Baker,* 86 N. C., 91; *Burton v. R. R.,* 84 N. C., 192; *Meroney v. McIntyre,* 82 N. C., 103; *Holmes v. Godwin,* 71 N. C., 306; *Key v. Allen,* 7 N. C., 523.

Error.

Cited: Benton v. Collins, 125 N. C., 90; *Cook v. R. R.,* 128 N. C., 336; *Lovick v. R. R.,* 129 N. C., 436; *Palmer v. R. R.,* 131 N. C., 251; *Harvey v. Johnson,* 133 N. C., 364; *Smith v. Bruton,* 137 N. C., 89; *Hutchinson v. R. R.,* 140 N. C., 126; *Stewart v. Lumber Co.,* 146 N. C., 66.

NATHAN HILL v. G. F. JONES AND G. W. JONES.

(Decided 9 November, 1898.)

Devise—Purchase of Contingent Undivided Interest.

Where land is devised by a testatrix to her children to be held by her husband until the youngest child became of age, and no part thereof to be sold or disposed of before that time, no action previous thereto can be maintained by a purchaser of an interest of one of the children, since deceased.

CIVIL ACTION for recovery of land, tried before *Allen, J.*, at November Term, 1897, of Superior Court of LENOIR County.

Martha E. Jones, mother of defendant G. H. Jones and wife of defendant G. W. Jones, devised to her children her real estate in fee, upon the conditions as follows: "No part or portion of said real estate to be sold or disposed of until my youngest child, then living, shall arrive at the age of twenty-one years; that the dwelling-house I now occupy, or such other as may hereafter be built, shall be and constitute a home for my husband, George W. Jones, during his (201) life, and for each and every of my children until my youngest child, then living, shall arrive at the age of twenty-one years; that the rent, profits, incomes, etc., derived from my plantation or any other source shall be devoted and applied to the support and education of my children, to the necessary repair of houses and plantation, and the surplus or excess of such annual rents, profits and income, shall and may be used in such manner by my executor, hereinafter named, as he may deem best, without his being required to render any account of the same."

"When my youngest child, then living, shall arrive at the age of twenty-one years, it is my will and desire that all my real and personal estate shall be divided equally between my above-named children, and such child or children as I may hereafter have issue of my body, share and share alike; and should either or any of them die without issue, then their share shall be equally divided between my other children then living, or should either or any of them die leaving issue, then such distributive share shall go to such issue so left."

G. W. Jones, defendant, was appointed executor. The defendants became indebted to plaintiff, executed to him their note and secured it by mortgage of the interest of G. F. Jones in the land devised— the note not being paid, the mortgage was foreclosed by the sale of the land, and plaintiff became the purchaser—and took commissioner's deed.

The youngest child of the testatrix was still under age at the time this suit was brought. G. F. Jones has died since. The question submitted to his Honor was whether this action could be maintained.

(202) His Honor thought not, and rendered judgment dismissing the case.

Plaintiff excepted and appealed.

George Rountree for plaintiff (appellant).
N. J. Rouse for defendants.

CLARK, J. By the terms of the will, no part of the real estate was to be sold or disposed of until the youngest child should become of age, and then it should be divided in manner specified. Until that time, the husband should occupy the premises and use the surplus of income from the realty after paying for necessary repairs thereon and the education of the children, in such manner as he should deem best, without being required to render any account thereof. The youngest child has not become of age, and the question intended to be presented, whether the purchase of the share of one of the devisees now deceased (under a mortgage made by him on his undivided interest) is entitled to recover, cannot now arise. If such devisee were alive, he could not claim possession or partition till the youngest child became of age, and of course his mortgagee could acquire no greater right, even if the devisee possessed such an interest as could be mortgaged, as to which we express no opinion.

In dismissing the action there was

No error.

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(203)

IREDELL MEARES AND E. B. MANNING, RECEIVERS OF THE CAROLINA INTERSTATE BUILDING AND LOAN ASSOCIATION, v. W. B. DUNCAN AND WIFE, EMILY F. DUNCAN.

(Decided 9 November, 1898.)

Building and Loan Associations—Married Women.

A married woman who becomes a stockholder in a building and loan association, and also a borrower, her husband joining in the note and mortgage on her land to secure the note, must contribute *pro rata* to the expense and loss account in case of failure—just as she would have participated in the profits if it had been a success.

CIVIL ACTION for foreclosure of mortgage executed to the Building and Loan Association by Emily F. Duncan and her husband, tried before *Adams, J.*, at March Term, 1898, of Superior Court of CARTERET County.

Emily F. Duncan became a stockholder in the company and also a borrower of $1,000, for which she and her husband gave their note, with a mortgage on her land to secure it.

The company failed and went into the hands of the plaintiffs as receivers. Its liabilities, and costs and charges of winding up amount to 30 per cent of its assets.

The defendant Emily F. Duncan claims that by reason of her being a married woman she is not liable for any portion of this deficiency. If her contention is allowed, it was agreed that the amount due from her is $498.66—but if she is liable then the balance due from her, and for which her land is bound is $651.56, as claimed by plaintiffs.

His Honor adjudged that she was liable for $498.66, and gave judgment of foreclosure for that amount.

Plaintiffs excepted and appealed.

Charles R. Thomas and Allen & Dortch for plaintiffs (appel- (204) *lants.*

No counsel contra.

FURCHES, J. The defendant Emily F. Duncan became one of the stockholders and incorporators of the "Inter-State Building and Loan Association of Wilmington"; that she subscribed for $1,000 of the capital stock of said concern which was issued to her; that she then borrowed $1,000 in money from said association, and she and her husband W. B. Duncan executed their bond and obligation to said association therefor. And at the same time the defendant W. B. Duncan and his wife, the said Emily F., made and executed a mortgage on the real estate of the said Emily F., to secure the payment thereof.

This statement of facts, about which there is no dispute, shows that this is the debt of the defendant Emily F. Duncan, evidenced by the bond of her, and her husband, W. B. Duncan. *Mahoney v. Stewart,* at this term.

This debt was secured by the mortgage of the husband and wife on the wife's property. This made the mortgaged property liable to the plaintiff for whatever may still be due thereon. This we do not understand the defendants to dispute, and the single question presented for our consideration is as to whether there is still due on said debt the sum of $651.56, or only $498.66, with interest on the correct amount.

This corporation has become insolvent; a creditor's bill has been filed and it is now in the hands of the plaintiff receivers for liquidation and settlement. It has been ascertained that the defalcations of the concern and the costs and charges incident to the winding up and closing out the same, amount to 30 per cent of its assets. This is undisputed.

(205) But the defendant Emily F. claims that as she is a *feme covert,* she is not liable for this deficiency, but that she is entitled to have credited all that she has paid in to the concern upon her bond. And it is admitted that if she is so entitled, the amount still due is $498.66, but if she is liable for her part of the deficiency, then the balance due is $651.56.

The fund is now in the custody of a court of equity and to be administered according to the principles of equity. And as the defendant Emily F. is one of the corporators and entitled to her part of the profits of the concern, if any had been made, equity says that she must bear her part of the losses as other stockholders have to do. Were she not so liable, the whole equitable settlement of the concern would be destroyed. She got in the same boat with the other stockholders, and as it sank she has to take her chances of escape with the others, though she is a married woman. This is the equitable solution of the matter. But there is another solution that is more direct, and that is this:

As the expenses and losses had to be paid out of the assets of the concern, and they have been ascertained to be 30 per cent thereof, and her note being a part of the assets, and this expense and deficiency having first to be paid, she can claim no credits on her bond until this is paid. So, she has not, in legal contemplation paid this 30 per cent on her debt, but paid it to the concern, which went to the expense and loss account; and therefore she is not entitled to have it credited on her bond.

This matter has been very much discussed in *Strauss v. B. & L. A.,* 117 N. C., 308; 118 N. C., 556; *Thomas v. B. & L. A.,* 120 N. C., 420; *Meares v. Davis,* 121 N. C., 126, and we think the principle involved in this case is settled by those cases.

(206) In our opinion the defendant Emily F. Duncan, as well as her husband, is liable to the plaintiffs for $651.56 and interest, and judgment should have been entered for that amount. There is error in the judgment, to this extent.

Error.

Cited: Meares v. Butler, post, 208; *Williams v. Maxwell, post,* 595; *Bank v. Riggins,* 124 N. C., 536; *Meares v. Improvement Co.,* 126 N. C., 665.

IREDELL MEARES AND P. B. MANNING, RECEIVERS OF THE CAROLINA INTERSTATE BUILDING AND LOAN ASSOCIATION, *v.* C. T. BUTLER AND WIFE, ELLA LEE BUTLER.

(Decided 15 November, 1898.)

Wife's Liability when Mortgagor to Secure Husband's Debts—Usury—Building and Loan Association.

1. Where the husband is a borrower and incorporator of a building and loan association and his wife joins him in a mortgage of her land to secure the debt, while she incurs no personal liability, yet she occupies the relation of surety to the extent of her mortgaged property.

2. The wife cannot sue the association, or recover by way of counterclaim for usurious interest not paid by her.

CIVIL ACTION to foreclose a mortgage, tried before *Adams, J.*, at the Superior Court, February Term, 1898, of SAMPSON County.

C. T. Butler, one of the defendants, became a corporator and a borrower of the Carolina Inter-State Building and Loan Association, and his wife, Ella Lee Butler, also defendant, joined him in a mortgage of her land to secure the debt.

The Association failed and passed into the hands of the plaintiffs, receivers, duly appointed, who instituted this action to subject the land to the payment of C. T. Butler's debt—the balance due, after allowance of all deductions by way of payments, forfeitures, fines, etc., being ascertained to be $249.72, and for which judgment was (207) rendered against him.

So far as Mrs. Ella Lee Butler was concerned, his Honor being of opinion that the loan was usurious, that no interest is collectible out of the land, that no deductions from payments to cover losses ought to be made as to her, and that she was entitled to be credited for the purpose of discharging the mortgage lien with twice the amount paid by C. T. Bland within two years, and so holding the said mortgage debt has been paid as to her, it was adjudged that the mortgage deed is fully discharged, and the plaintiffs are directed to cancel the same of record.

The plaintiffs and the defendant T. C. Butler excepted and appealed.

Charles R. Thomas and Allen & Dortch for appellants.
No counsel contra.

FURCHES, J. It is astonishing to see what amount of litigation can grow out of an insolvent Building and Loan Association. The first case that came before us, growing out of this association, was *Strauss v. Building and Loan Association*, 117 N. C., 308. In that case the court

undertook to mark out the principles upon which the concern should be wound up and settled. And while the principles laid down in that case established the rules upon which the same should be settled, there are still troublesome questions arising all along the line. The last deliverance of this Court upon questions growing out of the settlement of this insolvent concern is *Meares v. Duncan,* at this term.

(208) That case is only differentiated from this in one respect. In that case Mrs. Duncan was the borrower and one of the incorporators. In this case Mrs. Butler was not the borrower, and was not one of the incorporators, but her husband was the incorporator and borrower, and she mortgaged her land as security for the payment. *Sherrod v. Dixon,* 120 N. C., 60. And while Mrs. Butler is under no personal obligation to the plaintiff association, by reason of her mortgage, she occupies the relation of surety to the extent of her mortgaged property. *Sherrod v. Dixon, supra; Hinton v. Greenleaf,* 113 N. C., 6; *Smith v. Building and Loan Asso.,* 119 N. C., 257; *Hedrick v. Byerly,* 119 N. C., 420.

But these authorities only go to the extent of relieving the surety where the principal debtor is relieved, and to the extent of his relief. Or where the plaintiff has done something that releases the surety (or security) from the payment of the debt. Such as extending the time of payment without the consent of the surety or the lapse of time, under the plea of the statute of limitations, or a tender of payment, or where the creditor has done something that the surety has a right to plead as a defense, independent of the rights of the principal.

In this case the principal is not entitled to this defense, as is shown in *Meares v. Duncan, supra.* If he was it would inure to the benefit of the wife's security, as in *Smith v. B. & L. Assn., supra.*

Nor is it a defense that the surety is entitled to plead and set up as a counterclaim, as she would have the right to plead the statute of limitations, or the extension of time or the tender of payment. It is not claimed that a greater rate of interest is charged in this case than

(209) six per cent. Nor is it claimed that any payments made, whether as fines, fees or assessments, have not been allowed the defendants by plaintiff. But it is alleged by defendant that these payments when made were upon a usurious contract, and that she (the surety) is entitled to set them up as counterclaims, under the statute. In this she is mistaken. The statute does not so provide.

The Code, sec. 3836, provides that "In case a greater interest has been paid (than six per cent) *the person by whom it has been paid,* or his legal representative, may recover back, in an action of debt, twice the amount of interest paid." (The italics are ours.) The case states that what has been paid on this debt was paid by the principal (C. T.

Butler) and not by the wife. This right, whether by action or by way of counterclaim, is purely statutory. *Roberts v. Ins. Co.,* 118 N. C., 429, and Mrs. Butler has no cause of action—could not sue the association and recover for usurious interest not paid by her, and cannot recover by way of counterclaim, which is in effect a cross action.

This case is distinguishable from *Smith v. B. & L. Assn., supra.* The principal question decided in that case was that a tender of payment had been made by the principal and refused, which released the surety though it did not release the principal debtor. That was a case where the creditor by his act had released the surety and which she had the right to plead independent of the principal, as she would the statute of limitations.

The other was the recovery of double the amount of usurious interest by the husband *who paid it.* And of course when he recovered this it inured to the benefit of his surety.

There is no conflict in this opinion and that of *Smith v. B. &* (210) *L. Assn., supra.* There is error in the judgment appealed from, in that it discharged the mortgage.

The plaintiffs, upon the facts found, are entitled to a judgment of foreclosure of the mortgage for the satisfaction of their judgment.

Error—reversed.

Cited: Williams v. Maxwell, post, 595; *Meares v. Improvement Co.,* 126 N. C., 666; *Fleming v. Barden,* 127 N. C., 215.

THE WILMINGTON AND WELDON RAILROAD COMPANY v. THOMAS B. BURNETT AND ELIJAH HEWLETT, SHERIFF.

(Decided 22 November, 1898.)

Mortgages—Purchasers—Notice.

1. Under section 1255 of The Code, amended by Acts of 1897, ch. 324, mortgages of incorporated companies do not exempt their property from execution on judgments obtained in the courts of the State against them for labor performed nor for torts committed.

2. It makes no difference whether the mortgaged property was sold before, or after the judgment, when the purchaser takes with notice.

CIVIL ACTION for injunction heard before *Adams, J.,* at April Term, 1898, of NEW HANOVER Superior Court.

There was a restraining order issued, and order directing the defendants to show cause why an injunction to the hearing should not be granted enjoining them from selling under execution property claimed by plaintiffs under the following circumstances:

The W. N. & N. Railway Company operating a line between Wilmington and New Bern on 12 January, 1891, executed a mortgage conveying its property to secure its bonds. Default having been made the
(211) trustee on 13 March, 1897, instituted a suit in Equity in the United States Circuit Court for the Eastern District of North Carolina to foreclose the mortgage, appoint a receiver and sell the property, all of which was done, and a sale made by the receiver on 15 July, 1897, to parties who organized a corporation known as the Wilmington & New Bern Railway Company.

The sale was confirmed, and deed made to this company on 27 July, 1897, who in December following conveyed the property to the plaintiff.

After the execution of mortgage aforesaid, Burnett, one of the defendants, on 26 November, 1894, while a passenger on the train of the W. N. & N. Railway Company, then operating its road, was injured and on 9 January, 1895, brought an action against said Railway Company in the Superior Court of New Hanover County for damages for such injury. The action was tried and judgment recovered by Burnett at September Term, 1896. Appeal by the railway company. Judgment reversed by the Supreme Court. New trial had and judgment obtained below at September Term, 1897, against the railway company, but subsequent to the sale to the plaintiff.

On this judgment execution was issued and levied upon the property of said railway company, mortgaged as aforesaid, and the sale advertised by the sheriff. The plaintiff, W. & W. Railroad Company, claiming the property under the said foreclosure sale, instituted this action against the sheriff and Burnett to enjoin the sale.

His Honor dissolved the restraining order, so far as the sheriff was concerned, as erroneously made, but continued it as to Thomas
(212) B. Burnett until the hearing. From this judgment the defendant Burnett appealed.

E. S. Martin, George Rountree, T. W. Strange, and Bellamy & Bellamy for appellant.

A. M. Waddell for plaintiffs.

FURCHES, J. The Wilmington, New Bern & Norfolk Railway Company, a corporation in this State, on 12 January, 1891, executed a trust deed or mortgage to the State Trust Company of New York to secure certain bonds issued by said corporation. Default being made in the

payment of said bonds, as provided in the mortgage, suit was commenced in the Circuit Court of the United States at Wilmington, N. C., on 13 March, 1897, for a foreclosure and sale of the mortgaged property. A receiver was appointed who took possession of the same, a decree of foreclosure was had, and on 27 July, 1897, the road (the mortgaged property) was sold and the assignor of the plaintiff became the purchaser; that on 26 November, 1894, the defendant Burnett, at that time a passenger on the mortgaged road, was injured by said road, for which he commenced a suit for damages against the mortgaged road in the Superior Court of New Hanover County on 9 January, 1895; that this action continued and pended in said court until September Term, 1897, when the defendant Burnett recovered judgment against the Wilmington, New Bern & Norfolk Railway Company (the mortgagor); that upon this judgment the defendant Burnett has caused execution to issue to the sheriff of New Hanover County, and he is seeking to collect the same out of the mortgaged property of the Wilmington, New Bern & Norfolk Railway Company, purchased by the plaintiff, or its assignor on 15 July, 1897, under the foreclosure sale made under (213) a decree and order of the Circuit Court of the United States.

This action is brought to enjoin the defendant Burnett and the sheriff of New Hanover County from selling said property under said execution.

It seemed to be conceded by counsel on both sides that the plaintiff's right to the relief demanded depends upon the construction the court puts on section 1255 of The Code.

This section has been considered by this Court in several recent opinions. But it is contended by the plaintiff that the precise question presented in this case has not been decided, while it is contended by the defendant that it has been decided in favor of the defendant in *Coal Co. v. Electric Light Co.*, 118 N. C., 232, and in *Langston v. Improvement Co.*, 120 N. C., 132. (And we wish here to correct an error in this last case on page 134. It should be section 1255, and not 685, as it is printed.)

The distinction the plaintiff seeks to make is that the mortgaged property had been sold before the defendant recovered his judgment, when it had not, in the other case. But upon an examination of these cases (*Coal Co. v. Electric Light Co.*, and *Langston v. Improvement Co., supra*) it will be seen that in both of them the mortgaged property had been sold under the mortgage; and in both of them it was held that this made no difference, as the purchaser took with notice of the plaintiff's claim. So, in this case, the plaintiff purchased with notice of the defendant's claim, as it was considered by the master or referee, to whom the matter was referred by the court making the decree of fore-

closure and order of sale and reported by him as a claim against the mortgagor corporation. So we fail to see the distinction claimed (214) by the plaintiff between this case and *Coal Co. v. Electric Light Co., and Langston v. Improvement Co.,* on the ground of the sale of the mortgaged property. These opinions are expressly put upon the ground that the mortgages were void as to such claims, and that the property stood, so far as such claims are concerned stand, just as if no mortgage had been made. If this were not so, this statute would be a false light held out to such claimants to induce them to furnish material and labor—thinking they had a security, when in fact they had none. A party furnishes a corporation with $500 worth of coal to run the concern; he knows there is a mortgage on the corporate property, but he knows that section 1255 says that this mortgage is not good against such claims. The corporation refuses to pay, and he is compelled to sue, and before he can get his judgment the mortgage is foreclosed, the property sold, and he gets nothing. The Legislature could not have intended this and we so hold.

The mortgagee always has the power to protect himself against such claims, if he chooses to do so, by foreclosing the mortgage or by taking the property into possession, or by having a receiver appointed. And where the mortgagee is getting a part of the earnings by way of interest or otherwise, and prefers to allow the mortgagor to remain in possession and to run the concern, he must take the risk of such liabilities.

Another ground the plaintiff takes is that the mortgaged property was sold under a decree of the Circuit Court of the United States, having jurisdiction of the matter, and the power to foreclose the mortgage and to make an order of sale. This is not disputed. But the defendant was not a party to that suit, and no rights that the defendant Burnett had are affected by this decree and order of sale. Therefore, the (215) fact that the plaintiff claims under a sale made under a decree of foreclosure and order of court, does not affect the rights of the defendant Burnett. The order was based on the mortgage, and conveyed no more than was conveyed by the mortgage. It conveyed no more than would have been conveyed by a foreclosure of the mortgage, under a power of sale contained in the mortgage.

We have stated that the mortgagee had notice of the plaintiff's claim, and that the purchaser was affected with this notice, as it was a part of the record in the proceedings under which the purchaser bought. We have done this for the purpose of showing the great similarity between this case and the cases of *Coal Co. v. Electric Co.,* and *Langston v. Imp. Co., supra.*

But this notice of the defendant's claim is not involved in the principle upon which this case is decided. The principle underlying this

decision and upon which it is decided, is, that under section 1255 of The Code, the mortgage conveyed nothing as against this claim; and as it conveyed nothing as against this claim, the purchaser got nothing as against this claim by the mortgage sale.

There were many authorities cited in the well considered brief of defendant's counsel, but as the principle upon which the case turns has been so recently decided by our own Court, we have not thought it necessary to cite them in this opinion. The plaintiff has also filed a well considered brief, in which a number of cases are cited to sustain the contention of the plaintiff, which we do not discuss, and will only refer to the case of *The B. C. R. & N. R. Co. v. Verry,* 48 Iowa, 458, which was considered by the counsel for plaintiff to be more directly in point than any case cited for plaintiff. That case is distinguishable from this. The statute upon which it is based differs very (216) much from our statute (section 1255). That statute makes the *judgment* recovered on such claim a lien on the *property* of the corporation, and such *judgment* is to have priority to the debts secured in the mortgage. It does not provide, as our statute does, that the mortgage is void as to such debts. But it provides that judgment when recovered shall be a lien on the *property* of the mortgagor. This lien does not attach until there is *judgment,* and then on the *property* of the mortgagor.

And as this is so, and as there is no provision against mortgaging as to such debts, when the *judgment was obtained,* the sale having taken place, the mortgagor had *no property* upon which the lien could attach. To our mind, the distinction between the two statutes, and between that case and this, is clear.

From the view we have taken of this case, there is error in the judgment appealed from, in continuing the restraining order and in granting the injunction.

Error.

Cited: Belvin v. Paper Co., ante, 147; *Williams v. R. R.,* 126 N. C., 920; *Howe v. Harper,* 127 N. C., 358; *Harden v. R. R.,* 129 N. C., 363.

J. W. GRAINGER, D. S. BARRUS AND A. P. LAROQUE
v. G. M. LINDSAY ET AL.

(Decided 9 November, 1898.)

Subrogation.

1. Subrogation is an equitable relief, and is usually applied in cases where the complainant has had to pay the debt of another to prevent injury to his own rights or property.

2. It is not applicable where there is a clear remedy at law.

(217) APPLICATION for injunction in a civil action heard before *Robinson, J.*, at chambers, pending in the Superior Court of GREENE County.

There was a demurrer to the complaint which was overruled by his Honor and a restraining order granted, from which ruling the defendants appealed. The pleadings and facts are clearly stated in the opinion.

George M. Lindsay for defendants (appellants).
Y. T. Ormond for plaintiffs.

MONTGOMERY, J. In 1897 the defendants Bell and Nethicutt were tenants of the defendant Barwick. The plaintiffs furnished supplies to Bell and Nethicutt to make their crops and took mortgages on the crops to secure their debts. In the fall of the same year the defendant Barwick, in an action to recover possession of personal property, took possession of the crops and gave bond to Bell and Nethicutt for their return, or for the money value thereof if return could not be made, with the defendant Dixon as surety. At the August Term following of Greene Superior Court final judgment was rendered for the defendants in that action for the return of the crops and in case return could not be made for $95, their value. The crops had been disposed of by Barwick, and Bell and Nethicutt were and are insolvent. Execution was about to be issued by Bell and Nethicutt against Barwick, and the plaintiffs brought this action, the object of which is to have them subrogated to the rights of Bell and Nethicutt in the judgment. The defendant Lindsay has bought the judgment, with knowledge of all the facts and is now the owner of the same. The defendants demurred, alleging several grounds for the demurrer.

(218) One ground is for a misjoinder of parties plaintiff and defendant; another is for a misjoinder of actions, and still another is that the relief sought by the plaintiffs, to wit, subrogation to the rights of Bell and Nethicutt in the judgment cannot be granted.

In proceedings for an injunction in the cause the demurrer was overruled, the defendants given permission to answer, and Bell and Nethicutt were enjoined from collecting the judgment and Barwick from paying the same until the final hearing of the cause.

Whatever irregularities may appear in the case we need not notice, for the judgment or order upon being reviewed here puts an end to the case. It is only necessary to discuss and decide the question of subrogation raised by the demurrer. It is clear that the plaintiffs are not entitled to that relief. This doctrine of subrogation was born of equity, and the ground of relief is not founded on contract. The principle is usually applied in cases where the complainant has had to pay the debt of another to prevent injury to his own rights or to save his own property. There are other instances in the text books and in the decisions of the courts where the doctrine is applied, but they are all founded on the general principle above stated. Under no head of the doctrine can the plaintiff's claim be classed. For a discussion of the principle of subrogation, see *Liles v. Rogers,* 113 N. C., 197, and *Jeffries v. Vaughan,* 119 N. C., 135.

Besides, the plaintiffs had their clear remedy in law. The defendant Barwick had taken and converted to his own use the property of the plaintiffs, and he was liable to them for its conversion. It matters not that Bell and Nethicutt, the mortgagors of the plaintiffs, had been permitted to recover the value of the mortgaged property from Barwick, the wrongdoer. And whatever effect that recovery may (219) have had between the parties to the suit, it could not and did not affect the plaintiff's right to recover against Barwick for his conversion of their property.

There was error in granting the injunction, for it appears upon the complaint and the demurrer that the plaintiffs are not entitled to the relief they demand.

Error.

A. S. WOOTEN, ADMINISTRATOR OF JULIA WOOTEN, v. SIMEON WOOTEN.

(Decided 15 November, 1898.)

Administrators.

If the husband shall die after his wife, without having administered, there is no authority to appoint an administrator upon her estate. The Code, sec. 1479.

CIVIL ACTION upon a note under seal, tried before *Adams, J.,* at Spring Term, 1898, of Superior Court of GREENE County.

The note for $500 was executed by Simeon Wooten, defendant, payable to intestate of plaintiff. The defendant contested the right of plaintiff to bring this suit, on the ground that Julia Wooten died leaving her husband, William I Wooten, surviving, who died without having administered, and that his administrator was the proper person to sue. The defendant also alleged that W. I. Wooten died largely insolvent, and owed defendant some $20,000.

(220) Pending the action, and after answer filed, the defendant, Simeon Wooten, took out letters of administration upon the estate of W. I. Wooten and applied by petition to be made a party to the cause as such administrator. His Honor granted the petition, and being of opinion that under section 1479 of The Code, that the personal property of the intestate Julia Wooten goes to the administrator of her husband, to be by him administered according to law, and that the plaintiff is not entitled to administer upon her estate, adjudged that this action be dismissed at the costs of the plaintiff.

The plaintiff excepted and appealed.

George M. Lindsey for plaintiff (appellant).
Swift Galloway and J. B. Batchelor for defendant.

CLARK, J. The Code, sec. 1479, provides: "If the husband shall die after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as part of the estate of the husband, subject as aforesaid," *i. e.,* to her debts. This changed rule of the common law, which was that the personalty of the wife did not go to the husband when he died without having reduced it to possession by administration. And further, in conformity to this charge, it devolves the right of administering upon the wife's estate upon the executor or administrator of the husband *ex officio*. The object was evidently to save the cost and expense of two administrations and two sets of commissions by making the *cestui que* trust (the husband's representative) *ex officio* the representative of the wife. If there was an executor or administrator of the husband, an appointment of an administrator of a wife, who had predeceased him, would

(221) be a nullity because not authorized by law. If there is a creditor of the wife, when there is default in taking out letters of administration upon the husband's estate, his remedy is not (as here attempted) by taking out administration upon the wife's estate, but to apply for administration upon the husband's estate, and then, as the law provides, he "shall receive the wife's personalty" and apply it to her debts.

As in this case it seems there was no creditor of the wife (who died, indeed, eight years before her husband) the proceeding was probably

taken by some creditor of the insolvent husband with the view of applying to his debts the property of the wife, which, having become his, was liable to such application. But, in any event, whether the plaintiff was creditor of the wife or of the husband, his remedy under this statute was to take out administration upon the husband's estate.

The court below properly held that there is no authority to appoint an administrator upon the estate of a wife who dies before her husband, and, such appointment being void, dismissed the action.

Affirmed.

FURCHES, J., dissenting: Julia L. Wooten, plaintiff's intestate, was the wife of W. I. Wooten, and W. I. Wooten was the intestate of the defendant. The plaintiff's intestate died in 1888 and the defendant's intestate died in 1896. That in 1896, but after the death of W. I. Wooten (the husband) the plaintiff was appointed and qualified as the administrator of Julia L. Wooten (the wife). That on 3 December, 1887, the defendant, Simeon Wooten, made and executed his promissory note to Julia L. Wooten, plaintiff's intestate, for $500 with interest at the rate of 8 per cent. That on 25 July, 1896, and after the plaintiff had been appointed administrator of his intestate, Julia, (222) he commenced this action against the defendant to recover the money due on said note. The defendant answered, admitting the execution of the note, but alleging among other things that while the note was given to the wife, it was not for the benefit of the husband, who was insolvent to the amount of $30,000, $20,000 of which was due the defendant; that said note had been paid and that the administration of plaintiff and this action is for the purpose of delaying the settlement of the estate of W. I. Wooten (the husband). This answer was filed at August Term, 1896, and at February Term, 1897, the defendant having then qualified as the administrator of W. I. Wooten (the husband) by leave of court, filed another answer, in which he claimed that as such administrator he was the owner of said note, and entitled to the possession of the same, and that the plaintiff's action be dismissed. The judge so held and dismissed the plaintiff's action and taxed the plaintiff and his bondsmen with the cost of action.

This is a short-handed way of getting shut of paying a debt and imposing a bill of costs on a plaintiff who had a right of action, when the action was commenced. I don't think it can be done in this way. At common law the husband had the right to administer upon the estate of his deceased wife. And as there was no provision for distribution he was entitled to hold all that remained after paying debts and costs and charges of administration. Williams on Executors, star page 357.

And by the law of this State, if the husband does not administer, but another does, the husband is entitled to all overpaying debts
(223) and cost of administration. *Hoskins v. Miller,* 13 N. C., 360.

If the husband dies after the wife, but before administration, the next of kin of the wife are entitled to have the administration on her estate. But such administrator will have to account to the personal representative of the husband, for his administration on the wife's estate. *Whidbee v. Frazier,* 2 N. C., star page 275; *Weeks v. Weeks,* 40 N. C., 120. Thus showing that the personal estate of an intestate deceased person only passed from such estate by the means and the intervention of a personal representative. For if it had passed to the husband by the death of the wife she would have had no estate to administer.

This seems to be admitted to have been the law until 1871, section 1479 of The Code. And while this section does modify the law to some extent, this modification does not affect the law as applied to this case. It does not change, or profess to change, the rights of the husband. He can only become the *owner* by and through an administration, either by himself or some one else. And as he died before there was an administration he never was the owner of this note. It is clear, then, that it was not at the time of his death, and is no part of *his estate.* There is no change or modification of his rights by this statute so long as he is living. And as we have seen, upon his death the next of kin of the wife are entitled to administration. *Whidbee v. Frazier* and *Weeks v. Weeks, supra.* This is still law unless it has been changed by section 1479 of The Code. The first paragraph of this section is an affirmation of the common law, as I have stated it. The other paragraph of said section is as follows: "If the husband shall die after his wife, but before administering, his executor or administrator or assignee shall receive
(224) the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as herein provided."

This paragraph still treats the wife's property as belonging to her estate. That "his executor or administrator shall receive the personal property *of the said wife,* as a part of the estate of the husband." Still treating it as the *wife's property,* until the administration upon the husband's estate.

The plaintiff having the right to administer and the note belonging to his intestate's estate when he administered, he had the right and it was his duty to bring this action as he did, upon defendant's refusing to pay the same.

So the question comes down to this: Can the defendant, by such legerdemain as this appears to be, free himself from the demands of the law, and impose a bill of cost on the plaintiff, who was in the rightful discharge of his duty?

The law will not allow such juggling as this. It will not allow a defendant to set up a counterclaim or to plead a set-off against a plaintiff's demand, unless he was the owner of it before suit was brought. Will it allow such defense in this case?

It was said that the object of this statute was to prevent the necessity of two administrations, and I think this is so. But it has not prevented two in this case, and the second administration is brought about by the defendant, and, as it seems to me, to prevent having to pay this debt. As he did not administer on the husband's estate until long after this action was brought, and after he had answered, denying that he owed the debt, and then he administered on an estate that he says is insolvent to the amount of $30,000, and it does not appear that (225) there are any assets except this note.

The defendant says in his first answer that the note was given for the benefit of the husband, as he was insolvent, and in fact it was his note. This is a very singular statement for him to make, when he alleges that the insolvent husband was owing him $20,000. If this be true, why did the defendant give the note for $500 to bear interest at the rate of 8 per cent till paid?

It is said by the court that it appears that the wife owed no debts. This may be so, but there is nothing in the record that shows it to be so.

It is also said by the court that if there were creditors of the wife they should have administered on this insolvent estate of the husband to get their debts. This would be a great hardship and I do not believe the law makes any such requirement of them.

My opinion is that if the defendant had administered on the estate of the husband before the plaintiff administered on the estate of the wife, he would have been entitled to receive this note, as he would have been the administrator of the wife by force of the statute. The note belonged to her estate until there was an administrator. But when there was an administration on her estate the title to the property (the note) passed to her administrator, and he alone had the right to collect the same. Williams on Executors, star pages 700 and 722.

In my opinion there was error in the judgment appealed from.

DOUGLAS, J. I concur in the dissenting opinion.

(226)

B. J. BEST v. R. H. HARDY AND W. D. MEWBORN.

(Decided 9 November, 1898.)

Fixtures—Severance—Deed of Trust.

Where fixtures are put upon land by the owner, who mortgages it as security for a debt, they may not be severed to the injury of the mortgagee—but where placed on the land by the holder of a particular estate, they may be removed.

CIVIL ACTION, tried before *Robinson, J.*, at Fall Term, 1898, of Superior Court of GREENE County.

The plaintiff and his partner, since dead, made two deeds of trust to the same trustee to secure the same debt. The first was executed 24 May, 1890, and conveyed the land without reference to the fixtures (steam engine, boiler, etc.) attached—and the second was executed 12 June, 1890, and conveyed the fixtures only.

Under the first trust the land was sold, and the sale confirmed to one A. L. Richardson, who conveyed it with all appurtenances to the defendants.

The plaintiff now sues to recover the fixtures, or the value thereof, on the ground that his first deed did not convey them, or if it did his second deed severed them, and made them personalty. The defendants claimed the fixtures under their deed. There was judgment for the plaintiff, and appeal by defendants.

George M. Lindsay for defendants (appellants).
Swift Galloway and J. B. Batchelor for plaintiff.

FAIRCLOTH, C. J. In May, 1890, the plaintiff and his partner, now dead, conveyed a tract of land to a trustee to secure their indebtedness to the British & American Mortgage Company. There was at
(227) that time on the land one steam engine and boiler, one sawmill, one cotton gin, and one set of millstones, with the attachments, pulleys and shafting, to each, necessary for their proper use, all so fastened to the premises as to make them fixtures, and it is conceded that they were fixtures at that time. In June of the same year the plaintiffs executed another deed to the same trustee to secure the same debts, conveying the same engine, sawmill, cotton gin and millstones, etc.

Under regular foreclosure proceedings to which the plaintiff was a party, a decree of sale foreclosing the first deed was entered in 1897, and sale made, confirmed and deed made to the purchaser Richardson, who afterwards sold to the defendants, there being no exception of the fixtures in the deed, nor at the sale.

The plaintiff (trustor) now sues to recover said fixtures on the idea that the second deed, between the same parties, severed the fixtures and made them personalty as a matter of law, without any agreement in fact that they should be severed. That is the only question to be considered.

Since *Elwees v. Mowe,* 2 Smith's Leading Cases, the subject of fixtures has been often before the courts in its application to the various relations of the litigating parties, it being held therein that much depended on those relations.

In *Overman v. Sasser,* 107 N. C., 432, this Court commented on several of such relations, and it was held that attachments made by a *tenant by the curtesy* might be recovered by his personal representative against the remainderman.

In *Moore v. Valentine,* 77 N. C., 188, a distinction was drawn and it has been since followed by this Court, viz.: (1) That where improvements to the land were made by the owner, mortgagor, (228) trustor, lessor, or vendor, these improvements *enhanced* the value of the land, and of course increased the security, and that such attachments could not be removed by the owner to the prejudice of the mortgagee, etc. (2) That where improvements were added by the lessee, tenant for life, or other tenants, these attachments apparently fixtures were for the betterment of the particular estate, and that in the interest of trade, manufacturing and agriculture they could be removed at the will of the tenant, as that rule worked no injury to the owner.

An illustration of the first proposition is found in *Bond v. Coke,* 71 N. C., 97. A. mortgaged his land to B. to secure the payment of debts and afterwards fixed a gin and press in the usual manner, and subsequently sold his equity of redemption, including the gin and press, by name, to C. B. sold the land under the first trust, excepting the gin and press at the sale, but made no exception in his deed to the purchaser: *Held,* that the purchaser acquired title to the gin and press, as any verbal exceptions at the sale would have no effect in controlling the provisions of the deed.

Such fixtures as those in the present case are a part of the land, as much so as a house or a tree, until *actual* severance, and a deed conveying the land, without any exception, in legal effect passes the title to the steam engine, etc., to the purchaser, who received his title under the sale decreed by the court. Even if there had been a verbal agreement to revest in the plaintiff the title to the fixtures, it (the title) could not pass except in the manner required by the statute of frauds.

The second deed does not profess to work a severance, nor to assume expressly that an actual severance had occurred; but it undertakes to convey an interest that had already passed by the first deed. If the idea was to convey the equity of redemption to the same (229)

trustee, the plaintiff's equity to redeem would still remain. The second deed would have no effect on the rights of the purchaser. It was probably made under some doubt in the minds of the contracting parties, whether the fixtures passed with the land under the first deed, or not.

Other questions were argued, but they are of no importance in the case. In any aspect of this case, we think the judgment was erroneous.

Reversed.

W. T. SMITH v. W. D. SMITH.

(Decided 15 November, 1898.)

Amendment of Pleadings—Statute of Limitations—Mortgage.

1. The rule seems to be well settled that amendments to pleadings are left to the discretion of the presiding judge—there are some exceptions.
2. Amounts received from the debtor by the owner of a note and mortgage are by force of law applied as payments upon the mortgage.
3. Where the mortgage has been overpaid and the mortgagor sues to recover the overpayment, and the mortgagee pleads the statute of limitations, the defense is applicable only to the excess of payments over the mortgage debt.

CIVIL ACTION for an injunction to enjoin the sale of land under mortgage, and for an account, tried before *McIver, J.*, at November Term, 1897, of CUMBERLAND Superior Court. Appeal by plaintiff.

(230) STATEMENT OF THE CASE.

The plea of the statute of limitations was set up by the defendant in this action, and the court adjudged that the plaintiff's action was barred, and the plaintiff appealed.

The summons was issued on 8 February, 1896.

The plaintiff alleged in the complaint that on 8 April, 1884, he executed to defendant a promissory note for $150, payable 1 December, 1884, with interest, the consideration being a horse, to enable plaintiff to cultivate land which he had rented from defendant on the west side of the Cape Fear River, rent being 800 pounds lint cotton, and also another tract on the east side of the river for $75 money rent, etc. Defendant denied the allegations of the complaint.

In the course of the action a reference was had to state an account between the parties in which the referee finds a balance due the plaintiff of $293.65. The date of the last item of the account is 1 October, 1895, being a credit of a cash payment on note.

Much evidence was introduced before the referee.

The judgment of the court was: It is adjudged that the plaintiff's cause of action is barred by the statute of limitations, and that the defendant's exceptions to report and account filed are allowed, and that the plaintiff's application for an injunction to restrain defendant from selling the land to collect the debt, referred to in the pleadings as per note and mortgage dated 31 December, 1884, is disallowed, and commissioners were appointed to make the sale of the land, etc.

The plaintiff excepted to the judgment:

1. Because the statute was allowed to be pleaded after the reference was ordered, the evidence taken, the report made, and exceptions thereto filed by defendant "and a trial by jury waived." (231)

2. The plea of the statute was not applicable to the course of dealings between the parties as disclosed in the evidence, the relation of principal and agent being shown, and a running account between the parties.

3. The statute of limitation is not applicable so as to exclude evidence of payments on the note.

4. The finding of the court upon the effect of the statute upon the plaintiff's cause of action is erroneous and without evidence to support it. The cause of action was the wrongful act of defendant in exposing plaintiff's land to sale under a mortgage which was itself more than ten years old, and which, according to the evidence reported and the findings of the referee, was overpaid.

5. Because the effect of the plea sustained by the court could only exclude the liability of the defendant in respect to the excess found in favor of the plaintiff over the satisfaction of the note and mortgage.

The defendant's exceptions to the account and statement of the referee, which were allowed by the court, are as follows:

1. That defendant is charged with 1,900 pounds of cotton at 9¾ cents and with ten dollars cash in 1884—$195.25.

2. That defendant is charged with 2,000 pounds of cotton at 9⅝ cents and 63 bushels of seed cotton at 8 cents in 1885—$197.54.

3. That defendant is charged with 1,740 pounds of cotton at 8¾ cents and 76 bushels seed cotton at 8 cents, in 1886—$158.33.

4. That the defendant is charged with 2,433 pounds of cotton at 9½ cents and 80 bushels seed cotton at 10 cents in 1887—$239.13.

5. That defendant is charged with 1,740 pounds of cotton at (232) 9¾ cents and cash $35, in 1888, making $204.35.

6. That defendant is charged with cash $10, 17 February, 1889.

7. That defendant is charged with cash $23, 1 October, 1895. That the testimony does not support the above-mentioned items of charge.

8. That the referee failed to find as a fact that plaintiff at the end of each and every year had a settlement with defendant as to all matters connected with the rent of land and advances, and that nothing was due the plaintiff on those matters.

9. That the referee failed to find as a fact that defendant owed plaintiff nothing, and that plaintiff owed defendant the amount of the note secured by the mortgage referred to in the pleadings.

10. That the finding of fact as to plaintiff's indebtedness to defendant should have been $159 and interest from 31 December, 1884, as per note set out in the mortgage, $150 and interest from 8 April, 1894, as found by the referee.

Defendant insists upon his right to a jury trial upon said exceptions as above set out, and upon all issues raised by the pleadings and upon all the several exceptions made by him as to the reception and exclusion of testimony.

R. P. Buxton and N. A. Sinclair for plaintiff (appellant).
N. W. Ray for defendant.

MONTGOMERY, J. At the term of the court to which the referee made his report the defendant was allowed to file, as an amendment to his answer, the plea of the statute of limitations. The rule seems to (233) be well settled by the decisions of this Court that amendments to pleadings are left to the discretion of the presiding judge. In *Gilchrist v. Kitchin,* 86 N. C., 20, on that point, the Court said: "But independent of The Code, we hold that the right to amend the pleadings of a cause and allow answers and other pleadings to be filed at any time is an inherent power of the Superior Courts which they may exercise at their discretion unless prohibited by some statutory enactment, or unless vested rights are interfered with." There are some exceptions, as where an amendment should be desired to make a pleading conform to facts proved, it should not be allowed if it changes the claim or defense; or if an amendment is allowed in favor of one party to the suit and a corresponding amendment is rendered thereby necessary on the part of the adverse party a refusal to allow the latter would be appealable. *Knott v. Taylor,* 96 N. C., 553; *Brooks v. Brooks,* 90 N. C., 142. In the case before us, however, the rule prevails and the matter was therefore in the discretion of the court. A hardship seems to have been put upon the plaintiff in the allowing of the amendment, but as the matter was in the discretion of his Honor, we cannot review it. The complaint alleged that the defendant owed the plaintiff a balance for each of several years; more than three years, however, having elapsed since the date of the last item in the account. The answer was a simple denial of the indebtedness.

Upon the motion of the plaintiff an order of reference was made to have an account stated between the parties. This was a consent order, no objection having been made by the defendant. After the account was stated and reported by the referee, the defendant finding that it was against him, was allowed to put in the plea of the statute of limitations. The defendant knew that he had this plea as well before the (234) reference as afterwards. It looked like trifling with the court to go to trial on the merits of his case and, after being defeated, to make, by way of amendment, a defense of the statute of limitations, which he knew he could avail himself of at the start. But, as we have said, the matter is not an open question. That part of the judgment which concerned the plea of the statute was in this language: "The court allowed the motion of defendant for leave to amend the answer and plead the statute of limitations, and defendant filed his plea accordingly. And thereupon the court doth adjudge that the plaintiff's cause of action is barred by the statute of limitations." The judgment further declared "that the defendant's exceptions to the report and account filed are allowed, . . . and the plaintiff's application for an injunction to restrain the defendant from selling the land to collect the debt referred to in the pleadings as per note and mortgage, is disallowed." The last was clearly only the conclusion of the court as to the legal effect of the statute of limitations upon the indebtedness of the defendant to the plaintiff as set out in the complaint; for it was made without any finding of facts by his Honor. When the judge finds no facts it is presumed that he adopted those found by the referee. *McEwen v. Loucheim,* 115 N. C., 348; *Bancroft v. Roberts,* 91 N. C., 363. But it is apparent that he did not adopt the findings of the referee, for the referee found them all in favor of the plaintiff and the judgment is against the plaintiff. In order that the defendant's exceptions to the report of the referee should have been sustained it was necessary for the court to have reviewed and set aside the facts found by the referee and to have found the facts himself in favor of the defendants. This he did not do. As, (235) therefore, there was no finding of facts by his Honor, and the findings of the referee were not approved, there is error in that part of the judgment which sustains the defendant's exceptions and denies the application for the injunction. There is partial error in the judgment concerning the plea of the statute of limitations. The plea of the statute was available only as to whatever amount was found to be due by the defendant to the plaintiff in excess of the amount which the plaintiff owed the defendant for the horse, the consideration of the note and mortgage. If it should be found that the defendant owes to the plaintiff any amount, that amount by force of the law is a payment on the debt due by the plaintiff to the defendant on note and mortgage; and if the

defendant's indebtedness should exceed the amount due by the plaintiff for the horse, then the plea of the statute will apply to the excess. There was error, and the case is remanded to the end that the report and the exceptions thereto filed by the defendant may be heard and the law in reference to the statute of limitations be applied as herein declared.

Error.

Cited: Balk v. Harris, 130 N. C., 383; *Ramsey v. Browder,* 136 N. C., 253.

(236)

E. H. KELLY, GUARDIAN OF LUCY GRIMM, v. THOMAS MANESS AND WIFE, MAGGIE.

(Decided 15 November, 1898.)

Gift, Delivery of.

There must be an intention to give and a delivery, actual or constructive, to constitute a gift—and these are facts to be passed upon by a jury.

CLAIM AND DELIVERY, tried before *Allen, J.,* at April Term, 1898, of Superior Court of MOORE County.

The property claimed, a cow and some bed-room furniture, had been the property of Lewis Grimm, husband of Lucy Grimm, lunatic ward of plaintiff and father of defendant Maggie Maness. He had died intestate, and the property had been included in a year's allowance to the widow, and was sued for by her guardian. The defendant Maggie claimed the property as a gift from her father, Lewis Grimm.

As to the cow, there was evidence tending to show that her father had said that he had given it to Maggie, when a calf, and that he was not going to take it away from her. The cow was raised on the place and fed by him.

As to the furniture, there was evidence that her father had said he bought it for Maggie and had placed it in her chamber.

His Honor charged the jury that if they believed the evidence they should find that the plaintiff was the owner and entitled to the possession.

Defendants excepted.

Verdict and judgment for plaintiff, and defendant appealed.

(237) *W. C. Douglass for defendants (appellants).*
Black & Adams for plaintiff.

FURCHES, J. This action is for the possession of certain articles of personal property. The plaintiff claims them as the property of her

ward, Lucy Grimm, widow of Lewis Grimm, and now a lunatic. The defendant claims that her father, Lewis Grimm, who was the husband of Lucy Grimm, during his lifetime gave them to her.

The plaintiff claims that this was the property of Lewis Grimm at the time of his death, except the sewing machine, which the plaintiff says belonged to Lucy before her marriage with Lewis. The other property claimed by plaintiff, except the sewing machine, was laid off and assigned to the widow Lucy, as a part of her year's support.

The court left it to the jury to say, from the evidence, whether the sewing machine belonged to Lucy or not, and there is no exception to his Honor's charge as to this.

There was evidence tending to show that Lewis had given the other property to the defendant Maggie, who is his daughter. That he had told Maggie if she would take the calf and raise it she might have it; that he had after this said he had given it to Maggie, and that he would not take it from her. But the evidence was that the calf remained with the other stock of Lewis, was fed and pastured with them until it was grown, and had remained there until after the death of Lewis, and was laid off to the widow as a part of her year's support.

The other articles were bed-room furniture, bought by Lewis, put in the bed chamber of Maggie, which he said he had fitted up for her, and frequently spoke of it as Maggie's. That he bought it (238) and gave it to her.

As we see no evidence of a delivery as to the cow, we would not disturb the verdict and judgment as to her, nor as to the sewing machine, if there was no error as to the other property (the bed-room furniture).

But we said in *Newman v. Bost,* 122 N. C., 524, that two things are necessary to constitute a gift—the intention to give and a delivery, actual or constructive. And these are facts to be found by the jury, where there is evidence tending to establish them. And that where the donor in that case bought a set of bed-room furniture, put it in plaintiff's room, and always after that spoke of it as hers, this was sufficient evidence of a delivery to sustain a finding by the jury that it was her property. Under the authority of this case, we are of the opinion that the question as to the title to this property, under proper instructions as to what it takes to constitute a gift, should have been submitted to the jury; and that it was error for the court to instruct the jury "that if they believed the evidence they should find this issue in favor of the plaintiff."

For this error there must be a

New trial.

(239)

PEARRE BROS. & CO. v. MIKE FOLB, B. R. TAYLOR, ASSIGNEE OF MIKE FOLB ET AL.

(Decided 15 November, 1898.)

Assignment—Attachment—Oaths—Estoppel.

1. Under the Act of 1893, ch. 453, assignors in deeds of assignment are required in a mandatory way to file under oath a schedule of all preferred debts, with particulars, within five days of the registration of the deed.

2. Oaths are to be taken and administered with the utmost solemnity, and this applies not only to the substance of the oath, but to the form and manner of taking and administering it required by statute, sec. 3809 of The Code. *State v. Davis*, 69 N. C., 383.

3. A recital in a bond given in attachment proceedings to the sheriff for the delivery of the goods, should the plaintiff recover judgment, that the sheriff had made seizure and levy of the goods, estops the defendants to deny the sufficiency and validity of the seizure of the goods and levy of the attachments.

CIVIL ACTION on money demand, tried before *Allen, J.*, at May Term, 1898, of CUMBERLAND Superior Court.

Attachment proceedings had been taken out in this case. There were eleven other cases pending on the docket, instituted by creditors of Folb, against Folb and his assignee, B. R. Taylor, in all of which attachments had been taken out and were awaiting trial, and were instituted to have declared fraudulent and void the deed of assignment from Folb to Taylor dated 12 July, 1897, and also to have declared fraudulent and void the schedule and preferences under said assignment. These eleven cases were consolidated by order of the court with this case and the whole tried together.

The debts claimed by the respective plaintiffs were not denied.

The following issues were submitted to the jury:

"1. Was the deed of assignment from Folb to Taylor made with intent to hinder, delay or defraud the creditors of Folb, or any of them?

(240) Answer: 'No.'

"2. Are the preferred debts in first class in said deed (naming them) and debts to M. Silver in second class creditors, or any of them fictitious? Answer: 'No.'

"3. Did the sheriff of Cumberland levy the attachments in his hands on the personal property in the hands of the assignee, and was said property replevied by the defendant Taylor, assignee? Answer: 'Yes, under instructions.'

"4. Was a duly sworn schedule of preference filed by the defendant Folb in the office of the clerk of the Superior Court of Cumberland

County, and is such schedule in compliance with the laws of North Carolina regulating assignments? Answer: 'No, under instructions.'"

The return of the sheriff upon the attachments recited that he had executed the warrant of attachments by levying upon and taking into possession the goods; and the defendant Taylor, assignee, with sureties, executed bonds to the sheriff, which contained the same recitals.

The defendants proposed to prove that in some of the cases the sheriff had not taken possession of the goods.

The evidence was objected to on the ground that the defendants were estopped to deny the validity of the levy and seizure of the goods.

His Honor so ruled, and directed the response to the third issue accordingly, in the affirmative.

Defendants excepted.

In swearing to his schedule, there was no Bible used. The justice of the peace who administered the oath said to Folb: "Hold up your right hand. You do solemnly swear, or affirm, that the matters and things contained in the paper-writing are correct, so help (241) you, God!"

Folb was not a Quaker, nor a Moravian, nor a Dunkard, nor a Mennonist, but a Jew. He did not ask to affirm, and testified that he had no conscientious scruples against being sworn on the Bible.

The plaintiffs insisted that the oath was not administered and taken in accordance with the requirements of our statute, and was invalid.

His Honor so ruled, and directed the response to the fourth issue accordingly, in the negative.

Defendants excepted.

Upon the issues as found his Honor rendered judgment in favor of the plaintiffs in the respective cases upon the several replevin bonds.

Defendants appealed.

H. L. Cook, George M. Rose, and C. W. Broadfoot for defendants (appellants).

H. McD. Robinson, R. P. Buxton, McRae & Day, E. K. Bryan, and S. H. MacRae for appellees.

MONTGOMERY, J. The act of 1893, ch. 453, in a mandatory way, requires the assignors in deeds of trust or deeds of assignment for the benefit of creditors to file under oath a schedule of all preferred debts, with particulars, within five days of the registration of the deed. The first question presented for decision in this case is one that relates to the sufficiency and validity of the oath which the assignor made when the schedule of preferred debts was filed. The assignor was a Jew. When the justice of the peace administered what the defendants insist is a valid oath, that officer said to the assignor, "Hold up (242)

your right hand"; upon which being done, the justice said, "You do solemnly swear, or affirm, that the matters and things contained in the paper-writing are correct, so help you, God." There was no Bible used. The affiant was not a Quaker, nor a Moravian, nor a Dunkard, nor a Mennonist; he did not ask to affirm, nor did he express any conscientious scruples at touching the Bible, or being sworn on that book, but, on the contrary, said he had none.

That proceeding did not constitute a valid oath under the laws of North Carolina. The preamble to chapter 40 of volume 2 of The Code is in these words: "Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government, and being most solemn appeals to Almighty God as the Omniscient witness of truth and the Just and Omnipotent Avenger of falsehood, such oaths therefore ought to be taken and administered with the utmost solemnity." This "solemnity" applies not only to the substance of the oath, but to the form and manner of *taking* it and of *administering it,* as was said by the Court in the case of *S. v. Davis,* 69 N. C., 383. And therefore the statute, section 3809 of The Code, provides that "Judges and justices of the peace and other persons who may be empowered to administer oaths shall (except in the cases in this chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume, and in further token that if he should swerve from the truth he may be justly deprived of all the blessings of the Gospel and made liable to that vengeance which he had im-
(243) precated on his own head, and he shall kiss the Holy Gospel as a seal of confirmation to the said engagement."

The only exception made in the statute to the general rule is "where the person to be sworn shall be conscientiously scrupulous of taking the Book oath in the manner aforesaid, he shall be excused from laying hands upon or touching the Holy Gospels"; and the oath required in such cases shall be administered in a certain prescribed manner in section 3310 of The Code is equally as solemn as the general law requires. And Quakers and some others, with conscientious scruples about swearing at all, "are permitted to affirm." In *S. v. Davis, supra,* the Court further said, "if the usual form of oaths upon the Holy Evangelists is dispensed with and an 'appeal' or 'affirmation' is substituted, it must appear that the person sworn had conscientious scruples, else the appeal or affirmation is invalid." That decision has never been altered or modified by this Court.

The only other question necessary for us to decide is as to the validity of the levy and seizure by the sheriff of the goods of the defendant Folb

under the warrants of attachment. The defendant Taylor, the assignee, with sureties, executed to the sheriff a bond for the delivery of the goods, should the plaintiffs recover judgment in the action against Taylor, the assignee of Folb, and in that paper-writing they recited the fact that the sheriff had made seizure and levy of the goods. The defendants are estopped to deny the sufficiency and validity of the seizure of the goods and levy of the attachments. *Hunlay v. Filbert,* 73 Mo., 34; 7 A. & E., 8. There is no error, and the judgment is

Affirmed.

(244)

A. L. WEBB & SONS v. R. W. HICKS, J. Y. GOSSLER ET AL.

(Decided 15 November, 1898.)

Partnership—Practice—New Action.

1. The usual, not universal, test of partnership is participation in the profits and losses.
2. A judgment of dismission, as upon *demurrer ore tenus*, for that the complaint fails to state a cause of action, does not bar another proceeding.
3. If commenced within the statutory time, it will save the bar of statute of limitations.

CIVIL ACTION upon a money demand, tried by *Allen, J.* (a jury trial being waived), at March Term, 1898, of CUMBERLAND Superior Court.

An action between the same parties and in regard to the same subject-matter had heretofore been instituted in Superior Court of Cumberland, and had been dismissed on the ground that the complaint did not state a cause of action and, on appeal, this Court affirmed the judgment, 116 N. C., 598—and the cause was finally dismissed as upon *demurrer ore tenus* by the Superior Court at May Term, 1895, and the present action was instituted 30 April, 1896, in which the defendants are treated as partners, and are sought to be held liable for money advanced and articles furnished to their agent in the conduct of their business. The facts are sufficiently stated in the opinion.

His Honor adjudged, among other things:

That the agreement of January, 1891 (Exhibit A referred to in the opinion), does not render the defendant Hicks liable to A. L. Webb & Sons for the debt sued on.

Also, that the cause of action herein is barred by the statute of limitations.

Also, that the matters set up in the pleadings in this case have (245) been heretofore adjudicated by courts of competent jurisdiction.

Plaintiffs excepted; judgment in favor of defendants; appeal by plaintiffs.

N. A. Sinclair and N. W. Ray for plaintiffs (appellants).
MacRae & Day, H. McD. Robinson, and S. H. MacRae for defendants.

FAIRCLOTH, C. J. An action between the same parties, touching the same subject-matter, was before this Court and is reported in 116 N. C., 598, in which the facts were set out fully. On the trial of that action the Superior Court dismissed it and, on appeal, this Court, as upon demurrer *ore tenus,* held that there was no error, on the ground that no cause of action was stated, and on the certificate of this Court the action was dismissed below. The present action was begun within the time allowed by the statute. Jury trial was waived and it was agreed by both parties that the court find as facts the same facts as are set out in the former case. For the purpose of determining the question now presented, the following facts may be stated. On 12 December, 1890, W. J. McDiarmid and A. A. McDiarmid, being insolvent, conveyed and assigned all their property to M. McD. Williams, in trust, to collect and sell the same and pay their creditors in the order therein prescribed. That prior to said assignment the same property was encumbered with mortgages, deeds in trust, etc. That these deeds were foreclosed by sales, and J. Y. Gossler and R. W. Hicks became the purchasers on 5 January, 1892, and received a deed, and on same date the assignee Williams (246) executed a quitclaim deed to Gossler and Hicks.

It is admitted that in January, 1891, all the creditors of W. J. McDiarmid & Brother, including the defendants Hicks and Gossler, entered into a written agreement (Exhibit A), which differs in some respects from the assignment, reciting the several debts, and that Gossler & Company had purchased from the debtor certain lumber, and that they were willing that M. McD. Williams should remain to run the business therein contemplated, and "Whereas it is to the interest of all parties concerned that the property shall not be sacrificed at a forced sale for cash under said mortgages, judgment and assignment, but that the business should be carried on as it heretofore has been, for the benefit of the creditors, in order that the full value of said property shall be realized for the payment of the creditors in full."

The agreement then provides that the assignee Williams and creditor, in consideration of the premises, "may and shall continue the business as it has heretofore been carried on (manufacturing and dressing lumber and distilling turpentine at the same places) for the term of one year from 1 January, 1891, at the end of which time he shall render an account of the said business to the said creditors, at which time it may be determined, whether the business shall be further continued or wound up by a sale of the property. Said Williams is to conduct the said business . . . economically and prudently." It also provides for his

compensation in lieu of his commissions on receipts and disbursements under the assignment, and directs the order in which the creditors shall be paid by him. Said Williams, in the course of his duties under said agreement, bought some articles and drew drafts on the plaintiffs for money to carry on the business, the plaintiffs having knowl- (247) edge of the written agreement referred to, marked Exhibit "A" before the drafts were accepted. These are the facts. The judgment of dismissal in the first action, for the reason stated, cannot bar the present action, because there was nothing adjudicated except that fact.

The main question is, Do the facts show a partnership between those who signed Exhibit "A"? When the facts are undisputed, what constitutes a partnership is a question of law, and the usual, not the universal, test is participation in the profits and losses attending the enterprise. *Jones v. Call,* 93 N. C., 170; *Koots v. Tuvian,* 118 N. C., 393.

"A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals for the purpose of joint profit." 1 Bates Law of Partnership, 1; Story on Partnership, ch. 1, sec. 2.

In determining whether the relation constitutes a partnership, the intention is to be considered. If that relation is established, however, it matters not whether they declare that they are or are not partners. The intention of the parties will be determined from the effect of the whole contract, regardless of special expressions. If the actual relation assumed and the rights and obligations created are those of partners, the actual intention or declared purpose of the parties cannot suspend the consequences. 1 Bates Partnership, sec. 17. The contract *where third persons' claims are not in question* will be liberally construed, as to the actual understanding and the purposes the parties had in view. *Hitchings v. Ellis,* 12 Gray, 449; *Tayloe v. Bush,* 75 Ala., 432. (248)

The creditors had the right to have the property sold by the assignee at once and the proceeds applied to their debts, but for the expressed purpose of gain and enhancement of the value and to avoid loss and sacrifice by sale, they agreed to have the business continued and thereby obtain a profit, and they were to reap the profit, if any, and must bear the loss and expense, if any. As we understand it, the barrels bought and the money drawn was turned into the new business, as it could not be continued well without expense, and that would render the defendants liable on the ground that whoever gets and uses goods ought to pay for them. *Pool & Hunt v. Lewis,* 75 N. C., 417. Our conclusion is that the judgment of his Honor was erroneous.

Reversed.

Cited: S. c., 125 N. C., 201.

ELBERT WARD, BY HIS NEXT FRIEND, v. QDELL MANUFACTURING COMPANY.

(Decided 22 November, 1898.)

Evidence—Negligence—Judge's Charge—Fellow Servant.

1. Where inconsistent statements are made by a witness, it is error for the judge to assume which is correct; it is for the jury, in the light of all the evidence, to determine that.
2. Negligence is not a pure question of law, unless where the facts are undisputed, or a single inference only can be drawn from the evidence.
3. Where the evidence tends to show that improper implements are furnished by an employer to a workman to do his work, and injury to a fellow workman ensues, it is for the jury to determine from the evidence who is responsible in damages to the injured party.

(249) CIVIL ACTION for damages for alleged negligence tried before *Starbuck, J.*, and a jury, at February Term, 1897, of IREDELL Superior Court.

The plaintiff was a boy eleven years of age who was employed about the factory as a quill carrier, which required his moving about over the room, and while thus employed he was seriously injured by a piece of iron wire flying from the work bench where wires were being cut by another employee. The wires were cut both with a cold chisel and with nippers. There was evidence tending to show that it was dangerous to use either, and there was evidence tending to show that the danger was confined to the use of the chisel, and that the injury was occasioned by its use. There was also evidence tending to show that the defendant supplied both instruments for the purpose of cutting wire for mending chains. One of the witnesses for the defendants, named Suter, boss of the section where the work-bench stood, during the course of his evidence stated: "Fragments likely to fly off in cutting wire with nippers"—afterwards stated: "Don't think there was any danger in cutting wire with nippers."

There was a verdict for defendants. Appeal by plaintiff.

The exceptions to his Honor's charge are adverted to in the opinion.

Armfield & Turner and H. P. Grier for plaintiff (appellant).
Long & Long and W. J. Montgomery for defendants.

MONTGOMERY, J. This action was brought by an infant of eleven years, through his next friend, to recover damages of the defendant for a personal injury alleged to have been suffered by the plaintiff (250) through the negligent keeping and use of a work-bench and tools, by the defendant, in the manufactory where the plaintiff was employed.

In the building of the defendant company in which was manufactured its goods, there was at the time of the alleged injury of the plaintiff, a very large room divided into two well-defined sections, but by an imaginary line, each section being under the control of a superintendent, who was called a "boss" and who supervised the machinery and controlled the employees. The plaintiff worked under the supervision of Ward, one of the section bosses, his business being to carry quills from the looms to the quillers, and the work-bench at which the plaintiff alleged he was injured was in the corner of the room and in the section under the control of Suter, another section boss. Upon this work-bench were nippers and also a cold chisel and hammer and other tools, with which wires were cut to be used in the business of the defendant. The plaintiff testified on the trial below that on the day he was injured the quill carrier in Suter's section was sick, and that he was instructed by Ward to do the work of the other boy in addition to his own, and that his duties took him all over the room; that in carrying quills to the quiller room he had to pass about 5 feet from the bench and between a loom and the bench. He said he could have gone up the middle of the room, but it would have been much further; that at the bench they would cut wires by setting the cold chisel and then hit it with a hammer; that he did not know there was any danger in passing the bench, and that while engaged in his work and as he was passing a piece of wire flew from the work-bench and struck him in one eye, inflicting a serious injury. The main contention of the plaintiff's counsel was that the defendant was negligent in allowing the work-bench and tools (251) and the work thereon and therewith to be carried on in its manufactory, so close to the pass-way along which the plaintiff and other employees were compelled or permitted to go in the discharge of their duties as to make it dangerous to pass by while the work was going on. Another contention of the plaintiff was that, even if the act of the defendant in keeping the work-bench and tools and the use of the same for the purposes described by the witnesses was not in itself negligence, yet that the manner in which the tools were used on the occasion when the plaintiff was injured was imprudent and negligent. His Honor instructed the jury on these points as follows: "I will tell you that the mere having and maintaining of the work-bench and those tools used for the purposes for which witnesses say they were used, was not in itself negligence, because the evidence shows that the bench could have been operated and the work necessary to be done upon it could have been performed without injury to any one if proper precautions had been taken." We think that there was error in that instruction and that the error arose from his Honor's inadvertence to or misunderstanding of a part of the evidence. The evidence on this point was not all one way.

There was evidence tending to prove that it was dangerous to cut wires on the bench with either chisel or nippers. The witness Ryan said that nippers were furnished by the defendant with which to cut the wires, and that if nippers were used wires would not fly out. The witness Wood said "that wires were cut with nippers which always stayed on the bench and that there was no danger in using nippers." But Suter, who was the boss in charge of the section in which the bench
(252) was, said: "We did not allow the boys to work around the work-bench; there would be danger in a boy's being around while wire is being cut. Fragments are likely to fly off in cutting wire with nippers." It is true that this witness (Suter) also said "that the proper way to cut wires was with nippers and that the company furnished nippers for that purpose; and he also said he did not think there was any danger in cutting wires with nippers—a statement inconsistent with his first statement. Whatever effect that inconsistency may have had upon his evidence he unmistakably said that fragments were likely to fly off in cutting wires with nippers, and the jury ought to have been allowed to say whether or not such flying off of fragments of the wires from being cut with nippers was dangerous under the particular circumstances of this case.

Negligence is not a pure question of law unless from the evidence a reasonable person could draw only one inference as to whether it existed or not. *Tillett v. R. R.*, 118 N. C., 1031. In *Ellerbee v. R. R.*, the Court said: "It is the province of the Court, where the facts are undisputed or where but a single inference can be drawn from the testimony, to instruct the jury whether either of the parties has been negligent and what culpable act must be deemed the proximate cause of an injury. Where the facts are in dispute, or more than one inference might be drawn from the testimony by fair minded men, it is the duty of the court to instruct the jury, when requested to do so, whether in any aspect of the case arising out of the testimony the acts of either party would constitute culpable carelessness; but in such cases it is always the province of the court to tell the jury that they are to determine whether, under all the circumstances, the party charged
(253) with culpability acted as would the ideal prudent man, and to make their verdict depend upon their decision of that question."

His Honor further instructed the jury that "the mere having of the work-bench and the tools in the room apart from other considerations would not amount to negligence in itself, and if you find that the work-bench and the tools were used in a proper and prudent manner, as I will hereafter explain, then you will answer the first issue 'No,' in favor of the defendant." A part of the explanation of that instruction was as follows: "If you find that the safe way to cut wire was with nippers,

and that the defendant furnished nippers for the cutting of the wire, and the witness Ryan used a chisel to cut the wire and by so doing hurt the plaintiff's eye, it was the negligence of Ryan (a fellow-servant), for which the defendant would not be liable, and you should respond 'no' to the first issue, unless Wood, as the representative of the company, was responsible for this negligence, as I will hereafter explain."

If we are right in our conclusion that there was error in the first instruction pointed out, then the same error appears in the last instruction. His Honor assumes that the cutting of the wires with nippers was a safe way to cut them. As we have said, the evidence about that matter was conflicting, and it should have been left to the jury for their finding.

But, besides that, there was further error in the last instruction. According to the testimony of the defendant's witness Suter, it was the duty of Wood, another boss of a section, and himself to do this work. He said, "Wood and I had control of this room, employees and machinery. Work-bench there for making picking sticks and filling up chains. It was the duty of Wood and myself to do this work. (254) The boys did go and do this work. If they wanted to use hammer and chisel for the purpose of cutting wires *they were there for that purpose.*" And J. Carter, another witness for the defendant, said he was a loom-fixer, and that he never used a chisel for small wire, but used it for cutting large wire. That evidence tended to show that the defendant put the chisel and wire upon the bench for the purpose of having the wires cut with it, as well as with the nippers; and the matter ought to have been submitted to the jury under instructions that if they believed that testimony they ought to find that the injury to the plaintiff was caused by the defendant's negligence and not by Ryan's; that is, if they believed from the evidence that Suter was a vice-principal of the defendant, and that he had instructed Ryan to cut these wires under the evidence in this case.

We think the issues as submitted were sufficient; that the burden of proof to show negligence was on the plaintiff (*Hudson v. R. R.*, 104 N. C., 491), and that the charge of his Honor on the law governing negligence, as applicable between employers and employees of tender years, was correct, and substantially what the plaintiff requested him to charge. For the errors pointed out, however, there must be a

New trial.

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

Cited: Ward v. Odell, 126 N. C., 946; *Avery v. Lumber Co.,* 146 N. C., 595; *Whitfield v. R. R.,* 147 N. C., 241.

(255)

MORRIS RICKERT v. SOUTHERN RAILWAY COMPANY.

(Decided 22 November, 1898.)

Prayer for Instruction—The Code, Sec. 413.

1. Where the evidence was conflicting, a prayer for instruction, "If the jury believe the evidence, the answer to the first issue should be 'No'" was properly refused.
2. Such an instruction would have been a direct violation of The Code, sec. 413.

CIVIL ACTION for damages, tried before *McIver, J.*, at Spring Term, 1898, of the Superior Court of IREDELL County.

The plaintiff was a passenger upon the defendant's freight train, between Salisbury and Statesville. He testified that when he got up here to Statesville they blowed the station blow, and they slowed down about the switch, and he (the conductor) motioned to me to get off, and in attempting to do so I slipped, caught my foot in the stirrup, fell, and was injured.

The defendant introduced evidence contradictory to that of plaintiff, and without demurring to the evidence of plaintiff, in effect asked his Honor to instruct the jury to negative it. His Honor declined to give the instruction asked for, and defendant excepted.

There was a verdict and judgment in favor of plaintiff, and appeal by defendants.

The issues, instructions, and evidence appear in the opinion.

Charles Price, G. F. Bason, and A. B. Andrews, Jr., for defendant (appellant).

Armfield & Turner for plaintiff.

(256) FURCHES, J. The facts disclosed by the trial of this case strongly impress us with the belief that the plaintiff was not entitled to a verdict in his favor. At the same time, we cannot say that there was not evidence that entitled him to go to the jury, and, if believed, to a verdict; and we cannot review the findings of the jury, however much we might differ with them. But we will say that outside of all the evidence on the part of the defendant, contradicting the evidence offered by the plaintiff, it was not a very reasonable statement, that if the plaintiff paid his fare from Salisbury to Statesville, as he says he did, he would have ridden all the way from Salisbury to Statesville in an open coal car, early in the morning of 23 December (only two days before Christmas), when he was entitled to a comfortable seat in the caboose. But if there is error in the findings of the jury, as we have said, they cannot be corrected in this Court, unless the judge who tried the case committed an error of law on the trial. If this were so, and a

new trial ordered on that account, this would vitiate the verdict. But it would not be because we have the power to review the findings of the jury, or had done so. And, upon a careful examination of the record, we find no error in law committed by the court below, on which we can give a new trial.

There are several exceptions taken by the defendant, and while none of them are formally abandoned, the defendant in its brief discusses but one of them.

The issues submitted are as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff guilty of contributory negligence? Answer: 'No.'

"3. What damage is the plaintiff entitled to recover by reason of said injuries? Answer: '$500.'"

For the purpose of sustaining the plaintiff's contention, the (257) plaintiff testified that he paid his fare as a passenger from Salisbury to Statesville on the defendant's freight train, leaving Salisbury early in the morning of 23 December, 1896; that he rode in an open box-car used for hauling coal, where he could be seen and was seen; that he only paid his way from Salisbury to Cleveland station, and at Cleveland he paid his fare from that place to Statesville; that when the station whistle sounded at Statesville, the train "slowed up" to three or four miles an hour, and the conductor, from the window of the caboose, signaled him to get off, and in attempting to do so he slipped, caught his foot in the stirrup, and was injured. He was corroborated by other testimony as to the conductor's giving the signal by the wave of the hand, and as to the fall and injury. All this evidence was flatly contradicted by the engineer and crew of the train. But still it was evidence for the jury, which they might believe, and did believe. It would seem that the defendant thought it material, if believed, as it offered evidence to contradict it. But whether the defendant thought it material or not, it was material if believed, and the court could not say it should not be believed. As to whether it should be believed or not was a question for the jury alone.

Upon this evidence, the defendant's first prayer for instructions, and the only one discussed in the brief, was that upon all the evidence the court should instruct the jury to find the first issue "No." The court refused to give this prayer, and committed no error in doing so. Had the court given this prayer for instruction, it would have been deciding upon the credibility of witnesses, the weight of the evidence, and the facts in the case, and would have been in direct violation of section 413 of The Code.

(258) This prayer is in effect a demurrer to the evidence, and admits, for the purposes of the prayer, that all the evidence is true. Such prayer can only be given in cases where the party asking the instruction is entitled to a finding upon the issue in his favor, taking all the evidence for the other side to be true—considered in the most reasonable light for the other side. *Baker v. Brem,* 103 N. C., 72; *Nelson v. Whitford.* 82 N. C., 46; *Hopkins v. Bowers,* 111 N. C., 175. Taking the plaintiff's evidence to be true, he was a passenger on the defendant's train, and when it slowed up he was told to get off and was injured in so doing. This was negligence. *Lambeth v. R. R.,* 66 N. C., 495; *Hinshaw v. R. R.,* 118 N. C., 1047.

We have examined the charge of the court and find it full, fair, and correct. The court, among other things, charged the jury that if they believed (find) from the evidence that the plaintiff was stealing a ride, he could not recover, or, if the conductor did make signals with his hand, not intended for the plaintiff, and the plaintiff mistook them, and undertook to get off the train and was injured, he could not recover. We find no error in refusing the instructions asked, nor in the instructions given.

Affirmed.

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(259)

ELIZABETH CHAPPELL v. MILTON ELLIS ET AL.

(Decided 6 December, 1898.)

Damages, Compensatory and Punitive—Mental Anguish.

The doctrine of "mental anguish" is not applicable to the question of damages for wrongful seizure of property; where such act is attended with circumstances of aggravation, punitive damages may be awarded.

CIVIL ACTION for damages for the wrongful seizure of the personal property of plaintiff under process against her husband, tried before *McIver, J.,* at Fall Term, 1897, of the Superior Court of IREDELL County.

The complaint alleged that by the wrongful act of Deputy Sheriff Thorpe, and Ellis, she has suffered greatly in body and mind to her damage $500.

The articles taken were two shotes, one yearling, 25 or 30 bushels of corn, and something less than eight bushels of peas. About a week after that, they returned to her 19 bushels of corn, the yearling, some peas, and one shote.

The jury found all issues in favor of plaintiff and assessed her damages at $100.

During the trial, S. A. Reavis, one of the plaintiff's witnesses, was asked:

Q. What was the condition of plaintiff next day? Objected to by defendant. Objection overruled, and defendants excepted.

A. She was crying and going on considerably; seemed to be in a great deal of trouble, and was in trouble for weeks afterwards.

Judgment was rendered in accordance with the verdict. Appeal by defendants.

B. F. Long for defendants (appellants). (260)
Armfield & Turner for plaintiff.

DOUGLAS, J. This is an action to recover damages for the unlawful seizure and detention of personal property, and also for mental suffering caused thereby. The plaintiff alleges that a writ of possession was issued in favor of the defendant Ellis against her husband and herself, and also directing the sheriff to make the sum of $197 with interests and costs out of her said husband; that her said husband had not been living with her for two years, having abandoned her and removed to the State of Indiana; that the defendant Thorpe, deputy sheriff, in obedience to said writ, removed her from the premises; and, also, under the direction of the defendant Ellis, levied upon the following personal property belonging to her, to wit: "About 35 bushels of corn, 5 bushels of peas, 1 yearling calf, and 2 shotes, and delivered the same to the defendant Ellis against the will and over the protests of the plaintiff, she at the time informing Thorpe that she was the sole owner of said property; that the said Ellis took the said property to his home and kept it for more than a week, when he returned a part of the corn and peas, the yearling and one shote; and that the property not returned was reasonably worth $20." She further alleges: "That she is old and infirm, having reached the age of 64 years, and has to depend upon her own labor and exertion for a support; and after the removal of the said property by Thorpe and Ellis, she had nothing upon which to live and no home to shelter her body; that by the wrongful act of Thorpe and Ellis in taking from her the said property, contrary to the writ aforesaid and without authority in law, and depriving her of the only means of support she then had in her advanced age in life, she has suffered (261) greatly in body and mind, to her damage $500."

It is unnecessary to consider the answers or the general testimony, as the jury evidently believed the plaintiff, as they found every issue in her favor. We see no error in the charge of the court of which the defendants can complain, as it appears from the record that every instruction asked by them was given. Therefore, their third assignment of error, "For that his Honor failed to instruct the jury as prayed by defendant

in the prayers numbered 1 to 9 inclusive, and failed, except the 8th, given," cannot be considered by us. The record states that "the defendants asked the following special instructions in writing, *which were given by the court.*" Then follow immediately eight numbered prayers, one or two of which it would be difficult to sustain under exception by the plaintiff.

But there is one exception by the defendants which we think must be sustained, and that is to the testimony of the plaintiff's witness Reavis. He was asked, "What was the condition of the plaintiff next day?" and answered, "She was crying and going on considerably; seemed to be in great deal of trouble, and was in trouble for weeks afterwards." As this testimony tended to show mental suffering, and as it is evident that the greater part of the damages awarded was based upon such suffering alone, the exception becomes of vital importance. The doctrine of mental suffering or "mental anguish," as we prefer to call it, as indicating a higher degree of suffering than arises from mere disappointment or annoyance, contemplates purely compensatory damages, and, as far as we are aware, has never been applied to cases like that at bar. This case would come under the rule of exemplary, punitive, or vindic-
(262) tive damages, as they are variously denominated. Such damages, which look not only to the loss sustained by the plaintiff, but still more to the conduct of the defendants, can be allowed only where there is shown, on the part of the defendants, malice, wantonness, oppression, brutality, insult, gross negligence, or certain cases of fraud. Hale on Damages, secs. 85 and 86; 1 Sedgwick Damages, 520; 7 A. & E., 450, 451; *Duncan v. Stalcup,* 18 N. C., 440; *Gilreath v. Allen,* 32 N. C., 67; *Hansley v. R. R.,* 117 N. C., 565. These matters of aggravation need not all concur, as any one will be sufficient if it exists in sufficient degree; but, in the absence of them all, exemplary damages cannot be allowed, no matter how great may be the mental suffering of the plaintiff. The question of exemplary damages does not appear to have been raised in the trial of the action, as no such issue of instruction was asked by either party. The theory of the plaintiff was the recovery of compensatory damages for mental anguish under the rule laid down in *Young v. Tel. Co.,* 107 N. C., 370, and analogous cases. This rule cannot be extended to the case at bar. The plaintiff is entitled to recover all her actual damages sustained from the wrongful act of the defendants, including not only the value of the property not returned, but also whatever damages may have accrued from its seizure and detention. Furthermore, she may be allowed exemplary damages, in the discretion of the jury, if such circumstances of aggravation are shown as would bring her within the rule; but her case does not come within the doctrine of "mental anguish." It is true the two doctrines are somewhat similar inasmuch

as they recognize suffering other than physical or pecuniary, but they are so widely distinguished in their application that they are universally recognized as distinct principles, wherever they are (263) recognized at all.

It is urged on behalf of the plaintiff that this case should be governed by the principles laid down in *Cashion v. Tel. Co.,* at this term. We see no resemblance. Our opinion in *Cashion's case* was hinged on the solemn fact of death and the associations inseparable from the final severance of all earthly ties by an immortal Spirit. The anguish of a mother bending over the body of her child, every lock of whose sunny hair is entwined with a hearstring, and kissing the cold lips that are closed forever, cannot come within the range of comparison with any mental suffering caused by the loss of a pig.

We are not insensible to the pitiable condition of the plaintiff, thrown upon the highway without shelter and with but little to eat, but we must remember that her shelterless condition, which probably caused the greater part of her distress, was the result of a lawful eviction. Charity would have dictated a different course, but that great virtue is not enforceable in a court of law.

But it is urged that the principle of the *Cashion case,* if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering. It may be, but we feel compelled to carry out a principle only to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles.

The one universal law of nature is that all action, animate as well as inanimate, is the result of conflicting forces. The orbit of the earth depends upon the exquisite adjustment of two conflicting forces, the centripetal power of attraction and the centrifugal force of momentum. The preponderance of either would lead to inevitable destruction.
The trajectory of every shot is governed by three opposing forces: (264) momentum, friction, and gravitation—the speed with which it leaves the gun, the resistance of the atmosphere, and the attraction of the earth. It is so with human action. Government itself is recognized as springing from the love of personal liberty on the one hand and the desire for personal protection on the other. It is said that their just equilibrium produces a government of liberty without license and of law without tyranny, but that its disturbance would lead to anarchy or to despotism.

We do not feel at liberty to adopt any one principle as the sole guide of our decisions and to carry it out to extreme and dangerous limits, regardless of other great principles of justice and of law so firmly established by reason and precedent.

For the error of his Honor in admitting evidence which tended simply to show the mental suffering of the plaintiff, disconnected with any allegation of malice or wantonness on the part of the defendants, a new trial must be granted.

New trial.

Cited: Carter v. R. R., 126 N. C., 439; *Kelly v. Traction Co.*, 132 N. C., 375; *Orr v. Tel. Co.*, 132 N. C., 694.

RUSSELL AND NICHOLSON v. COMMISSIONERS OF IREDELL COUNTY.

(Decided 13 December, 1898.)

Contract—Performance.

1. What is a contract and its effect, when the terms are clear, whether written or oral, is a question of law.

2. Whether there has been substantial compliance is a question of fact for the jury under proper instructions from the court.

(265) CIVIL ACTION for stipulated price, $100 for building a county bridge, tried on appeal from justice's court, before *Allen, J.*, at August Term, 1898, of Superior Court of IREDELL County.

The plaintiffs claimed that they had built the bridge according to contract and were entitled to the contract price.

The defendants deny that the bridge was completed according to contract, and plead a counterclaim by way of damages of $40.

Two issues were submitted by the court:

"1. Was the bridge built substantially according to the plans and specifications agreed on?

"2. If not, what damage has the defendants sustained?"

The evidence was conflicting.

His Honor charged the jury:

"I shall leave the question with the jury as to whether the bridge was built substantially according to the contract.

"It was not so much a question as to whether it was a good bridge, but is it a substantial compliance with the terms agreed on in quality and kind? If it is so far different from the contract, as not to answer the purpose for which it was intended, the plaintiffs could not recover."

The defendants excepted.

Verdict: "Yes," on the first issue.

Judgment for plaintiffs for contract price.

Appeal by defendants.

B. F. Long and Armfield & Turner for defendants (appellants).
No counsel, contra.

FAIRCLOTH, C. J. This case concerns the building of a bridge. (266) The defendants ordered the supervisors of Statesville Township to get up plans and specifications and let out the building of a bridge to the lowest bidder across the Salisbury branch on the Salisbury road, which was done, and the plaintiffs were the lowest bidders and got the contract at $100.

The chairman of the board of supervisors testified that "the bridge has been completed and not paid for. It was completed as early as could be. The bridge was and is being used by the public, and did immediately after it was finished. I had plans prepared. There is no variation in the building with one exception. The plan was to let plank project three feet. Instead of that, I asked them to have it bolted to the abutments—to the foundation—that made it more stable and firm. It required no more labor, but additional expense of both. It was a substantial compliance with the plans and specifications. . . . Plans called for mud-sills to be two feet below the water. Don't think it is quite two feet; it goes to the rock, to a solid foundation." The plaintiff testified that he built it according to contract. Both parties introduced other evidence and witnesses tending to sustain their contentions. The court submitted this issue: "Was the bridge built substantially according to the plans and specifications agreed to?" which the jury answered "Yes," and that plaintiffs are entitled to the contract price. There was judgment accordingly.

His Honor charged the jury: "I shall leave the question with the jury as to whether the bridge was built substantially according to the contract . . . ; that it was not so much a question as to whether it was a good bridge, but is it a substantial compliance with the terms agreed on, in quality and kind." He also charged that if it is so far different from the contract as not to answer the purpose for which (267) it was intended, the plaintiffs could not recover.

The defendants filed exceptions to the evidence, to the issue, to the charge, and to the judgment, but their real contention is that the court erred in leaving the question of substantial compliance with the jury.

What is a contract and the effect of a contract, when the terms are clear, from which only conclusion can be drawn, whether written or oral is a question of law; but whether the contract has been performed, when the evidence is conflicting, is a different question. Whether substantial compliance has occurred under proper instructions of the court, we think, is a question of fact for the jury.

Looking at the findings and the charge, under the rules above stated, we see no error, and think substantial justice has been done, and it will be so certified.

Affirmed.

ANNA CASHION v. WESTERN UNION TELEGRAPH COMPANY.

(Decided 22 November, 1898.)

Damages—Mental Anguish.

1. Damages may be recovered of a telegraph company for mental anguish occasioned by its negligent failure to promptly deliver a telegram.
2. In the near relations of life, such as husband and wife, parent and child, brothers and sisters, the tender ties of affection usually exist, and mental anguish may be presumed, as a natural consequence of their being injuriously affected through the negligent conduct of another.
3. This presumption will not be made in the more distant relations of life—such as brothers-in-law or friends—the mental anguish in such instances must be matter of proof.

(268) CIVIL ACTION against the defendant for failure to deliver a message, sent by the plaintiff to her brother-in-law, tried before *McIver, J.*, and a jury, at May Term, 1898, of Superior Court of IREDELL County.

The plaintiff's husband was killed while at work in Morganton. Having no relations there to whom she could apply for assistance for herself and child, she sent the following telegram to her brother-in-law, who had been living with her, but who was then absent at Davidson, N. C.

"J. W. Mock, Davidson. Come at once; Mr. Cashion is dead. Killed at work. John Payne."

John Payne, the signor of the message, was the agent of plaintiff for the purpose of sending it.

Two issues were submitted to the jury:

"1. Was the defendant guilty of negligence, as alleged in the complaint? Answer: 'Yes.'

"2. What damage, if any, has the plaintiff sustained by reason of the negligence of the defendant? Answer: '$1,000.'"

Upon the trial there was evidence on the part of the plaintiff tending to support the finding of the first issue.

Upon the question of damages, the defendant asked the following special instruction:

"That upon all the evidence in the case, the plaintiff, if entitled to recover anything, can recover no more than the amount paid by her for sending the telegram, and in no aspect of the case can the jury answer the second issue more than 25 cents."

This instruction his Honor declined to give, and charged the jury: "If the answer to the first issue be 'Yes,' then your answer to the second issue would be such amount as in the opinion of the jury (269) would be a reasonable and just compensation for the mental anguish, if any, occasioned by the failure of Mock to reach Morganton on the night of 17 August, and not the mental anguish naturally arising from the death of her husband."

Defendant excepted.

Verdict and judgment for plaintiff; appeal by defendant.

Jones & Tillett for defendant (appellant).
J. F. Gamble and L. C. Caldwell for plaintiff.

DOUGLAS, J. This is an action brought to recover damages for mental anguish suffered by the plaintiff from the neglect of the defendant to promptly deliver a telegram. The facts material to its present determination are few.

On 17 August, 1897, the husband of the plaintiff was killed while at work in Morganton, N. C., leaving the plaintiff and an infant child. Having no relations in the town, which was the residence neither of her own nor of her husband's family, she caused the following telegram to be sent to J. W. Mock, her brother-in-law, who had been living with her in Morganton, but was then visiting his relatives in Davidson, N. C.: "Morganton, N. C., 17 August, 1897. J. W. Mock, Davidson. Come at once, Mr. Cashion is dead. Killed at work. John Payne." This telegram was received at the office of the defendant company at Davidson at 5 o'clock the same evening, but was not delivered until the following morning. Mock testifies that if the telegram had been promptly delivered he would had ridden through the country to Statesville in time to take the train that arrived at Morganton about 11 (270) o'clock that night. The plaintiff left Morganton the following morning with the body of her husband, and arrived at Statesville about 7 o'clock a. m., where she remained awaiting a train until 7 o'clock that evening. Mock arrived in Statesville about 10 o'clock the same morning, and returned to Davidson that evening with the plaintiff. Issues were submitted and answered as follows:

"1. Was the defendant guilty of negligence, as alleged in the complaint? Answer: 'Yes.'

"2. What damage, if any, has the plaintiff sustained by reason of the negligence of the defendant? Answer: '$1,000.' "

There was sufficient evidence upon the first issue to be submitted to the jury, and, we think, was submitted under proper instructions.

After the well considered opinion delivered at this term in *Lyne v. Tel. Co.*, it must be deemed the settled rule of this Court that damages may be recovered for mental anguish, irrespective of any physical injury, caused by the negligence of a defendant in failing to exercise reasonable care and diligence in the delivery of a telegram. The principles therein so clearly given need not now be repeated, as they are founded upon a sound public policy as well as natural justice, and are sustained equally by reason and precedent. *Young v. Tel. Co.*, 107 N. C., 370; *Thompson v. Tel. Co., ibid.*, 449; *Sherrill v. Tel. Co.*, 109 N. C., 527, and *S. c.*, 116 N. C., 653, and *S. c.*, 117 N. C., 353; *Havener v. Tel. Co.*, 117 N. C., 540. The doctrine is of comparatively recent origin, but has already been adopted with varying modifications by the states of Alabama, Illinois, Indiana, Iowa, Kentucky, North Carolina, Tennessee, and Texas, and is recognized in Shearman & R. Negligence, vol. 2,
(271) sec. 756 (5 ed.); Thomp. Elect., sec. 379; 3 Suth. Dam., secs. 975 to 980; 2 Sedg. Dam., sec. 894.

The rule was perhaps suggested by the following passage in Shearman & Redfield Negligence, sec. 605 (3 ed.): "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages."

The doctrine first appears, but only inferentially, in 1877, in *Logan v. W. U. Tel. Co.*, 84 Ill., 468. It was for the first time, as far as we are aware, distinctly enunciated in 1881, in *Se. Relle v. W. U. Tel. Co.*, 55 Texas, 308. This celebrated case was subsequently distinguished, doubted, modified, and finally practically reaffirmed by the Supreme Court of Texas. The following suggestion from that opinion strongly commends itself to our approval. It says: "That great caution ought to be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the default or neglect of the company, for it is only the latter for which a recovery may be had, and the attention of juries might well be called to that fact." This is a very important distinction, as mental anguish is naturally so intangible, and when proceeding from two concurring causes, so difficult of apportionment, that jurors should be

careful not to give the plaintiff more than such a just and reason- (272)
able compensation as proceeds from the negligence of the defendant. This very difficulty, emphasized by the excessive damages occasionally given, is the strongest reason urged against the adoption of the rule in those jurisdictions where it does not prevail.

On the other hand, to say that in such cases the plaintiff can recover only the pittance paid for sending the telegram seems so utterly subversive of every principle of justice and of public policy as to commend itself neither to the judgment nor the conscience of the Court. A *quasi*-public corporation, exercising extraordinary powers and receiving enormous profits solely in consideration of the performance of its public duties, cannot be permitted to neglect or evade those duties with practical impunity. To allow it to cancel all liability for a negligence that may have wrung the heartstrings of the citizen for whose service it was created by simply refunding the 25 cents which it had received, but never earned, would destroy all sense of responsibility. All privileges have their corresponding duties, and all powers their equivalent responsibilities. As was said in *Reese v. W. U. Tel. Co.*, 123 Ind., 294, the failure to promptly deliver a telegram "is not a mere breach of contract, but a failure to perform a duty which rests upon it as the servant of the people."

This liability on the part of public servants to respond in civil damages to the injured party is the surest guarantee for the proper performance of their duties to the public, as criminal and penal statutes are difficult of enforcement. A suitor for a mere penalty does not receive much sympathy, while few care to undertake the criminal prosecution of a powerful corporation for mere witness fees, which are necessarily much less than their actual expenses. But an action for (273)
compensatory damages is looked upon as an effort on the part of the plaintiff to obtain simply what belongs to him as the just equivalent of the injury he has sustained at the hands of the defendant. He has thus the chance to recover a substantial compensation without the risk or odium of a penal suit. The public servant, knowing this, is more careful to avoid such liability, which it can always do by the proper performance of its public duties.

A recent and interesting case, especially valuable for its long list of citations, is *Mentzer v. Tel. Co.*, 93 Iowa, 752.

The question of damages is peculiarly within the province of the jury and should be settled by them, under proper instructions from the court, in accordance with the dictates of conscience and of common sense, giving to the plaintiff the just measure of compensation for the unlawful injury he has sustained, but remembering always that *generosity is not a virtue when dealing with the property of others.*

Coming to the second issue of the case at bar, as to the amount of damages, we think that the defendant's ninth prayer for instructions, or its equivalent, should have been given, and that the failure of the court to do so is such material and substantial error as entitles the defendant to a new trial. That prayer is as follows: "That upon all the evidence in the case, the plaintiff, if entitled to recover anything, can recover no more than the amount paid by her for sending the telegram, and in no aspect of the case can the jury answer the second issue more than 25 cents." This prayer is not as definite as it might be, but it is sufficient to cover the point that there was no evidence of
(274) mental anguish on the part of the plaintiff arising from the failure of her brother-in-law to arrive on the night of the 17th. Mental anguish must be something more than mere disappointment, and like every other material allegation, relied upon by the plaintiff, must be alleged and proved. It is true that there are certain facts which, when proved, presume mental anguish. The tender ties of love and sympathy existing between husband and wife or parent and child are the common knowledge of the human race, as they are the holiest instincts of the human heart. It is useless to tell the jurors of the anguish of a true wife, waiting for hours to take the train to the bedside of a dying husband, knowing well that the sands of life are falling fast, but uncertain of the vital measure, and finally reaching her journey's end only to bestow her last greeting upon lifeless clay. But beyond the marriage state, this presumption extends only to near relatives of kindred blood, as acute affection does not necessarily result from distant kinship or mere affinity. A brother's love is sufficiently universal to raise the presumption, but not so with a brother-in-law, who is often an indifferent stranger, and sometimes an unwelcome intruder into the family circle. It is true that with him such affection may exist, and in the present case doubtless does exist, but it must be shown. Moreover, there is a difference between those cases where the plaintiff is herself kept away from the bedside of a dying relative, and where she is merely deprived of the company of another relative whose sympathetic love might tend to comfort and console her in her hour of sorrow. This difference may be considered by the jury in fixing the damages. We do not mean to say that damages for mental anguish may not be recovered from the
(275) absence of a mere friend, if it actually results; but it is not presumed. The need of a friend may cause real anguish to a helpless widow left alone among strangers with an infant child and the dead body of her husband. In the present case the plaintiff seems to have received the full measure of Christian charity from a generous community, but it may be that she did not expect it, and looked alone to her brother-in-law, whose absence she so keenly felt. If so, she may prove

it. We think that the allegations in the complaint are sufficient. An interesting case upon this point is *Tel. Co. v. Coffin* (30 S. W. Rep., 896), Texas, which is copied with a very full note in 5 Am. Elec. Cases, 781.

For failure of proper instruction, a new trial is ordered upon the entire case.

New trial.

Cited: Chappell v. Ellis, ante, 263; *Laudie v. Tel. Co.,* 124 N. C., 532; *Bennett v. Tel. Co.,* 128 N. C., 104; *Mfg. Co. v. Bank,* 130 N. C., 609; *Meadows v. Tel. Co.,* 132 N. C., 42; *Bright v. Tel. Co., ibid.,* 323; *Hunter v. Tel. Co.,* 135 N. C., 463; *Harrison v. Tel. Co.,* 136 N. C., 383; *Green v. Tel. Co., ibid.,* 492; *Cranford v. Tel. Co.,* 138 N. C., 165; *Alexander v. Tel. Co.,* 141 N. C., 79; *Harrison v. Tel. Co.,* 143 N. C., 152; *Helms v. Tel. Co., ibid.,* 394.

E. E. MENDENHALL, ADMINISTRATOR OF JASON MENDENHALL, v. NORTH CAROLINA RAILROAD COMPANY.

(Decided 22 November, 1898.)

Measure of Damages.

Where life is lost by reason of the negligent management of a railroad train, the measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy.

CIVIL ACTION for damages for injuries to plaintiff's intestate resulting in his death, and for destruction of his property, caused by a collision with defendant's train, tried before *Allen, J.,* at Fall Term, 1898, of the Superior Court of DAVIDSON County.

The issues were as follows:

"1. Was the plaintiff's intestate's horse killed by the negligence (276) of defendant's lessee? Answer: 'Yes.'

"2. Was the death of plaintiff's intestate and the injury to his wagon and harness caused by the negligence of defendant's lessee, as alleged? Answer: 'Yes.'

"3. Did the plaintiff's intestate, by his negligence, contribute to his own injury? Answer: 'No.'

"4. Notwithstanding the contributory negligence of the intestate, could defendant's lessee by the exercise of ordinary care have avoided the collision? Answer: ——.

"5. What damage is plaintiff entitled to recover? Answer: '$3,000.' "

There was a motion by defendant to set aside the verdict, because it was excessive and not warranted by the evidence.

Upon an intimation of the court that it would modify the verdict as to damages, plaintiff submitted that it be reduced to $2,100, and there was judgment accordingly, and defendant appealed from the judgment as rendered. The exception taken was to the charge of his Honor upon the measure of damages, and to his declining to give the instruction asked for by the defendant on that subject.

The instruction asked for and the judge's charge appear in the opinion.

G. F. Bason for defendant (appellant).
B. F. Long for plaintiff.

MONTGOMERY, J. The intestate of the plaintiff was so badly injured on the railroad track of the defendant company in a collision with its engine that he died a few hours after he received the injury, and this is an action brought by the administrator to recover damages on the
(277) allegation that they were caused by the death of the intestate, and that his injury and death were caused by the negligence of the defendant. The defendant made numerous exceptions to the charge of the court below, but argued none of them in this Court, nor are they alluded to in the brief filed in the case. We have, however, examined the charge carefully and find in it no error of which the defendant company could complain. The defendant asked the court to charge the jury that "if they should believe that the intestate made no more than a living for himself there should be no damages awarded on account of his death." The court could not have given that instruction, as asked, for the reason that there was no evidence going to support that view to the extent requested in the instruction. There was, indeed, a witness (George Kinney) who said that "the intestate's farm was a tolerably large old farm, a little run down, what he would call rather a poor farm; that he did not know a great deal about what kind of crops the intestate made, but that he made a plenty to support himself, and that if he made anything more than a support for himself it was *not much more.*" That evidence tended to show that the intestate did not earn as much as the verdict of the jury declared, but certainly it did not tend to show that he made *nothing more than* a support for himself. There were other witnesses who testified that his net earnings were from $300 to $400 a year. The tax lists showed, for the year in which the intestate was killed, about $700 worth of personal and real estate. Under some circumstances that might have been evidence against him as to the value of his property at the time it was listed, but it hardly could be considered evidence as to what his services were worth or what he had earned in the year before. The instruction which his Honor gave followed the rulings of this Court upon the subject. Upon the whole evidence
(278) his Honor on this point instructed the jury as follows:

"The measure of damages is the present value of the net pecuniary worth of the deceased to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make their estimate, it is competent to show, and for them to consider the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed—the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family. You do not undertake to give the equivalent of human life. You allow nothing for suffering. You do not attempt to punish the railroad, but you seek to give a fair, reasonable pecuniary worth of the deceased to his family, under the rule which I have laid down. You should rid yourself of all prejudice, if you have any, and of sympathy. It is not a question of sympathy; it is just a plain, practical question, and you should give a reasonable and fair verdict upon all the issues."

The defendant requested the court to charge that "If the jury believed the evidence the crossing itself up to and including the boxes on each side, was in good condition, and that there is no evidence that any defect in the road within the limit of the two boxes was out of repair or caused the injury." Upon a superficial view it might appear that the matter to which the instruction pertained was material to the case, but, in reality, it is not so. (279)

The wagon, in which the intestate was seated, was struck by the pilot of the engine between the first and rear wheels. The contention of the plaintiff was that the defendant's engineer was negligent in not keeping a proper lookout, that the train was not properly equipped with employees and with brakes and other necessary appliances to check its speed after the intestate had been discovered on the track, and that the defendant's engineer failed to sound the whistle at the signal post. The contention of the defendant was that the plaintiff's intestate had crossed the track in the clear, but that his horse having become frightened backed the wagon on the track so suddenly that the engineer did not have time to check the speed of the engine and thereby to prevent the injury. The condition of the roadbed, therefore, had no connection with the collision from the standpoint of either the plaintiff or the defendant. The defendant's position was that, regardless of the condition of the roadbed, whether it was good or bad, the engineer could not have prevented the injury for want of time owing to the sudden backing of the horse. The judgment is

Affirmed.

Cited: Poe v. R. R., 141 N. C., 528; *Gerringer v. R. R.*, 146 N. C., 35.

(280)

R. L. WRIGHT, ADMINISTRATOR OF WILSON WILLIAMS, v. SOUTHERN RAILWAY COMPANY.

(Decided 29 November, 1898.)

Negligence of the Master—Of the Fellow-Servant.

1. It is the duty of the master, railway corporation, to furnish a safe roadbed.
2. Attention is called to the Act of 1897, inadvertently printed among the Private Laws, ch. 56, which provides that in actions against railroad companies for death or injuries sustained by an employee, the negligence of a fellow-servant shall not be a defense.

CIVIL ACTION for damages, tried before *Allen, J.*, at Fall Term, 1898, of ROWAN Superior Court.

The complaint alleged that the death of plaintiff's intestate, a brakeman on defendant's train, was occasioned by the negligence of defendant in not providing a safe track, in consequence of which the train was derailed, and the intestate fatally injured. There was evidence that at the place where the train ran off the track, the crossties were rotten and defective.

The second issue reads thus: "Was the injury and death of plaintiff's intestate caused by the negligence of a fellow-servant?"

In one portion of his charge, his Honor instructed the jury that if they found that the death was caused by the negligence of the section master in not providing the road with sound ties, . . . they should answer the second issue "Yes."

The plaintiff excepted.

The action was commenced previous to the act of 1897.

Judgment in favor of defendant.

Plaintiff appealed.

A. C. Avery, Lee S. Overman, and R. L. Wright for plaintiff (281) *(appellant).*

George F. Bason and Charles Price for defendant.

CLARK, J. The death of the plaintiff's intestate occurred prior to the act of 1897 (inadvertently printed among the Private Laws of that year, chapter 56), which provides that in actions against railroad companies for death or injuries sustained by an employee, the negligence of a fellow-servant shall not be a defense, therefore the doctrine in force prior to that statute applies. *Rittenhouse v. R. R.*, 120 N. C., 544.

The court charged the jury that if they found that "the death was caused by the negligence of the section master in not providing the road with sound ties," to answer the second issue "Yes." That issue was, "Was the injury and death of the plaintiff's intestate caused by the negligence of a fellow-servant?" This instruction was specifically excepted to and is clearly erroneous. It is the duty of the master, the corporation, to furnish a safe roadbed. It is not within the scope of the duty, or the powers of the section master to provide crossties. The plaintiff's intestate (a brakeman) and the section master were, as held in *Wright v. R. R.*, 122 N. C., 852, and in *Rittenhouse's case, supra,* fellow-servants within the scope of their duties. In the latter case there was a defect in the roadway, by a spike projecting too high, and this was the negligence of the track foreman of the street railway, and it was held that being the fellow-servant of the motorman, the latter could not recover for an injury caused by the negligence of such fellow-servant. But the failure to provide a safe roadbed, or material for it, such as sound ties, or good rails and the like, is the negligence of the corporation (282) and not of the section master. Indeed, when this case was here before (122 N. C., 959), the Court said: "If the defendant, by having proper appliances (air brakes) and a good roadbed, could have avoided the injury to the intestate, it is liable." That it is the negligence of the master not to have a safe roadbed, and that this duty cannot be shifted off on a subordinate, as the fellow-servant of an employee, who is injured or killed, is almost universally recognized. *Chesson v. Lumber Co.,* 118 N. C., 59; *R. R. v. Daniels,* 152 U. S. (at p. 688); *Hough v. R. R.,* 100 U. S., 213, 218; *Patton v. Ry. Co.,* 82 Fed. Rep., 979; *Lewis v. R. Co.,* 59 Mo., 495; McKinney Fellow-Servants, sec. 29, citing many cases, and 1 Shear. & Red. Neg., sec. 197 (5 ed.), and numerous cases cited in note 12. Indeed, the proposition requires no citation of authority. *Pleasants v. R. R.,* 121 N. C., 492, instead of being an authority for the defendant, clearly concedes (p. 496) that it was the duty of the railway company to keep its roadbed in safe condition, and that it could not delegate this duty to a servant so as to exempt the company from liability to an employee for injury caused by a defective roadway.

It is true that on the first issue, "Was the injury and death of plaintiff's intestate caused by the negligence of the defendant?" The court charged the jury: "If they found it was caused by reason of a defective roadbed, or of the crossties being defective or rotten, they should answer the first issue 'Yes,' " but added, "this is subject to instructions on second issue," and on the second issue he instructed the jury erroneously, as above pointed out, that they might find that "the failure to provide crossties was the fault of a fellow-servant," a section master. These in-

(283) structions are contradictory, and if the jury took the latter view as law, they necessarily would find, as they did on the first issue, that the railroad company was not guilty of negligence.

Error.

Cited: Hancock v. R. R., 124 N. C., 225; *Marcom v. R. R.*, 126 N. C., 204; *Wright v. R. R.*, 128 N. C., 79; *Coley v. R. R.*, 129 N. C., 409; *Orr v. Tel. Co.*, 132 N. C., 692.

O. D. DAVIS, ADMINISTRATOR OF MRS. E. H. M. SUMMERELL, v. JOHN L. BOYDEN, ASSIGNEE OF JOHN A. BOYDEN ET AL.

(Decided 22 November, 1898.)

Statute of Limitations.

The statute of limitations will not bar the *cestui que* trust pending that relation.

CIVIL ACTION upon a promissory note, not under seal, tried before *Allen, J.*, at August Term, 1898, of ROWAN Superior Court.

The defendant John A. Boyden, on 1 November, 1884, executed his promissory note payable to the intestate of plaintiff six months after date, with sureties. On 25 January, 1892, he made an assignment to John L. Boyden as trustee, since replaced by John S. Henderson as trustee, who has been made a party to this suit, which was instituted 8 November, 1895.

John A. Boyden pleaded the statute of limitations. The trustee filed no answer. The debt is in the preferred class.

His Honor decided the debt was barred as against Boyden, and gave judgment accordingly, but refused to give judgment against the trustee to be paid out of the trust funds, when sold.

(284) The plaintiff appealed from the ruling of the court.

Kerr Craige and L. H. Clement for plaintiff (appellant).
L. O. Overman for defendants.

FAIRCLOTH, C. J. John A. Boyden, with sureties, executed his note, not under seal, to the plaintiff's intestate in 1884, and the last payment was on 8 May, 1891, and this action was commenced 8 November, 1895. On 25 January, 1892, the said John A. Boyden made an assignment for the benefit of creditors, including the plaintiff's claim, and the defendant

Henderson is now the trustee and has taken no steps to close his trust. The defendant Boyden pleaded the statute of limitations, the trustee not filing or relying on such plea. The effect of the statute pleaded is the only question.

The plea is a bar to the plaintiff's action and protects the defendant Boyden. It is urged that as the principal debtor is discharged by the statute, therefore the plaintiff cannot recover of the trustee. That is a mistake. The assignment established an *express* trust in favor of the creditors, and as the trust has not been closed, that relation still exists. It is very well settled that the statute will not bar the *cestui que trust* pending that relation. It is only where the fiduciary character of the trustee has ceased, as by repudiating the creditor's rights, or by claiming the absolute ownership, or by refusing to account for the property, that the statute will operate, that is, when the trustee assumes an adversary character towards the beneficial owners. *Patterson v. Lilly,* 90 N. C., 87; Angel on Limitation, 468, 176, approved in numerous other cases.

No reason appears why the trust is not closed, nor why no order was made, declaring the rights of the plaintiff against the trustee. The plaintiff is entitled to have the trust closed and to a judgment (285) against the trustee for his proportion of the trust fund.

Remanded for proceedings according to this opinion.

P. C. THOMAS v. THOMASVILLE SHOOTING CLUB.

(Decided 29 November, 1898.)

Vague Agreement.

An agreement, so vague and indefinite, that it is not possible to collect from it the full intention of the parties, will not sustain an action.

CIVIL ACTION for damages, tried before *Allen, J.,* and a jury, at Fall Term, 1898, of DAVIDSON Superior Court.

The case originated in the justice's court—the plaintiff claimed $75 damages by reason of the failure of defendants to aid him in the building of a barn on his own land, as per agreement.

The defendant moved to dismiss the action as upon judgment of nonsuit. His Honor refused the motion—and submitted the evidence to the jury, who rendered a verdict for $65 in favor of plaintiff.

Judgment accordingly. Defendant excepted and appealed.

The complaint and evidence are stated in the opinion.

E. E. Raper for defendants (appellants).
Walser & Walser for plaintiff.

MONTGOMERY, J. The complaint is as follows:

1. That the Thomasville Shooting Club is a body corporate, duly incorporated under the laws of North Carolina.

(286) 2. That the plaintiff, by request or order of the defendant, expended considerable money and labor to erect a barn for the use of defendants, and agreed to advance the money to assist plaintiff in erecting said barn.

3. That defendant failed to comply with agreement, and erected another barn on defendant's property.

Wherefore the plaintiff demands a judgment for damages in the sum of $75, with interest from 1 October, 1894, and the costs of this action.

The plaintiff testified in these words: "Thomasville Shooting Club is a corporation. The club asked me to build a barn on my own premises and agreed to furnish part of the money for its erection; and afterwards refused to do so. I built it 40 by 45 feet, and put up a brick wall about four feet above ground and built a basement. I put in only part of timber and got it thus far in September. In September, 1894, Mr. Davis came down and went in and showed me how he wanted it arranged. He afterwards sent for me and said I have decided to build a barn myself on club lot, and I did nothing more on my barn. Davis wrote me a letter about barn, and in it said substantially: 'How about barn? We will want ample stable accommodations. Our business will be a considerable item. I mean to rig you up so you may make something out of this.' The lumber I got to build barn cost me $65. I had no use for it. I sold part of it. Brick cost me $60. I used part of them last year in my house. Labor cost $15, and lime cost $10. The barn was to be walled in and was to be exclusively for the use of the club. It was to be my barn on my own lot, but it was to be for the club's stock

(287) exclusively. My compensation for building barn was to come out of what I got from the club for taking care of their stock."

The defendant moved to dismiss the action as upon judgment of nonsuit, under chapter 109 of the acts of 1897. The motion was refused, but it ought to have been allowed. The plaintiff abandoned here any claim to recover for damages based upon the profits which he might have made if the barn had been completed and the stock of the defendant stabled there. Such claim was admitted to be purely speculative. But the plaintiff insists that he had a contract with the defendant to build the barn on his own land for the accommodation of the stock of the defendant for profit and that the defendant failed to comply with its part of the contract. The plaintiff's testimony is the only evidence of

the contract. That evidence does not tend to prove a contract; it was no evidence of a contract. "The club," the plaintiff testified, "asked me to build a house on my own land and agreed to furnish *part of the money* for its erection; and afterwards refused to do so." Who could tell how much money the defendants agreed to furnish? The plaintiff did not say. And who can estimate the damages which arose from the failure of the defendant to furnish an unknown and uncertain amount of money for the purposes mentioned in the complaint? The communications between the parties are too uncertain to constitute a contract. "In order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties it is void; for neither the court nor the jury can make an agreement for the parties." Chitty on Contracts, p. 68. Be- (288) sides, the plaintiff does not allege, nor did he offer to show, that the failure of the defendant to furnish money to build the barn prevented him from completing it; on the contrary, he insists that he left off building the barn after he had commenced the work because defendant built one on their own property. There was error, and the judgment is

Reversed.

DOUGLAS, J., dissenting: I cannot concur in the opinion of the Court that the "plaintiff's evidence does not tend to prove a contract." It is not for us to say whether the evidence proves or does not prove a contract, as that is the exclusive province of the jury. All that we can say is that there is no evidence, or nothing beyond a mere scintilla, *tending* to prove a contract. *Wittkowsky v. Wasson,* 71 N. C., 451; *Spruill v. Ins. Co.,* 120 N. C., 141, and cases therein cited. In going even that far, we must assume the evidence offered in behalf of the plaintiff to be true, and must construe it in the light most favorable to him, because, as this Court has said in *Springs v. Schenck,* 99 N. C., 551, 555: "The jury might have taken that view of it if it had been submitted to them." *Avery v. Sexton,* 35 N. C., 247; *Hathaway v. Hinton,* 46 N. C., 243; *S. v. Allen,* 48 N. C., 257, 268; *Abernathy v. Stowe,* 92 N. C., 213; *Gibbs v. Lyon,* 95 N. C., 146; *Hodges v. R. R.,* 120 N. C., 555; *Collins v. Swanson,* 121 N. C., 67; *Cable v. R. R.,* 122 N. C., 892.

Taking, then, the evidence in the light most favorable to the plaintiff, it seems to me that there is unquestionably more than a scintilla of evidence *tending* to prove a contract, the terms of which were substantially as follows: The defendant induced the plaintiff to build a barn upon his premises, and agreed, in consideration of a right to its exclusive use, to furnish part of the money necessary for its (289)

erection. As a further consideration, the defendant agreed to pay the plaintiff for taking care of the stock kept in said barn. In pursuance of this agreement, the plaintiff began to build the barn, and continued until the defendant notified him of its refusal to abide by the contract. In its partial erection, and before such notification, the plaintiff had expended $65 for lumber, $60 for brick, $15 for labor, and $10 for lime, aggregating the sum of $150, no part of which was paid by the defendant. For the labor and the lime (necessarily a total loss), and the depreciation in the value of the lumber and brick by their partial use, the plaintiff demands the sum of $75. This did not include any speculative or prospective profits. It did not even amount to the bare outlay, but included only the actual loss in cash after allowing a reasonable sum for the value of the material that could be re-used.

We should remember that speculative damages are denied, not because there is no injury (*injuria*) of which the plaintiff can complain, but because the loss or damage (*damnum*) resulting from such injury is incapable of definite estimation. In the present case there is no difficulty in estimating the damage asked by the plaintiff for the breach of the contract by which the defendant induced him to alter his condition. Subtract the value of the remaining material from the amount already expended, and you have the actual damages by a mere arithmetical calculation.

If a party were to induce a lawyer or a doctor to visit a distant city under the promise of professional employment, and were then to
(290) refuse his services, I think the injured party would be entitled to recover his actual damages. The lawyer could not demand the speculative profits of a contingent fee; but why could he not recover his actual expenses incurred at the request of the defendant? It is true that the plaintiff does not allege that he was unable to complete the barn; but neither is there any evidence that he was able to complete it, or had any use for it if completed. Even if able to do so, no one would care to put money into a building which would be neither useful nor profitable, and which would necessarily deteriorate. I think the judgment should be affirmed.

FURCHES, J. I concur in the dissenting opinion.

Cited: S. v. Rhyne, 124 N. C., 853.

N. A. STONESTREET ET AL. v. E. FROST, ADMINISTRATOR OF W. STONESTREET ET AL.

(Decided 13 December, 1898.)

Administration Bond—Account and Settlement—Statute of Limitations—Sureties.

In an action upon an administration bond by the next of kin for an account and settlement within three years after a demand and refusal, the statute of limitations will not avail as a defense to the sureties nor to the personal representatives of deceased sureties upon the bond. The Code, sec. 155, sub-sec. 6.

CIVIL ACTION by the plaintiffs, next of kin of W. Stonestreet, deceased, v. E. Frost, administrator, and the sureties to his bond for an account and settlement and payment of their distributive shares of intestate's estate; tried before *McIver, J.*, at Fall Term, 1898, of DAVIE Superior Court, upon exceptions to report of referee.

The summons was, by leave of the court, amended so as to run (291) in the name of the State, on the relation of the plaintiffs. It was issued 30 August, 1894. There was evidence of a demand upon the administrator and a refusal by him to settle the same year, and before suit, so found by his Honor.

E. Frost qualified as administrator 5 March, 1877. He filed an inventory 3 September, 1877, and made no other returns, and mixed the estate funds with his own.

The referee reports a balance due from E. Frost, administrator, of $544.59, of which $488.14 bears interest from 5 March, 1879; $29.25 from 7 April, 1881, and $29.20 from 11 October, 1887.

The referee had reported in his findings as matter of law that the statute of limitations had barred the action upon the bond so far as the sureties were concerned, because although the plaintiffs had proved a demand and refusal before suit, yet they had failed to show that the action had been commenced within three years thereafter.

To this finding the plaintiffs excepted, and insisted that this action had been brought within the year after the demand and refusal. His Honor sustained the exception, and rendered judgment against the sureties, who excepted and appealed.

One of the sureties, P. H. Cain, has died, and the defendant J. M. Cain was his administrator, and had made a final settlement of his estate after due notice to creditors. He was included in the judgment rendered by his Honor, to which he excepted, and makes this exception an additional ground for appeal.

Watson, Buxton & Watson for plaintiffs.

(292) *Glenn & Manly, E. L. Gaither, T. B. Bailey, and Holton & Alexander for defendants (appellants).*

IN THE DEFENDANT'S APPEAL.

MONTGOMERY, J. Although the plaintiffs allege in their complaint that the defendant Frost, administrator, made neither the annual return and accounts of his administration under section 1399 of The Code, nor his final account under section 1402 of The Code, yet it is apparent upon the face of the complaint that the real breach of the administration bond complained of was the demand of the plaintiff *for an account and settlement* made on the administrator Frost for an account and settlement of the estate of his intestate, and for the payment of them as distributees of the amount in his hands to which they were entitled, and his failure and refusal to do so. From that time, then, the three years statute of limitations (The Code, sec. 155, subsec. 6) began to run in favor of the defendant sureties on the administration bond.

The referee to whom was referred the statement of the administration account found as a fact that there was no evidence going to show the date at which the demand and refusal was made, and that as a matter of law (the statute of limitations having been pleaded and the burden of proof having thereby been placed on the plaintiffs to show that the action was begun within three years after such demand and refusal, so far as the sureties were concerned), the action was barred by the statute of limitations as to the sureties. The plaintiffs filed an exception to these findings of the referee, in which exceptions they allege that there was testimony (that of N. A. Stonestreet, one of the plaintiffs) that

(293) a demand was made for the settlement in 1894, and that this action was commenced afterwards, on 30 August, 1894. His Honor sustained the exception and reversed the finding made by the referee that the statute of limitation was a bar to the action against the defendant sureties, and had judgment entered against the defendants Frost, administrator, J. R. Williams, Sr., one of the sureties, J. M. Cain, administrator of P. H. Cain, a deceased surety, W. R. Ellis, administrator of D. S. Tucker, another of the deceased sureties, C. L. Cook and Annie Cook, executors of Harrison Cook, another of the deceased sureties, and Mattie K. Clement, executor of W. B. Clement, another of the deceased sureties. From the judgment the defendant Williams and the other defendants who are the personal representatives of the deceased sureties appealed.

The alleged error in the judgment is that his Honor held that the cause of action against the appellant defendants was not barred by the statute of limitations.

The case shows that the evidence was before his Honor, and we must conclude by his having sustained the plaintiff's exceptions that he found, upon inspection of the evidence, that the plaintiff N. A. Stonestreet had testified that in 1894 he had made demand upon the administrator for a settlement of his administration, and that the administrator refused to make the settlement, and that upon that testimony his Honor found as a fact that demand for the settlement was made in 1894. We cannot review that finding, and consequently there was no error in his holding that the action was not barred by the statute of limitations as to the defendant Williams and the other defendants, the personal representatives of deceased sureties.

The defendant J. M. Cain, administrator of P. H. Cain, a (294) deceased surety, excepted to the judgment on the further ground that his Honor held that he was liable as administrator notwithstanding the admitted fact that he had made a final settlement of his intestate's estate, and after having given the notice required by law to creditors. There was no error in his Honor's ruling on that point and the exception to the judgment cannot be sustained. The liability of the intestate surety, as we have seen, is not barred by the statute of limitations. Notwithstanding that, the defendant J. M. Cain, administrator of P. H. Cain, has given notice to creditors according to law, and has made a final settlement of his intestate's estate, he is still administrator (though not personally liable for any part of the recovery in this action), and the plaintiffs have resorted to a proper remedy to ascertain the amount of their debt against the estate of one of the deceased sureties on the bond.

No error.

Cited: Self v. Shugart, 135 N. C., 188.

JAMES F. KERNER, ADMINISTRATOR OF R. B. KERNER, v. BOSTON COTTAGE COMPANY, W. E. FRANKLIN AND H. R. STARBUCK, TRUSTEES.

(Decided 13 December, 1898.)

Cloud on Title—Tax Title.

1. A tax collector has no right to receive anything in payment of taxes except legal tender money, unless the tax collector is instructed by competent authority to take county script, or other lawful indebtedness of the county for county taxes.

2. If the tax collector pays or accounts for the taxes under an agreement with the tax debtor to do so, this will discharge the tax and the lien; and he may recover the amount back from the tax debtor.

(295) THIS original action was instituted in November, 1894, in the Superior Court of FORSYTH County.

By an order in the cause W. H. Hendren was appointed receiver of the Boston Cottage Company and sold real estate claimed by the company, at public auction, to A. H. Eller, a director, who declined to pay for the same, alleging that one William Palmer was claiming the same under a tax title. Hendren, receiver, alleged that the tax had really been paid, when the land was sold for taxes in May, 1895, and that Palmer therefore had acquired no title, but that his claim threw a cloud upon the title of the company and prevented a sale by him, as receiver.

By order of the court, in the original case, an action was docketed and complaint and answer filed at May Term, 1898, in a case entitled: "W. M. Hendren, Receiver, v. William Palmer. Issue: 'Had the Boston Cottage Company paid all taxes due on the property in dispute before the sale thereof in May, 1895?'"

This issue was submitted to the jury at August Term, 1898, of Forsyth Superior Court by *McIver, J.*

The plaintiff introduced a tax deed from McArthur, Sheriff, to the defendant, dated August 5, 1896, for the land in controversy.

A. H. Eller, witness for plaintiff, testified: That on the day of sale he saw Sheriff McArthur and arranged with him that the land should not be sold for taxes by giving his note payable in 60 days, which the sheriff agreed to accept in place of the money. That he did not take any receipt from the sheriff, and that the tax receipt remained in the possession of the sheriff; that he had never paid the note, and (296) did not know the land was sold until after the deed to the defendant was put on record in August, 1896. He then tendered the sheriff the money, who declined to receive it.

Sheriff McArthur testified: That the tax was not paid when he made the sale; that he had no recollection of taking Mr. Eller's note, but did not deny it.

The defendant relied upon his tax deed, and contended that even if a note had been given by Mr. Eller and accepted by the sheriff, that this was not a payment, but a mere promise to pay.

The judge charged the jury: That if the sheriff accepted Mr. Eller's note in settlement of taxes for the year 1894 that this was payment.

Defendant excepted.

The jury responded to the issue in the affirmative. Judgment for the plaintiff, receiver.

Defendant Palmer appealed.

Watson, Buxton & Watson, and Shepherd & Busbee for defendant (appellant).

Jones & Patterson and Glenn & Manly for plaintiff.

FURCHES, J. This action as originally commenced was to remove a cloud from the title of plaintiff, under the statute of 1893. But by the answer of defendant and reply thereto by plaintiff, it seems to have been turned into an action of ejectment. It is not necessary, however, to further notice this apparent change, as it does not affect the rights of the parties so far as this appeal is concerned, and is not the point in the case.

The plaintiff claims that the title is in the Boston Cottage (297) Company and defendant claims that he is the owner under a sale for taxes, due by the Boston Cottage Company, and the sheriff's deed. The sale and deed by the sheriff to the defendant (the appellant, W. M. Palmer) were admitted by the plaintiff; but plaintiff alleges that the taxes under which the sale was made had been paid before the sale under which defendant claims title. This is the only question presented by this appeal.

It was admitted by the plaintiff that these taxes had not been paid in money, or any kind of lawful currency; but he alleged that A. H. Eller, as the agent of plaintiff, had seen McArthur, the sheriff of Forsyth County, on the morning of the sale, and that under an arrangement entered into between Eller and the sheriff, Eller gave the sheriff his promissory note for the taxes under which the land was sold, and the sheriff agreed not to sell.

This the plaintiff alleges was in law a payment, and asked the court so to instruct the jury, while the defendant contended that this was not a payment, and asked the court to so instruct the jury. The court declined to give the instructions asked by the defendant, and instructed the jury that if they should find "that before the land was sold, on 6 May, 1895, for the taxes of 1894," the sheriff accepted the note of A. H. Eller and Addison for the taxes due on the property of the Boston Cottage Company, saying the property would not be sold, and you find the sheriff accepted the note, it is the duty of the jury to answer the issue "Yes."

The issue was: "Had the Boston Cottage Company paid all the (298) taxes due on the property in dispute before the sale thereof in May, 1895?"

There was error in refusing the defendant's prayer for instruction, and in the instruction given. "A tax collector has no right to receive anything in payment of taxes except legal tender money." Black on Tax Titles, sec. 160.

"And the lien will not be discharged by any such payment." Ibid. But this may be otherwise where the tax collector is instructed by competent authority to take county script, or other lawful indebtedness of the county for county taxes. Ibid. The same doctrine is held by Judge Cooley. Cooley on Taxation (2d Ed.), 452. If the tax collector actually pays or accounts for the taxes under an agreement with the tax debtor to do so, this will discharge the tax and the lien; and the tax collector, paying the tax, may recover it back from the tax debtor. Cooley, *supra.*

It was stated during the argument that the property in controversy was bid in by the county of Forsyth at the sale in May, 1895, and this bid was afterwards assigned to the defendant. But as this question is not presented by the record and seems not to have entered into the consideration of the trial below, we do not consider it on this appeal. There is error for which a new trial is ordered.

New trial.

Cited: S. c., 126 N. C., 357.

(299)

MRS. C. JAMES, ADMINISTRATRIX OF W. A. JAMES, v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

(Decided 6 December, 1898.)

Jurisdiction of the Supreme Court.

1. The Supreme Court has no power to change or modify its judgments rendered at a former term, except where they have been issued by mistake or inadvertence, and in such case they may be altered so as to speak the truth.

2. The Supreme Court being strictly an appellate court (except as to claims against the State), its jurisdiction is acquired only by reason of the appeal.

3. When the Supreme Court has certified its decision to the court below for judgment there, this Court has no further jurisdiction of the case.

MOTION, on affidavit, in the Supreme Court by plaintiff for a rule on defendant and its attorneys of record in this case to show cause why execution should not issue from this court to enforce the judgment in this action, to be levied by the marshal, and for an order restraining them from obstructing the enforcement of the execution.

This case was decided at September Term, 1897, and reported in 121 N. C., 523, 530.

AFFIDAVIT.

Lee S. Overman, B. F. Long and A. C. Avery, each being severally sworn, maketh oath:

1. That after the judgment in this court in the above entitled action had been certified to the Superior Court in Rowan County, the plaintiff, under the advice of affiants that the property of the defendants therein could not be subjected by an execution at law, brought suit in the Superior Court of Rowan County on behalf of the creditors of (300) said company and asked for an order to issue to the said defendant to show cause why a receiver should not be appointed, for reasons therein set forth, to take charge of the franchise and property of the defendant to the end that its income might be sequestered and its equitable assets subjected to the payment of its debts.

2. That thereupon the defendant, through its attorneys, brought a suit in equity in the name of the Southern Railway Company and The Central Trust Company of New York, as plaintiffs, in the Circuit Court of the Western District of North Carolina, to enjoin and restrain the plaintiff from proceeding in the said suit in Rowan, or by execution issuing upon her said judgment in the Superior Court of Rowan County to enforce the collection of the said judgment of this court which had been duly certified, and became a judgment final in the court below regularly by certificate from this Court.

3. That the Honorable Charles H. Simonton, Circuit Judge of the Fourth Circuit, and a *nisi prius* judge, granted first a temporary restraining order, and, upon the return day, an order enjoining plaintiff, till the hearing of said cause, from proceeding in any way in said Superior Court in Rowan County to enforce the judgment of this court, or to subject the property of the defendant to the payment of her said judgment.

4. That the plaintiff appealed from the said order to the Circuit Court of Appeals for the Fourth Circuit at Richmond where said appeal is now pending, and affiants are ready to procure a copy of the transcript of said appeal and to identify the same as genuine.

5. That said plaintiff and her said attorneys have been threatened with attachment and punishment for contempt, as they are informed, if they should take any steps to enforce said judgment (301) of their said client in said Superior Court of Rowan County.

Wherefore they ask, in behalf of said plaintiff, such orders in the premises as to this court may seem just, to protect the integrity of the judgment of this court and the rights of the said plaintiff.

B. F. LONG,
LEE S. OVERMAN,
A. C. AVERY.

Lee S. Overman, A. C. Avery and B. F. Long, each being duly sworn, maketh oath severally that the facts set forth in the foregoing affidavit are true. Sworn to and subscribed to before me November 16, 1898.

THOS. S. KENAN,
Clerk Supreme Court of N. C.

MOTION.

The plaintiff moves the court that an order issue in this cause to be served on said company and on Messrs. Charles Price and G. F. Bason, its attorneys of record in the above-entitled cause:

1. To show cause at 10 a.m. on Saturday, 19 November, 1898, before this Court why an order shall not be made that execution issue to enforce the judgment of this Court therein, and why the Marshal of this Court shall not be entrusted with the duty of levying said execution and enforcing the order of this Court.

2. To show cause why the Western North Carolina Railroad Company and its agents and attorneys shall not be required to desist from obstructing the enforcement of the mandates of this Court and disregarding its authority.

(302) 3. To show cause why the said company and its agents and attorneys shall not be enjoined and restrained from in any way interefering with or obstructing the enforcement of the said judgment of this Court by levying the execution issuing therefrom or otherwise.

A. C. AVERY,
B. F. LONG,
LEE S. OVERMAN,
Attorneys for Plaintiff.

NOTICE.

To Charles Price, Esq., Counsel for Defendant:

You are hereby notified that the foregoing motion will be made *ore tenus* on the opening of the Court on Thursday, 17 November, 1898, at 10 o'clock a.m.

A. C. AVERY,
LEE S. OVERMAN,
B. F. LONG,
Attorneys for Plaintiff.

16 November, 1898.

A true copy:

THOS. S. KENAN,
Clerk Supreme Court.

A. C. Avery, L. S. Overman and B. F. Long for plaintiff.
Charles Price for defendant.

FURCHES, J. This action was commenced in the Superior Court of Rowan County to recover damages for defendant's negligently killing the plaintiff's intestate. Upon the trial in the court below it was found that the plaintiff's intestate was killed by the negligence of the defendant, and the jury assessed the damages at $15,000. But the court being of opinion that the plaintiff was not entitled to judgment (303) against the defendant, refused to sign a judgment in her favor, and gave judgment against the plaintiff for costs. From this judgment the plaintiff appealed to this Court, where the judgment of the court below was reversed, and the case certified to that court for judgment. *James v. R. R.,* 121 N. C., 524. Upon the opinion of this Court being certified to the Superior Court of Rowan, the plaintiff at February Term, 1898, recovered judgment against the "Western North Carolina Railroad" for $15,000. Thereupon S. T. Pearson and Clemye James, Administratrix of W. A. James (Clemye James being the plaintiff in the action for damages mentioned above) commenced an action against the Western North Carolina Railroad Company, and, in their complaint, they style themselves creditors of said railroad company, and that they bring this action not only for themselves, but for the benefit of all other creditors of said railroad company, who make themselves parties plaintiff and contribute to the expense of its prosecution.

This complaint alleges that S. T. Pearson is the owner of one original share of stock in said road, and that Clemye James, as administratrix of W. A. James, is a creditor who "recovered judgment in the Superior Court of Rowan County against the defendant, The Western North Carolina Railroad Company, which bears date 21 February, 1898, for the sum of $15,000 and costs of action, brought for the negligent killing of her intestate, William A. James, and plaintiffs are advised, informed and believe that said judgment constitutes a lien upon the franchise and property of said company superior to the lien of either of said mortgages, even though the said mortgages should be declared valid liens."

The above quotation is paragraph 17 of the complaint, and the (304) reference made therein to mortgages refer to mortgages previously mentioned in the complaint.

The said plaintiff alleged that she could not enforce the James judgment by execution; that the defendant had assets that might be enforced in equity, and asked for an order of sequestration, and for a receiver.

Upon the filing of this complaint, the Central Trust Company of New York brought a proceeding in the Circuit Court of the United States, in which it alleged that the said railroad, roadbed, franchise and rolling stock had been sold under an order of the Circuit Court of the United States, at which sale the Southern Railway Company (a Virginia cor-

poration) had become the purchaser; that said Southern Railway Company borrowed large amounts of money from it, and have mortgaged or conveyed said property to it in trust to secure the payment of said money, and interest, so borrowed; and asked for an injunction against the plaintiffs, their agents and attorneys, restraining them from further prosecution of their suit, which motion (upon notice) was granted by the said Circuit Court of the United States, enjoining and restraining the plaintiffs, S. T. Pearson and Clemye James, their agents and attorneys, from further proceeding with or prosecuting their said suit.

The matter now before this Court was brought to our attention by an affidavit, filed by the attorneys of Clemye James on 16 November, 1898, in which the facts herein above set forth (as to the James judgment) are substantially recited; and, attached to this affidavit is a notice to the attorneys of The Central Trust Company to appear on the 19th (which was changed by the court to the 25th) of November and to show cause:

(305) 1. "Why an order shall not be made that an execution issue to enforce the judgment of this Court therein, and why the Marshal of this Court shall not be entrusted with the duty of levying said execution and enforcing the order of this Court."

2. "To show cause why the said Western North Carolina Railroad Company and its agents and attorneys shall not be required to desist from obstructing the enforcement of the mandates of this Court, and disregarding its authority."

3. "To show cause why the said company and its agents and attorneys shall not be enjoined and restrained from in any way interfering with or obstructing the enforcement of the said judgment of this Court by levying the execution issuing therefrom, or otherwise."

Service of this notice was accepted by the attorneys of the "Central Trust Company of New York."

During the argument the counsel for Mrs. James submitted (in addition to the motions mentioned in the notice to The Trust Company) a motion for judgment in this Court, to be entered *nunc pro tunc,* in the case of James v. The Western North Carolina Railroad Company.

However much this Court might be disposed to protect its judgments and any legal process issuing thereon, from unlawful interference by other courts, obstructing the same, it cannot do so in this case, even should the interference and obstruction be unlawful.

The judgment which the movers alleged has been unlawfully interfered with, and its enforcement to have been obstructed, is not a judgment of this Court, but the judgment of the Superior Court of Rowan County.

This is distinctly alleged in the 17th paragraph of plaintiff's (306) complaint, in the action of S. T. Pearson and Clemye James v.

The Western North Carolina Railroad. It is there alleged that she "recovered judgment in the *Superior Court of Rowan County* against the defendant, The Western North Carolina Railroad Company, which bears date 21 February, 1898."

The case of *James v. R. R.* was heard on appeal at September Term, 1897, of this Court, when the judgment of the court below was reversed. Upon the opinion in that appeal being filed, judgment was entered here against the defendant company for costs, and that the opinion be certified to the court below to the end that the court below might proceed to judgment. This was done and that court proceeded to judgment at February Term, 1898, as we have seen. This Court has no power to change, alter or modify its judgments rendered at a former term of the Court. *Moore v. Hinnant,* 90 N. C., 163; *Cook v. Moore,* 100 N. C., 294; *Murphy v. Merritt,* 63 N. C., 502. An exception to this rule is where the judgment has been erroneously rendered by mistake or by inadvertence. In such cases it may be altered so as to make it speak the truth—to make it in fact the judgment of this Court. *Moore v. Hinnant* and *Cook v. Moore, supra.*

This Court is strictly an appellate Court, with the exception as to claims against the State. It only acquired jurisdiction in the case of James v. The Western North Carolina Railroad Company by reason of the plaintiff's appeal. The purpose of this appeal was to have the rulings of the court below reviewed upon questions of law, presented by the record of the trial below; and when this was decided and certified to the court below for judgment there, the purposes for which the appeal was taken were ended, and this Court had no further (307) jurisdiction of the case. The legal link or string that brought the case to this Court was cut, and it went back home to the Superior Court of Rowan, and that court proceeds with the case upon its original jurisdiction, instructed by this Court as to the law involved in the appeal.

We cannot adopt the suggestion of counsel, made during the argument, to enter judgment here in the James case *nunc pro tunc,* for the reason that we have heretofore, at September Term, 1897, entered a judgment. And we have no power to enter another judgment in the case. *Moore v. Hinnant, supra.*

It was contended by counsel for James that this Court had a supervisory power over the Superior Courts, and could compel them, by *mandamus* and by other writs, to observe and obey the judgments and orders of this Court. This is true, but no action or order of the Superior Court has been called to our attention, of which Mrs. James can or does complain.

In the course of the argument, the complaint in the case of Pearson and James was called to our attention and discussed by counsel, as also was the complaint in the case of The Central Trust Company, filed in the Circuit Court of the United States; and the opinion of that court and the orders made therein were also called to our attention and discussed by counsel. But none of these matters are before us in such a way as to authorize us to discuss them, and we do not. We have no more right to review the opinion of the Circuit Court than it has to review the opinion of this Court, and we do not. While we see no reason for changing our opinion in James v. Western North Carolina Railroad, that matter is not now before us for our consideration.

(308) The rule to show cause must be discharged at the cost of the plaintiffs in said rule.

Rule discharged.

COMMISSIONERS OF WILKES COUNTY v. CLARENCE CALL, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY ET AL.

(Decided 9 November, 1898.)

County Bonds—Railroad Stock—Invalidity—Estoppel.

1. Legislation authorizing the creation of county indebtedness must conform to constitutional requirements.

2. A county bond stating on its face the act under which it is issued is notice to the holder, and estops him from controverting the statement.

CIVIL ACTION pending in WILKES Superior Court and heard by consent before *Starbuck, J.*, at Winston, upon a motion by defendants to vacate the restraining order heretofore granted until the final hearing.

The prayer of the complaint was to enjoin the defendant, County Treasurer of Wilkes, from paying the coupons on county bonds issued in aid of the Northwestern North Carolina Railroad Company on the ground that the bonds in controversy were issued by the Board of Commissioners of Wilkes County, without lawful authority so to do, and are invalid and void.

His Honor refused the motion to vacate the restraining order, and defendants excepted and appealed.

The statement of the case fully appears in the opinion of the Court and in the dissenting opinions.

(309) *A. C. Avery for plaintiffs.*
No counsel contra.

DOUGLAS, J. This is an action brought to test the validity of certain bonds issued by Wilkes County in payment of its subscription to the

stock of the Northwestern North Carolina Railroad Company. The suit was brought by the Commissioners of the county of Wilkes against the County Treasurer. The defendants Turner and Wellborn, who had become the owners of one of the bonds after the bringing of this action, by leave of the court, became parties defendant, and invited all other bond-holders to come in and join them in resisting the action.

In the face of each bond, dated 1 October, 1889, appears the explicit statement that: "This bond is one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified 20 February, A.D. 1879, entitled, 'An Act to amend the charter of the Northwestern North Carolina Railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth County, up the Yadkin Valley, by Wilkesboro, to Patterson's Factory, Caldwell County,'" etc. The bond does not allude in any way to any other legislative act, nor does it profess to claim further validity than that derived from the recited act.

It is admitted, as well as clearly shown by the evidence, that this act of 20 February, 1879, was not passed in accordance with the mandatory provisions of the Constitution of this State, as construed by this Court inasmuch as upon the passage of said bill upon its second reading in the House of Representatives, there was no call of the ayes and noes, and further that the vote upon such reading was not re- (310) corded in the Journal of the House. Constitution, Art. II, sec. 14. The amendatory act of 1881 is subject to the same objection. In view of the recent decisions of this Court it is useless to discuss this question now, as the rule has been definitely settled in the following cases: *Bank v. Commissioners of Oxford,* 119 N. C., 214; *Commissioners v. Snuggs,* 121 N. C., 394; *Charlotte v. Shepard,* 120 N. C., 411 and 122 N. C., 602; *Rodman v. Town of Washington,* 122 N. C., 39. Under the authority of these decisions we are compelled to hold that the entire issue of these bonds is null and void for want of legislative authority. An act of the Legislature passed in violation of the Constitution of the State, or in disregard to its mandatory provisions, is to the extent of such repugnance absolutely void; and all bonds issued thereunder bear the brand of illegality stamped upon their face by the hand of the law.

The act under which these bonds profess to have been issued was never legally passed and never became a law. As was said in *Norton v. Shelby County,* 118 U. S., 425, "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The Constitution of the State is plenary notice to the world of its organic law. There can be no *bona fide* holders of unconstitutional obligations, nor can ignorance of public statutes and legislative journals be deemed otherwise than willful or negligent. The journals are published for the information of the public, and are widely distributed and easily accessible, fully as much so as the public records of a
(311) county. Surely no one would be heard to say that he was the *bona fide* owner of a piece of land simply because he held a deed therefor, when an inspection of the records would show that his grantor had no power to convey. It has been well said in *U. S. v. Macon County Court,* 99 U. S., 582, "The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not infrequently been *gross carelessness* on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound."

A careful distinction should be drawn between the want of power to issue bonds, and mere irregularities in the exercise of that power. The latter, under certain circumstances, may be cured by recitals, or eliminated by estoppel; but a want of power goes to the very root of the transaction, and destroys its vitality. A tree may yet live though its branches are badly shattered by the storm, but the last leaf falls when the root is dead.

This rule has been clearly laid down by the Supreme Court of the United States in the oft-cited case of *Anthony v. County of Jasper,* 101 U. S., 693, where Chief Justice White says: "Dealers in municipal bonds are charged with notice of the laws of the State granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created. When the
(312) bonds now in question were put out the law required that to be valid they must be certified to by the Auditor of State. In other words, that officer was to certify them before their execution was complete, so as to bond the public for their payment. We had occasion to consider in *McGarrahan v. Mining Co.,* 96 U. S., 316, the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: 'Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. *Neither is directory, but all are*

mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires.' The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent."

By repeated adjudications this has become the settled rule of that court. *Police Jury v. Britton,* 82 U. S., 566, 570, 572; *Claiborne County v. Brooks,* 111 U. S., 400, 406; *Bank v. Porter Township,* 110 U. S., 608, 618; *Concord v. Robinson,* 121 U. S., 165, 167; *Kelley v. Milan,* 127 U. S., 139, 150; *Norton v. Dyersburg,* 127 U. S., 160, 175; *Young v. Clarendon Township,* 132 U. S., 340; *Hill v. Memphis,* 134 U. S., 198, 203; *Merrill v. Monticello,* 138 U. S., 673, 686, 687; *City of Brenham v. Bank,* 144 U. S., 173; *Savings Asso. v. Perry County,* 156 U. S., 692, 704.

But it is urged that while the bonds were expressly issued under the act of 1879, there was, apparently unknown to both parties to the transaction, and certainly ignored by them, an existing authority (313) to issue said bonds derived from an ordinance of the Constitutional Convention passed in 1868; and that therefore we should hold that these bonds were unwittingly issued under that ordinance, and are therefore valid. The only authority we can find in that ordinance in any way authorizing the subscription to the stock of the company or the issuing of the bonds, is as follows: "Section 2. That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars." "Section 12. Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor, or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the *same manner and under the same rules, regulations and restrictions* as are set forth and prescribed in the act incorporating the North Carolina and the Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company." That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons: First. We do not see that any authority whatever is given or attempted to be given by either of these sections, to Wilkes County to subscribe to the capital stock of this company. But it is said that section 12, by referring to the charter of the "North Carolina and Atlantic Railroad Company," by which we presume is meant the Atlantic and North Carolina Railroad, chapter 136 of the Laws of 1852, confers upon the different counties, through or near

(314) which the Northwestern North Carolina Railroad may run, the same authority to subscribe as was given to the counties tributary to the former company. Said section does not refer generally to the act of 1852, nor does it profess to confer any of the powers therein granted. It simply says that those counties and towns that do subscribe "shall do so in the *same manner and under the same rules, regulations and restrictions*" as are prescribed in the former act. The words "same restrictions" are peculiarly significant here, as the act of 1852, sec. 45, provides in express terms that "if the said road be not *completed* within six years after the ratification of this act, *this charter shall be forfeited.*" Therefore, even if the powers granted in the act of 1852 had been given to the Northwestern North Carolina Railroad Company or the counties in its interest, subject to the "same restrictions," those powers would have expired by their own limitation long before their attempted exercise 23 years thereafter. As all such powers must be strictly construed, this restrictive provision must be held to be in the nature of a limitation and not a condition subsequent. That is, the authority given to the counties to subscribe, if it ever existed, expired at the end of six years unless already exercised in such a way as to create vested rights. But it makes no difference how the power was exercised, if there was no power. Section 12 of the ordinance of 1868 does not refer to section 33 of the act of 1852, which confers the power, but is evidently limited by its very terms to sections 34, 35, and 36, which prescribe the *manner* in which that power must be exercised by the counties or towns to which it may have been granted. It would have been very easy for the convention to have given the same authority granted in section 33, either in express terms or by reference to said section, but it has not done
(315) so, and we cannot do so by judicial construction. There is no principle better settled than that all charters granting special privileges or powers must be not only strictly construed, but must be construed most strongly against the grantee. This rule, with the reasons therefor has been so clearly stated by *Chief Justice Pearson* in *R. R. v. Reid,* 64 N. C., 155, 158, that we can do no better than to quote his language, as follows: "It is equally well settled that contracts made by the State with individuals, in granting charters, are not to be construed by the same rule as contracts between individuals. In the latter case the rules of common law, which is the same as common sense, is 'words are to be taken in the strongest sense against the party using them,' on the idea that the said interest induces a man to select words most favorable for himself. It is otherwise where the State is a party; for it is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individuals seeking to procure the grant, and that 'the promoters,' as they are styled

in England, or the 'lobby-members,' as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes; and a matter of this kind, instead of being in its strict sense a *contract,* is more like the act of an indulgent head of the family dispensing favors to its different members and yielding to importunity. So the courts, to save the old gentleman from being stripped of the very means of existence by sharp practice, have been forced to reverse the rule of construction, and to adopt the meaning most favorable to the grantor." The same rule is laid down in *R. R. v. Canal Comrs.,* 21 Pa. St. Rep., 9, 22, where *Chief Justice Jeremiah S. Black* says for the Court: "It may be that the privilege which the (316) relators claim might arise by implication out of their charter or some other acts cited by their counsel, if we were at liberty to give them the broad construction which we sometimes apply to other laws of a different character. But corporate powers can never be *created by implication nor extended by construction.* No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the Legislature in a manner too plain to be misunderstood. When the State means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory, when they do find their way into the enactments of the Legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This Court has asserted it times without number. We have ruled five or six important cases upon it within the last year. We seem not to have made much impression on the professional mind, and we are probably making as little now. But when respectable counsel call upon us hereafter (as they doubtless will) to enlarge corporate powers by construction, we can only repeat again and again that our duty imperatively forbids it. The privileges of the Pennsylvania Railroad Company may be too rigidly restricted. If the usefulness of the company would be increased by extending them, let the Legislature see to it. But let it be remembered that *nothing but plain English words* (317) *will do it.*"

It should be borne in mind that there is no pretense of authority for the issue of these bonds outside of the charter of the Northwestern North Carolina Railroad Company and its amendments. It has been the actor

as well as the beneficiary throughout, and therefore the acts under consideration come peculiarly within the rule of strict construction laid down by the two great *Chief Justices* from whom we have quoted.

We have not overlooked the fact that in *Belo v. Comrs.*, 76 N. C., 489, this Court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the act of 1852; but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497 that "as the case is presented to us, that question does not arise, and we do *not* decide it." It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The Court stated that "the principle of equitable estoppel is a most important element in the transaction," and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel *in pais* upon the county of Forsyth.

Can it be questioned that estoppels must be mutual, and that he
(318) who relies upon the recitals in the bond to estop another must himself be bound by them? If this is so, it ends the case at bar, as all the recitals point to the unconstitutional act of 1879. The case of *Hill v. Comrs.*, 67 N. C., 367, considering simply the power of the Legislature to authorize the issue of bonds, has no bearing upon the present case. The Forsyth County bonds recited that *they* were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County at June Term, 1868, and reënacted and ratified and confirmed by an act of the General Assembly ratified 11 August, 1868." The cases are clearly distinguishable. Another important point of difference is that the Forsyth County bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation. It is evident that the Legislature, as well as the railroad company itself, thought that the authority given in the ordinance was not sufficient, as in both cases additional legislation was sought and obtained. But with this essential difference: In the case at bar, the amendatory act having been passed in violation of mandatory provisions of the Constitution, in legal contemplation, was never passed. As it has no legal existence, we have no authority to construe it, but simply to obliterate it. In *Jarratt v. Moberly,* 103 U. S., 580, 588, the Court in discussing a similar case says: "Further legislation was needed. Such was the evident opinion of the Legislature of the state, for by an addi-

tional act, passed on 29 March, 1872, the authority was given in terms." And on page 685 it says: "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it (319) was aimed."

Secondly. The bonds on their face profess to have been issued under an entirely different statute.

The principle laid down by the Federal authorities, and practically of universal acceptance, is that estoppels rest upon the recitals in the bond. The rule is generally cited as laid down in *Town of Colonia v. Eaves,* 92 U. S., 484, as follows: "When legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds, in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, *made in the bonds* issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality; *for the recital is itself a decision of the fact by the appointed tribunal." Buchanan v. Litchfield,* 102 U. S., 278; *Bank v. Porter,* 110 U. S., 608, 616.

In the case at bar the bonds recite that they were issued under the act of 1879; and as all estoppels of this nature to be operative must be mutual, are not the bondholders themselves estopped from setting up any facts to the contrary? These recitals point out the very act under which the power is claimed, and it was the duty of all persons claiming thereunder to see that the act met the constitution requirements.

Certainly the estoppel can never go further than the recital itself. It cannot operate upon any other act, nor as to the validity of any act. In *Gilson v. Dayton,* 123 U. S., 59, it was held that, "As it (320) appears on the face of the bonds sued on in this action that they were issued under the special act of 18 February, 1857, which was held void in *Post v. Supervisors,* 105 U. S., 667, and not under the general law of 6 March, 1867, the judgment dismissing the action is affirmed." As was said in *County of Davies v. Huidekoper,* 98 U. S., 98, 100: "There must indeed be power, which if formally and duly exercised, will bind the county or town. No *bona fides* can dispense with this, and no recital can excuse it." In *Dixon County v. Field,* 111 U. S., 83, 92, it was held that the estoppel arising from recitals, in the face of the bonds, never extended to or covered matters of law, and could arise only "upon matters of fact which the corporate officers had authority to determine and to certify."

Thirdly. That ordinance did not create a contract between the railroad company and the county of Wilkes. The only contract that has ever existed between them was the contract of 1888, which was subject to all the constitutional provisions then existing. The mere authority given in the charter of a railroad company to receive subscriptions from municipal corporations, where no consideration is given and no attempted exercise of the power, has none of the essential elements of a contract, and is held at the pleasure of the law-making power. Much more so is it subject to constitutional restrictions. *Town of Concord v. Bank,* 92 U. S., 625, 630; *Concord v. Robinson,* 121 U. S., 165, 169; *Loan Asso. v. Perry County,* 156 U. S., 692, 697. *Concord v. Bank, supra,* was overruled in *Fairfield v. Gallatin,* 100 U. S., 47, only in so far as it applied to the Constitution of Illinois, and for the only reason that the Supreme Court of the United States deemed it proper, in the construction of a State Constitution, to follow the State decisions
(321) instead of their own view of the law. The general principle remains unchanged, and meets our approval.

The ratification of the Constitution on 24 April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Article II, section 14, is as follows: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal." Article VII, section 7, is as follows: "No county, city, town, or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein."

The intention of the Constitution is obvious. Profiting by the sad experience of other states, it intended to restrict the granting of public aid, and to hold to the strictest accountability every member of the Legislature who assisted in such grant by forcing him to twice record his vote on the Journal, where it would be open to public inspec-
(322) tion. It further intended that every such grant should be the deliberate and intelligent act of the Legislature itself as well as of the community affected thereby. It is our duty to give to these salutary provisions that just construction, required alike by the rules of law and

of common sense, that will effectuate and not destroy their beneficial purpose. This view we think is sustained by the uniform decisions of the Supreme Court of the United States, the only tribunal before which this decision can ever lawfully come for review. In *Wadsworth v. Supervisors,* 102 U. S., 534, 537 (citing and reaffirming *Aspinwall v. Comrs. of Davies County,* 22 How., 364), the Court says: "We held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds, and that a subscription was necessary to create a contract binding the county to issue bonds in payment of the stock, and binding the company to receive stock for the bonds. 'Until the subscription is made,' said *Mr. Justice Nelson,* speaking for the whole Court, 'the contract is unexecuted and obligatory on neither party.' Hence the new State Constitution was held to govern the case, and from the time of its adoption to have withdrawn from the county commissioners all authority to make subscriptions to the stock of incorporated companies, except in the manner and under the circumstances prescribed in that instrument." In *Norton v. Brownsville,* 129 U. S., 479, 490, *Chief Justice Fuller,* speaking for the entire Court, says: "These cases (referring to *Concord v. Savings Bank,* 92 U. S., 625; *Falconer v. R. R.,* 69 N. Y., 491; *R. R. v. Falconer,* 103 U. S., 821; *Wadsworth v. Supervisors,* 102 U. S., 534, and *Aspinwall v. Comrs.,* 22 Howard, 364) sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the Legislature and a (323) constitutional inhibition upon the municipality itself. In the former case, past legislative action is not necessarily effective, while in the latter it is annulled. Of course, if an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therewith, and this was furnished in this instance by the first section of Article II, but such a provision does not perpetuate any previous law, enabling a municipality to do that which it is subsequently forbidden to do by the Constitution. The inhibition being *self-executing* and operating directly on the municipality, and not in itself enabling the latter to proceed in accordance with the rule prescribed, *further legislation is necessary before the municipality can act.*" In the late case of *R. R. v. Texas,* 170 U. S., 226, it is held that "a clause in a charter of a railroad company granting it power to consolidate with or become the owner of other railroads, is *not* such a vested right that cannot be rendered inoperative by subsequent legislation passed before the company avails itself of the power thus granted." It is useless to cite the cases themselves cited in the cases referred to herein.

It is further urged on the part of the defendants and those whom they represent that the issuing of these bonds was authorized by sections

1996 to 2000 of The Code. This question was definitely settled in *Comrs. v. Snuggs,* 121 N. C., 394, 400, 401, and we see no reason to reverse our ruling, nor do we find any facts taking this case from its operation. We can add nothing on this point to what was therein so fully and ably said in the opinion of the Court, except to say that (324) if the construction contended for by the defendants must be placed upon those sections, then they are in direct violation of the letter and spirit of the Constitution, inasmuch as they practically annul one of its essential provisions. If the word "uncompleted" can refer to any road not yet begun, and the word "interest" apply to a mere friendly feeling or supposed advantage to be derived from the general building up of the country, then the several counties may go on forever subscribing unlimited amounts to any railroad *in esse* or *in futuro* that may be located within the range of their knowledge. Such a construction would simply nullify the Constitution by making its explicit restrictions vain and worthless. It cannot be adopted by us, but if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books. While the Legislature may, in individual cases, grant to specific counties the necessary authority in accordance with the provisions of the Constitution and subject to its restrictions, it cannot, by a sweeping act of unlimited application, utterly destroy its operation. If the Legislature or the railroad company or the county had placed any such construction on those sections, additional legislation would have been deemed useless, and the recitals in the bonds would have been different. It is true that this road had been begun and was in one sense uncompleted when the subscription was made, but it was *not* begun when the Constitution was ratified, and the county at that time had no pecuniary interest in it, nor any interest contemplated by the statute.

It is not necessary for us to consider the fact that the first section of the road had been completed to Winston, beyond which all idea of extension seems for years to have been abandoned. The act of 1881 has (325) no reference to the bonds in question, and is subject to the same objections as the act of 1879, which we have been discussing.

We have given this case the most thorough investigation and careful consideration on account of the important principles and the large amount involved. We deeply deplore the fact that many parties must suffer, who are in morals, if not in law, innocent holders of the bonds, but their loss comes from their misplaced confidence in those from whom they received the bonds, and the negligence of the corporation to which the power was professedly given and the bonds were issued. The only authority for their issue is found in a railroad charter, and we cannot undertake to validate defective or unconstitutional legislation by judicial

construction. The suggestion of repudiation, so strongly urged here and elsewhere, has no weight with us. The so-called repudiation of an unconstitutional obligation is a contradiction in terms, and its assertion amounts simply to a moral and legal absurdity.

It has been said that the usual difference between heterodoxy and orthodoxy is the difference between your doxy and my doxy, and that in financial ethics the same distinction exists between stealing and financiering. This distinction we cannot endorse. It is just as wrong to wring from an unwilling and perhaps a suffering debtor an unjust debt as it is to deprive a creditor of a just debt. We will try to do neither, but will hew to the line. The strictly moral aspect of the case is not before us, but it is possible that the plaintiffs, representing an honest, industrious and intelligent people, may have reasons for their action as strong in morals as in law. (326)

Enough appears to indicate, what is common knowledge, that the stock for which these bonds were issued has been swept away in the maelstrom of corporate reorganization. It may be that the plaintiffs, deprived of every vestige of consideration by the decree of a court of equity, may not feel any moral obligation beyond the strict letter of the law. They may see no difference between repudiation and reorganization when both accomplish the same result, to retain the benefit and shift the burden.

In *Lewis v. Pina County,* 155 U. S., 54, 58, it was held that bonds issued under an act of the Legislature of the territory of Arizona, which was in violation of the Revised Statutes of the United States, were *void,* and *"created no obligation against the county which a court of law can enforce."* In the carefully considered case of *Brenham v. Bank,* 144 U. S., 173, 182, 188, the Court says: "It is easy for the Legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the *well-settled rule that any doubt as to the existence of such power ought to be determined against its existence,* it ought not to be held to exist in the present case. . . . As there was no authority to issue the bonds, even a *bona fide* holder of them cannot have a right to recover upon them or their coupons." Citing *Marsh v. Fulton County,* 10 Wall., 676; *East Oakland v. Skinner,* 94 U. S., 255; *Buchanan v. Litchfield,* 102 U. S., 278; *Hayes v. Holley Springs,* 114 U. S., 120; *Davies County v. Dickinson,* 117 U. S., 657; *Hopper v. Covington,* 118 U. S., 148, 151; *Merrill v. Monticello,* 138 U. S., 673, 681, 682.

It has been suggested that the defense in this case has been only (327) colorable, as but one of the bonds was represented. Under the circumstances we think that was sufficient. An elaborate answer, evidently prepared by able counsel, has been filed, presenting every reason-

able defense; and while no argument was made before us for the defendants, every phase of the case has been carefully examined by us in the five months during which we have held it under advisement. The plaintiffs had no means of knowing who held the bonds, as they are payable to bearer and pass from hand to hand without endorsement or registration. The bondholders themselves could have become parties at any stage of the proceedings, and would have been gladly heard by us; but the mere fact that they deliberately refrained from any participation in the defense when they had every opportunity of doing so should not deprive the plaintiffs of all power to protect the rights of the people they represent in a court of competent jurisdiction, where alone this action could be brought by them.

The current of authority from other states sustains the conclusions we have reached in this case, but owing to the large number of cases, we have thought it best to cite only from our own decisions and those of the Supreme Court of the United States.

For the reasons stated in this opinion, the judgment of the court below is

Affirmed.

FURCHES, J., dissenting: On 9 March, 1868, the Constitutional Convention of North Carolina passed an ordinance, chartering and authorizing the formation of a corporation, to be known as the "Northwestern North Carolina Railroad Company." Under this charter said (328) company was formed and organized, and on 25 March, 1868, the county of Forsyth subscribed $100,000 to said corporation, which subscription was held to be valid in *Hill v. Comrs.*, 67 N. C., 367. In payment of this subscription the county of Forsyth issued coupon bonds to the amount of $100,000 and they were held to be valid against the county in *Belo v. Comrs.*, 76 N. C., 489, and the work of constructing said road between Greensboro in the county of Guilford and Winston in the county of Forsyth was commenced. This part of the road was completed and put into operation within the next few years, and has continued to be run and operated ever since.

This charter made Winston a point to which the road should run, west of its starting point on the North Carolina Railroad. From this point (Winston) it was authorized to build branch roads, but none were built until 1887, when the company proposed to build a branch of its road from Winston to or near Wilkesboro in Wilkes County, provided Wilkes County would make a subscription of $100,000 to the capital stock of said company.

This proposition to subscribe $100,000 to the capital stock was submitted to the qualified voters of said county, by the commissioners

thereof, the vote taken, a majority of the whole qualified voters of said county voted for the subscription. The subscription was made and the road built to Wilkesboro in compliance with the agreement of the railroad company and the bonds now asked to be declared invalid were issued by the county, delivered to the railroad company, and the interest thereon regularly paid until the commencement of this action. All these facts are shown by the record and are admitted to be true. But there having been a change in the personnel of the board of commis- (329) sioners since said bonds were issued, and since said road was built, this new board is seeking in this action to repudiate the action of the former board.

I understand the court to rest its opinion on two grounds—the want of power in the commissioners to submit the proposition to the voters and to issue the bonds; and the doctrine of estoppel. If there is error in these positions, I shall contend that the conclusion to which the Court has arrived is erroneous and should be reversed.

I admit that if the commissioners had no legislative authority to submit the proposition of subscription to the voters of Wilkes, that these bonds are void and the judgment of the Court is correct. But I propose to show that they had this authority, and that the bonds are valid.

The charter (the ordinance of the Convention) in express terms makes the charter of the Atlantic and North Carolina Railroad Company a part of the charter of the Northwestern North Carolina Railroad Company, so far as it relates to the subscription of counties to the capital stock of the company. This being so, the charter of the Atlantic and North Carolina Railroad Company is to be read and considered as a part of the charter of the Northwestern North Carolina Railroad Company. *Range Co. v. Carver,* 118 N. C., 328; *Comrs. v. Higginsbothern,* 17 Kansas, 62. It is like an instrument referring to another instrument, *Flaum v. Wallace,* 103 N. C., 296, or where the complaint in one action refers to the complaint in another action for data, *Alexander v. Norwood,* 118 N. C., 381, they are to be read and considered together as one instrument.

I have shown that the subscription made to this company (the (330) Northwestern North Carolina Railroad Company) by the county of Forsyth, under the charter as originally passed, has been sustained and held to be valid by this Court in *Hill v. Comrs., supra.*

This decision established the power—the authority—to submit the proposition of subscription to the voters of the county, and to issue bonds. But the validity of the bonds issued on this subscription of Forsyth was again put directly in issue in the case of *Belo v. Comrs.,* in a mandamus proceedings, to compel their payment and their legality was again sus-

tained by this Court. *Belo v. Comrs.*, 76 N. C., 489. This case, also, as I contend, established the authority to submit the question to the voters, and to issue these bonds.

It is true that the submission of this question in Forsyth was made by the justices of the peace, acting as a county court. And it is true that the charter provides that the question should be submitted by them. But this charter was passed and this submission was made and the bonds issued before the adoption of the Constitution of 1868, which did not go into effect until 22 April of that year. By this Constitution and subsequent legislation, the county court was abolished and the county commissioners succeeded to their powers in this matter and in all such cases. It is so held by this Court in *Belo v. Comrs., supra,* and it is expressly so provided by the Legislature. Section 1997 of The Code.

Therefore, while the submission of the question in Wilkes was by the commissioners, they were the successors of the justices and the county court, fully and clearly authorized to make the submission and
(331) the subscription and to issue the bonds.

But it is contended by the Court that if the charter authorized this subscription and the issue of the bonds now sought to be repudiated, that it was passed before the Constitution of 1868 went into effect, and that it was thereby repealed. To support this position *Aspinwall v. Comrs. of Davies County,* 22 Howard, 364, and *Lewis v. Pina County,* 155 U. S., 54, are cited by the Court. Neither of these cases, in my opinion, sustain the position for which they are cited. The first case cited (22 Howard) is intended to raise the question of violating a contract under the Constitution of the United States, and nothing more. The submission in that case was made, and the vote thereon was had in 1849, but the subscription to the capital stock was not made, and the bonds were not issued until 1852. In the meantime the Constitution of the state (Indiana) had been amended so as to prohibit any county in the state from issuing such bonds. But Davies County proceeded to issue the bonds under said submission and vote and to put them on the market, but afterwards refused to pay them; and the plaintiff, being the holder of a part of these bonds, undertook to enforce their payment. There was no question made in that case but what the Constitution had inhibited their issue. But the plaintiff claimed that the submission and the vote thereon, which were before the amended Constitution, amounted to a contract; and that the new Constitution, which prohibited the county from issuing the bonds, was an impairment of the obligation of this contract, and therefore in violation of the Constitution of the United States. No such question as this arises in this case. There is no pretense that these bonds are protected by any provision of the
(332) Constitution of the United States.

But it is denied by the defendants that the Constitution of 1868 repealed the charter of this road, or that it prohibited Wilkes County from making this subscription or issuing these bonds, as I expect to show.

The case of *Lewis v. Pina County* arose out of the legislation of Arizona Territory. The Legislature of this territory passed an act authorizing Pina County to issue bonds for the construction of a railroad. This being a territorial government, it had no legislative powers except those granted by Congress. And it was held in that case that Congress had not only failed to grant such legislative power, but had in express terms prohibited its exercise, and the bonds were held to be void. I fail to see the argument to be drawn from this case against the validity of the bonds under consideration. As has been stated, the charter of the Northwestern North Carolina Railroad was passed before the adoption of the Constitution of 1868, which took effect on 22 April of that year. But the Legislature passed an act, ratified 11 August, 1868, as follows:

"Section 1. The General Assembly of North Carolina do enact: That an ordinance entitled 'An ordinance to incorporate the Northwestern North Carolina Railroad Company,' ratified 9 March, A.D. 1868, be and the same is hereby reënacted, ratified, and confirmed."

If there had been a repeal of this charter by the Constitution, which I contend there had not been, it seems to have been reënacted in August, 1868.

It has not escaped my attention that there is in the printed record an agreement as to what acts are to be considered by the Court in deciding this case, and the act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs and by counsel (333) for Mr. Turner and Mr. Welborne, but it is not signed by any one for the defendant Call. But if it had been signed by Call, I would have to disregard it. Parties may agree upon facts that I would feel bound by, but I cannot feel bound by an agreement as to what is the law. I refer to this act of 1868 for the purpose of meeting an argument in the opinion of the Court, and not for the reason that I consider it necessary to sustain the position I have taken, as to the authority of the commissioners of Wilkes County to submit this question to the voters, and to subscribe the stock, and to issue the bonds.

The charter provides for submitting the question to a vote of the people in almost, if not the language of the Constitution of 1868, with the single exception that it shall be sufficient if a majority of the qualified voters "voting thereon shall be in favor of the subscription." To this extent, and no further, did the Constitution of 1868 conflict with the provisions of this charter; and this was cured by section 1997 of The Code, which was admitted to have been passed as the Constitution requires, and which provides that it shall take a majority of the qualified

voters of the county to authorize the subscription, as was done in this case. Suppose that section 1997 of The Code had been passed by the Legislature, as an amendment to this charter, with all the formalities and requirements of the Constitution—would it be contended that the submission was without legislative authority, and that these bonds were void? And if not, why is it that a general law, applying to all cases of submission, has not the same effect?

(334) The next ground upon which the Court rests its opinion is that of estoppel. This ground of alleged invalidity to the bonds arises in this way: the Legislature at its February session (1879) attempted to pass, and did pass, an act providing for the extension of the Northwestern North Carolina Railroad from Winston to Wilkesboro, for the subscription of counties to its capital stock, and the issue of bonds. But it is claimed by the plaintiff, and such appears to be the fact, that this act did not receive the three several readings, on three several days, with a call of the yeas and noes, as provided by the Constitution; and for that reason that the said act is void under *Bank v. Comrs.*, 119 N. C., 214, and *Comrs. v. Snuggs,* 121 N. C., 400. But the commissioners, when they issued these bonds, did not know that this act was unconstitutional and void, and they recited in the bonds that they were issued under the act of 1879. This act does not purport to be an original act, but it is stated in the act itself that it is an amendment to the ordinance of the Convention chartering said road. So that any one seeing these bonds would be led by the statements therein to know that they depended upon authority derived from the original charter, that is, the ordinance of the Convention of 1868. And it is claimed in the opinion of the Court that this recital in the bonds, put there by the plaintiffs, estops the holders and those representing them from showing any other authority in the commissioners, except the act of 20 February, 1879, and that act being void for the reasons heretofore stated, the commissioners had no power to issue the bonds. I admit that this act is a nullity and cannot benefit the bondholders; and as it is void and can do them no good, it can do them no harm.

(335) The Court, therefore, upon this recital in the bonds that they were issued under the act of 20 February, 1879, again rests its judgment upon the doctrine of estoppel, and holds that the bondholders and the defendants in this action are estopped to show that the commissioners had any other authority except the said act of 1879.

With the greatest respect and deference to the opinion of the Court, it seems to me that the doctrine of estoppel is not only misapplied, but that its use and purpose are misconceived in this application by the Court. Estoppels are as to facts, and not of law. In such transactions as this they are made to apply to a party stating the facts, and not to

the party to whom they are stated. This seems to me to be elementary learning. But see Bigelow on Estoppel, pp 4, 5, 6, and 7, and 356 and note 1. "It is not the deed of the defendant but of Isham (the grantor) only, by whom alone it is executed; and not being the deed of the defendant, it cannot as a deed estop him from denying that the grantor had title." And the same principle is held in the case of *Northern Bank v. Porter Township,* 110 U. S., 608, near the end of the opinion (cited by the Court). In that case the bondholder was trying to estop the maker, by holding him to the statements in the bond. And the Court says that the maker is estopped by the recital of such facts as it was supposed to have special knowledge of—such as that there had been a submission to a vote, and that a majority of the qualified voters voted for the bonds. But it was held that the defendant (the maker) was not estopped to show the law—to show that the township had no legal authority to make the subscription and to issue the bonds. If the maker of the bonds was not estopped by the recitals in the bond from showing the want of legal authority to make the bonds, what rule of law or justice is there to estop the defendants in this case from showing that the commissioners of Wilkes County had the power—legal authority to issue (336) these bonds?

It is said in the opinion of the Court that "estoppels are mutual," and as the plaintiff would be estopped by the recitals that the defendant must be. This rule obtains in many instances, but I deny its application in this case, as I have shown above from Bigelow on Estoppel and from *Northern Bank v. Porter Township.* But were I to admit the rule to be that where one party is estopped the other party is also, what would be the result of the reasoning of the Court when I have shown that the maker would not be estopped to show the want of power?

The Court in its opinion says that certain positions were strenuously insisted on by the defendant. I think this must be a mistake, as the case was not argued before us, either by brief or by oral argument, on behalf of the defendants. Mr. Turner and Mr. Welborn, by leave of court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. The case appears to be a controversy so far as parties are concerned, for there are plaintiffs and there are defendants. But as to the conduct of the case before this Court is concerned, it has been unilateral. The opinion of the Court speaks of the reorganization of the railroad company, thereby defrauding some one out of his stock. The record furnishes no evidence of any reorganization of the railroad company. It is stated in the opinion of the Court that the Supreme Court of the United States is the only Court authorized to review this opinion. I agree with the Court in this expression of opinion, but I have no idea

(337) that it will ever be reviewed by that Court, as the case is decided in favor of plaintiffs, and the defendants have not taken interest enough in it to be represented by counsel, and it is not likely they will appeal.

It is said that the talk of repudiation has had no effect on the Court, and I have no idea that it has. And I hope that my aversion to repudiation has had no influence on me in coming to the conclusions I have reached.

My opinion is that the bonds are valid, and that their payment should be enforced by the courts.

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

Cited: Comrs. v. Payne, post, 486, 492; *Smathers v. Comrs.,* 125 N. C., 486; *Glenn v. Wray,* 126 N. C., 732; *Comrs. v. DeRossett,* 129 N. C., 280; *Cotton Mills v. Waxhaw,* 130 N. C., 294; *Debnam v. Chitty,* 131 N. C., 678; *Graves v. Comrs.,* 135 N. C., 54.

ELIZABETH BAKER v. W. V. MITCHELL AND D. O. BAKER.

(Decided 29 November, 1898.)

Deed, Reformation of—Omitted Agreement.

Where the court is asked to reform a deed by annexing to it an alleged omitted agreement, and the evidence, in any reasonable view of it, will not warrant the inference by the jury that there was any such agreement, as alleged by the plaintiff, the court should so instruct them.

CIVIL ACTION to reform a deed, tried before *Coble, J.,* at Spring Term, 1898, of ALEXANDER Superior Court.

The plaintiff was the owner of a life estate in a tract of land, 66⅔ acres, which she conveyed on 20 April, 1893, to the defendant D. O. Baker, her grandson—consideration stated being $40.

(338) D. O. Baker was the owner in part of the reversionary interest, and on 7 February, 1894, upon the named consideration of $200, conveyed the land to the defendant and W. V. Mitchell, who was the plaintiff's son-in-law. Mitchell deeded the land to his own wife on 15 January, 1895.

The complaint charges that in conveying the land to D. O. Baker it was part of the agreement that she was to have a support for life, and that the land was to be charged with it, but that this covenant was fraudulently omitted by him, when he had the deed drawn—also, that

the defendant Mitchell knew of this agreement when he took his deed from D. O. Baker—and that by reason of the fraud and wrong of the defendants she has been deprived of her land and support.

The prayer for relief is "that the said deed of the defendant be corrected so as to allow the proper consideration and to charge the land with her support, that she be allowed a reasonable amount for her support, and that the same be declared a charge upon the land, and for such other and further relief as the merits of the case require."

The answer of defendants denies that the deed from plaintiff was obtained by fraud and misrepresentation, and avers that $40 was a full and fair consideration for her interest in the land—and denies that there was any agreement for her support.

To the first issue, "Was the deed executed by the plaintiff to the defendant D. O. Baker obtained by fraud and misrepresentation or undue influence on the part of the said D. O. Baker, or any one for him?" the jury answered "No."

To the second issue, "Was the said deed executed for a fair and reasonable consideration?" the jury answered "Yes."

To the third issue, "Was the plaintiff to have her support and (339) maintenance on said land, when the said deed was executed?" the jury answered "Yes."

The defendant objected to all the issues, except the first and second.

In reference to the third issue, they asked the following special instructions:

That there is no legal evidence in this case to warrant the jury in finding that there was a contract that she should have her support on the land in controversy.

Instruction refused, and defendants excepted.

The first and second issues, bearing upon the question of alleged fraud, having been found in favor of defendants, it becomes unnecessary to state the evidence relating thereto, which was admitted over the objections of defendants.

The evidence of plaintiff relating to the third issue is substantially as follows: That she was 67 years old in April; that immediately before this suit she was living on the Nelson Kerley place (the land in question) which her mother gave her for life; had lived there 22 or 23 years; that her daughter, now dead, lived with her; that Daniel, who is D. O. Baker, the defendant, was born there; that she raised and educated him and looked to him; after the girls married off, no one lived with her except Daniel, who ran the farm; that she had been blind for 5 years, and she looked to him for everything; that after her death the land was to be divided among her children. That Philo Stephenson, a justice of the peace, came to her house about 6 o'clock in the evening and brought a

paper there for her to sign, and asked if Daniel had read it to her; upon her saying no, he said Daniel ought to have done so, and that he
(340) would read it to her. He read, she was sleepy and nodded during the reading and didn't understand it, and asked what it meant? He replied it was to keep the children from coming on Daniel for back rents. She does not remember making her mark. This was in April; the next she heard of the paper was in July following; Daniel was claiming the land then, and ordered her off, and she got her son-in-law, W. Vance Mitchell, to start a suit against him, which was withdrawn for purpose of compromise. That Vance Mitchell told her that he and Daniel were trading about the land. After Vance bought it she got him to read the deed she had made to Daniel—which was the first time she had heard it read—that Vance said when he read this deed that she was to have her support, and she said it was not named in the deed, and Vance said nothing. He didn't tell her of any contract with Daniel, but said he had got the land from Daniel. Vance was then living on the place and she was living with him, but left in August because of the way she was faring. That she did not intend to give that land to Daniel, and did not sell him her interest for $40; that the first time she heard of the $40 was when Vance read to her the deed to Daniel. That she can't recollect everything, owing to the fix her head was in.

That Blackwalder, her son-in-law, gave his interest to Daniel to stay there and take care of her—and so did Simpson Bowles—that Daniel mentioned when he came home at 10 o'clock the night that Stephenson was at the house, that he saw Stephenson when he came and when he went.

(341) A CONTRACT MARKED EXHIBIT A,

between the two defendants, Mitchell and Baker, was read in evidence as follows:

A contract has been this day entered into between W. V. Mitchell and D. O. Baker. The following articles of agreement are this, that the said W. V. Mitchell do agree to give the said D. O. Baker two hundred dollars for his entire interest in the estate of Elizabeth Baker, with interest at 8 per cent from date. These are following exceptions: He is to have the wheat of his old field without rent; he is also to have the field on top of the mountain to sow in oats without rent; the said W. V. Mitchell do agree that the said Elizabeth Baker shall have her maintenance on the said place, known as the Nelson Kerley tract of land.

This 27 January, 1894. We have hereunto set our hands and seals.

W. V. MITCHELL. [SEAL.]

Test: Z. P. DEAL. D. O. BAKER. [SEAL.]

F. C. GWALTNEY.

There was evidence that a suit was brought in the justice's court for the $40 consideration in name of plaintiff, and that she refused to take judgment, saying that she was to have her maintenance. The defendant Mitchell sued out the summons, after plaintiff had left his place and moved to Blackwalder's, and about two weeks before she went there the contract, Exhibit A, was drawn.

His Honor rendered judgment in favor of plaintiff, and defendants appealed.

F. A. Linney and A. C. McIntosh for plaintiff. (342)
No counsel for defendants (appellants).

MONTGOMERY, J. The plaintiff brought this action to have the deed in fee to the tract of land described in the complaint which she had executed to the defendant D. O. Baker reformed so as to annex it to a covenant for the support and maintenance of the plaintiff, for her life, to be a charge upon the land, the allegation being that at the time of the execution of the deed it was intended and agreed that such charge for maintenance was to be inserted, but it was left out by the fraud of the grantee who prepared the deed for her signature.

The evidence objected to by the defendants and received by his Honor all pertained to the question of fraud in the execution of the deed, and as an issue of fraud was submitted to the jury and found for the defendant, it is unnecessary to consider the exceptions to his Honor's rulings and the evidence offered under that head.

The third issue was in these words: "Was plaintiff to have her support on the land when said deed was executed?" and the jury responded "Yes." The defendant's counsel asked the court to instruct the jury that there was no evidence to warrant a finding by the jury that there was an agreement between the parties to the deed that the plaintiff was to have a charge upon the land for her maintenance. The instruction was refused. After a most careful reading of the evidence offered, we are of the opinion that it was not sufficient in a reasonable view of it to warrant the inference by the jury that there was any agreement as alleged by the plaintiff. His Honor was in error in refusing the instruction.

Error.

Cited: White Co. v. Carroll, 147 N. C., 334.

(343)

SHOAF & CO. v. E. FROST.

(Decided 29 November, 1898.)

Homestead.

1. Valuation of the tract of land, subjected to the homestead, placed by the jury, is conclusive.
2. Where the jury value the tract at $2,000, the land will be divided into two parts of equal value, and the homesteader will take his choice.
3. Where there is appreciation or depreciation afterwards, relief must be sought in another proceeding. Same case reported in 121 N. C., 256.

HOMESTEAD PROCEEDING heard before *Coble, J.*, at Spring Term, 1898, of DAVIE Superior Court.

The cause came on to be heard on the certificate being filed from the Supreme Court on the opinion rendered at September Term, 1897.

Plaintiffs moved for judgment in accordance with certificate filed.

Defendant moved the court on affidavits, that the court order the appraisers, in laying off the homestead of the said E. Frost to consider any material depreciation in the property since the time of the first allotment in the spring of 1894; or that said appraisers make a report to the court, if such depreciation exists, and what is the value of said depreciation, if any.

His Honor declined the motion made by defendant and rendered judgment prayed for by the plaintiffs.

Defendant excepted and appealed.

E. L. Gaither and Glenn & Manley for defendant (appellant).
Watson, Buxton & Watson for plaintiffs.

FAIRCLOTH, C. J. The history of, and the facts in this case, will be found in same case reported in 116 N. C., 675, and 121 N. C., 256. Pursuant to the opinion of this Court, the value of the tract of land,
(344) which had been set apart by the commissioners, was found by the jury to be $2,000, and this Court held that the verdict was conclusive in that respect and directed that a commissioner be appointed to divide said land into two equal parts, one part to be selected by the homesteader as his homestead. The defendant now moves on affidavit that the order to reallot his homestead shall contain a provision that the appraisers take into consideration any material depreciation in the value since 1894 when the verdict of the jury was rendered. This proposition we declined to adopt in the second opinion above cited, and pointed out by reference the defendant's remedy if depreciation has taken place.

The defendant has remained in possession of the whole tract, and to grant his motion now would in effect be a revaluation, and might differ from the finding of the jury, which we have said must stand. It would seem that when the defendant has accepted the homestead, valued at $1,000 by the jury, then he may consider the question of depreciation, but not in this action, nor out of the excess laid off in this proceeding, as the creditors may in the event it has appreciated.

Affirmed.

Cited: S. c., 127 N. C., 307.

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(345)

PEYTON HAIRSTON ET AL. v. J. M. GARWOOD.

(Decided 29 November, 1898.)

Judgments—Attorney and Client.

A judgment, entered by consent of counsel of record, in a matter coming within the scope of his authority, is regular, and binding on the client, and will not be set aside on the ground of surprise or excusable neglect.

MOTION in the cause, to set aside a judgment rendered at Fall Term, 1896, of Superior Court of DAVIE County, heard before *Starbuck, J.,* by consent, at chambers.

Garwood, the defendant, had theretofore filed a petition before the clerk, in the nature of a processioning proceeding to have the lines of his land established. The plaintiffs, who were the adjoining proprietors, were duly notified, appeared and filed answers. The lines were surveyed, and judgment rendered by the clerk in favor of Garwood, and on appeal to term the judgment was affirmed.

The plaintiffs, Hairston and others, then, each of them brought actions of ejectment against Garwood, which were all consolidated into the present action at the Fall Term, 1896, and judgment was rendered in favor of the defendant in these words: "It is further ordered, adjudged and decreed by and with the consent of the attorneys for plaintiff and defendant in all of said cases, that all matters and things set up and involved in said cases are hereby determined in favor of J. M. Garwood, and that the said J. M. Garwood is the owner in fee simple of all the lands described in the pleadings in the several cases; and it further appearing that this and the three other cases aforesaid brought to Spring Term of this Court and consolidated herein were brought, (346) in *forma pauperis,* it is now adjudged that this consolidated case be and the same is hereby dismissed without costs."

Plaintiffs offered affidavits in support, and defendant affidavits in denial of contentions as to the want of authority in plaintiff's attorney to consent to said judgment, and as to the merits of plaintiff's cause of action.

It is admitted that pursuant to the compromise defendant paid plaintiffs' attorney $35; and that the judgment was rendered in open court, by consent of said attorney for plaintiffs and attorney for defendant; also that the attorney for plaintiffs was employed by them to represent them in the case, and that he was marked on record as plaintiffs' attorney.

No evidence is offered to show that said attorney is insolvent.

The plaintiffs insist that if their said contentions are true, the judgment should be vacated on this motion, upon the grounds:

First. Of excusable neglect and surprise.

Second. Of want of authority in their attorney.

Third. Because of irregularity, in that their attorney had no authority to consent to the judgment, and that the judgment purports to be by consent of attorneys and not by consent of parties.

The Court is of opinion:

That the judgment is regular.

That plaintiffs' contentions and admitted facts do not present a case of surprise or excusable neglect within contemplation of section 274 of The Code.

That plaintiffs' redress lies against their attorney.

That if the judgment is open to attack, the attack should be by independent action.

(347) The Court, therefore, declines to find whether plaintiffs did or did not consent to the compromise and judgment.

For the reason stated it is adjudged that the motion of plaintiffs to vacate said judgment be and is hereby dismissed.

Plaintiffs appealed.

E. E. Raper for plaintiffs (appellants).
E. L. Gaither and T. B. Bailey for defendant.

MONTGOMERY, J. This proceeding is on a motion made by the plaintiffs to vacate and set aside a judgment taken against them by the defendants at the Fall Term, 1896, of Davie Superior Court, and to reinstate the case which was dismissed by that judgment. The case in which the motion was made embraced a former suit by the defendants here against the plaintiffs, and a latter suit by the plaintiffs here against the defendants—both suits being over the same subject matter and consolidated by order of the Court.

The grounds of the motion were, first, irregularity of the judgment, and, second, surprise and excusable neglect under section 274 of The Code. The plaintiffs are entitled to no relief on the latter point, as the whole proceeding shows that the plaintiffs' contention is that their counsel exceeded his authority in his conduct of the case. He is not charged with negligence, but with too much zeal. The judgment complained of recited that the matters and things set up and involved in the cases were by and with the consent of the *attorneys* for plaintiffs and defendants determined in favor of J. M. Garwood, the defendant, and that J. M. Garwood was the owner of the land (348) described in the pleadings, and that the consolidated case be dismissed. The plaintiffs contended, on the hearing of the motion that the judgment was irregular for the reason that the consent of the *atttorney* of the plaintiffs to the rendition of the judgment was not the consent of the plaintiffs themselves. Affidavits were introduced by the plaintiffs going to show that the plaintiffs' attorney, without the consent of the plaintiffs and even against their instructions, entered into a compromise of the lawsuit and that the judgment was the result of the compromise; that as soon as they heard of the judgment, they made the motion to vacate it, and that if they had been present when the judgment was rendered they would have opposed it. The defendants also had affidavits in which the compromise was admitted, but affirming that the plaintiffs had knowledge of the action of their attorney. His Honor declined to find whether the plaintiffs did or did not consent to the compromise and judgment, and held the judgment to be regular. There was no error in that course by his Honor. The action of the plaintiffs' attorney was plainly within the scope of his authority. An attorney can confess a judgment and thereby bind his client. Weeks on Attorneys, sec. 222. In *Stump v. Long,* 84 N. C., 616, it is said by the Court that "every agreement of counsel entered on record and coming within the scope of his authority must be binding on the client," and to the same effect is the opinion in the case of *Bradford v. Coit,* 77 N. C., 72; *Henry v. Hilliard,* 120 N. C., 479. If the judgment had shown upon its face that it had been entered as the result of a compromise made by the *attorney,* and that the judgment had been entered by his consent, the question would be a very different one from the one presented by this (349) record. That question is not before us and we need not discuss it. On the subject, however, the case of *Moye v. Cogdell,* 69 N. C., at page 95, may be read with interest.

Affirmed.

Cited: Westhall v. Hoyle, 141 N. C., 338; *Harrill v. R. R.,* 144 N. C., 544.

JAMES McGUIRE, TREASURER OF DAVIE COUNTY, v. W. F. WILLIAMS, SHERIFF, AND W. A. BAILEY, B. R. BAILEY, C. G. BAILEY, AND W. R. ELLIS, SURETIES.

(Decided 29 November, 1898.)

Sheriffs—Bondsmen—Tax Levy—Demand.

1. Where a sheriff's settlement of one tax fund is made partially by an amount deducted from another tax fund, the settlement exonerates him and his surety from liability on the bond for the taxes settled; he and his sureties on the bond for the taxes misappropriated, in an action for failure to settle the same, are liable for such defalcation.

2. The validity of a special railroad tax cannot be questioned, in an action on the sheriff's bond for failure to account for it, especially when it has been collected. If the statute authorizing the tax were unconstitutional, or otherwise invalid, the sheriff could not be permitted to retain the money illegally collected under color of his office.

3. A demand is not necessary before suit by the county treasurer on a sheriff's bond, as the sheriff is required by law to settle on or before a day certain.

CIVIL ACTION on the official bonds of the defendant Williams, sheriff of DAVIE County, heard upon exceptions to report of referee by *McIver, J.*, at Fall Term, 1898, of DAVIE Superior Court.

The defendant W. R. Ellis was surety on the school tax bond only. This tax had been settled in full, but had been so settled by application of funds collected and secured under the general tax bond.

(350) He claimed exemption from all liability, as the bond he signed had been settled.

His Honor ruled otherwise, and defendant Ellis excepted.

The other sureties, the defendants Bailey, were on both the general tax bond and the school tax bond. The railroad tax alone remained unsettled. These sureties claimed exemption from liability on grounds embodied in their exceptions, which are fully stated in the opinion.

The exceptions were overruled, and they excepted. From the judgment rendered the defendants all appealed.

T. B. Bailey and Jones & Patterson for appellants.
E. L. Gaither for plaintiff.

DOUGLAS, J. This is an action brought by the county treasurer on the bonds of the sheriff to recover the sum of $3,515.75, balance of unpaid taxes, with the statutory penalty of 2 per cent per month. Only two of the sheriff's bonds are really involved, one for the collection and settlement of the school and poll tax, and the other for the general public taxes. The defendants, W. A. Bailey, B. R. Bailey and C. G. Bailey, are sureties on both bonds, while the defendant, W. R. Ellis, is surety only on the first. The case was referred to a referee, to whose report

exceptions were filed by all parties; but those of the defendants Bailey and Ellis are the only ones that need be considered. The exceptions are as follows:

"W. F. Williams, W. A. Bailey, C. G. Bailey and B. R. Bailey (351) file the following exceptions to the report of G. M. Bingham, referee.

"I. Because the levy of 22 cents on the $100 worth of property for special or railroad tax was illegal and void and without authority of law for reason that the acts of the Legislature of 1879, ch. 113, do not appear from the evidence to have been ratified by a vote of the people of said county as required by said act and the Constitution of the State.

"II. Because no act of the Legislature authorizing said special tax or levy was ever submitted to or ratified by a vote of the people of Davie County.

"III. Because referee charged defendants with $3,504.12 merely because the levy was made: There being no evidence nor finding by the referee that the sheriff actually collected any part of the special tax fund sued for.

"IV. If the court should construe the referee's report to mean that sheriff did collect a part of the special tax, then defendants except because the referee finding that at the time of the alleged settlements and payments of the sheriff to the treasurer, the sheriff having mixed the funds collected, used $3,097.42⅔ of the special and ordinary fund and paid the same on the school fund and these defendants, sureties on said special and ordinary tax bonds, claim that they are entitled to be exonerated to the amount of the special fund so used by the sheriff in the payment of the school tax.

"V. Because the referee did not charge the sureties on the school bond with $3,097.43⅔, the amount of special or railroad and ordinary tax money used in the settling of school funds.

"VI. Defendants further except to the report because the referee (352) ruled that the defendants, W. A. Bailey, C. G. Bailey and B. R. Bailey, were primarily liable for the whole amount of alleged default, to wit, for $3,504.72.

"VII. Because the referee charged said W. A. Bailey, B. R. Bailey and C. G. Bailey with the sum of $1,365.18, it being 2 per cent per month interest as a penalty for the alleged default."

"The defendant W. R. Ellis excepts to the report of the referee, for that:

"I. The referee having found as a fact that all taxes levied by the county during the term of defendant Williams' office were duly collected and properly disbursed, save and except for the year 1896, and that which was collected and not disbursed, was not of the school fund but

the general tax fund. And having further found as a fact the defendant W. R. Ellis had signed, during the last term of defendant Williams' office, only one bond, dated 3 December, 1894, designated as Exhibit No. 8, and known as school tax bond. And having further found as a fact that the school tax levied for the year 1896 was $4,646.14, and that the defendant W. F. Williams had paid to plaintiff on school tax for year 1896 the sum of $4,646.14, and that the defendant did not sign the general tax bond of the defendant W. F. Williams. It was error on the part of the referee to hold as a matter of law that the defendant W. R. Ellis was secondarily liable for any part of the defalcation.

"That said referee should have held from the facts found that the defendants W. A. Bailey, B. R. Bailey and C. G. Bailey, who signed the general tax bond, dated 3 December, 1894, are alone liable
(353) for the defalcation, there being no default for any part of the school fund for the year 1896 or any year during the term of office of the defendant W. F. Williams.

"That the referee did not have evidence upon which to support his findings as to how much of other funds was used by the sheriff in paying off to the plaintiff treasurer the amount due on the school fund, and his findings as to this should not be sustained."

The following judgment was rendered: "The court overrules the exceptions filed by the defendant W. R. Ellis, and also overrules the exceptions filed by W. F. Williams, W. A. Bailey, C. G. Bailey and B. R. Bailey numbered 1, 2, 3, 6, and 7 and sustain numbers 4 and 5, and also overrules exception No. 1, without prejudice, and cannot recover this in this action by the plaintiff and sustains No. 2 and modifies No. 3.

"It is therefore considered, ordered and adjudged that the plaintiff recover of the defendants W. F. Williams, sheriff, principal, and W. A. Bailey, C. G. Bailey and B. R. Bailey, sureties, the sum of fourteen thousand dollars to be discharged upon the payment of forty-nine hundred and forty and 52/100 dollars, and that of the said amount the defendant W. R. Ellis, surety, is liable in equity for one-fourth of three thousand dollars, being the sum of seven hundred and seventy-four and 35/100 dollars.

"It is further considered and adjudged that the defendants J. H. Hartman, A. E. Hartman and G. E. Barnhardt are not liable for anything.

"It is further ordered and adjudged that the plaintiff recover of the defendants W. F. Williams, W. A. Bailey, C. G. Bailey, B. R. Bailey and W. R. Ellis, the sum of ..... dollars, the costs of this
(354) action, to be taxed by the clerk of this court, including the sum of ..... dollars as an allowance to the referee."

The defendants Bailey, who also use the name of the defendant Williams throughout, assign as error: "1. That the court committed error

in the judgment rendered overruling exceptions 1, 2, 3, 6 and 7 filed by these defendants. 2. Because he rendered judgment against the defendants for any amount whatever."

The defendant Ellis assigned as error: "1. That the court committed error in the judgment rendered by failing to render judgment absolutely and alone against the sureties on the general tax bond. 2. That the court erred in charging a contribution on the part of defendant Ellis to pay any part of said judgment. 3. That the court erred in sustaining the findings of the referee as to the amount of funds collected from other sources and used by the sheriff in the settlement of his school tax, the evidence not warranting the findings of the referee or the court in such an adjudication and finding."

It appears that the full amount of the special railroad tax, and that alone, remains unsettled.

The material contentions may be briefly stated as follows: 1. That it does not affirmatively appear that the act of 5 March, 1879, was ever ratified by a popular vote, and therefore the sheriff's bond cannot be held liable for a tax which, in the absence of such ratification, would be unconstitutional. 2. That the defendant Ellis having signed only the bond under which the sheriff has fully settled, cannot be held liable either legally or equitably for any part of the railroad tax, even if any part of said tax had been collected and used in the payment of the school and poll tax.

The first contention cannot be sustained. The validity of the (355) special railroad tax cannot be called in question by the defendants in this action. Admitting for the sake of the argument that the tax may be unconstitutional, the defendant sheriff and his bondsmen are estopped from denying the validity of a tax which he has already collected. It appears from the report of the referee and the accompanying evidence that the railroad tax was expressly included in the regular printed receipt used by the sheriff; that the entire amount of county taxes for the year 1896 was $13,370.16, including $5,399.52 for school taxes, $4,454.89 for county purposes, and $3,315.75 for railroad tax; and that of these amounts less than $100 remains uncollected, of which less than $25 would belong to the railroad tax. The sheriff made no objection to the levy, nor does it appear that the collection of any part of the tax was obstructed by legal process or otherwise. To permit him now, after having collected $3,500 in taxes, to set up the unconstitutionality of the act under which they were collected merely as a bar to their recovery, would be in the highest degree unconscionable. This money cannot belong to the sheriff under any construction of the law, and must be paid over to the county in accordance with the obligation of his bond to "well and truly collect and account for, pay over and

settle all the public taxes during his continuance in office." Whatever constitutional objections may have existed to his collecting the money, certainly none remain to his paying it over.

We think that a tax levy, in all respects regular upon its face, carries with it the presumption of validity. This presumption is not conclusive, but however slight it may be, it exists in the absence of any impeaching fact. Since the opinion in *Charlotte v. Shepard,* 122 N. C., 602,
(356) concurred in by every member of this Court, it must be considered a settled rule that the provisions of the Constitution in relation to municipal indebtedness and taxation are mandatory, and will be strictly enforced by this Court. So great is their effect that any act repugnant thereto, at least to the extent of that repugnance, will be declared null and void *ab initio,* not only without legal effect, but without legal existence. It makes no difference when or how such unconstitutionality appears to us; but it must be made to appear, and until it does appear, the presumption is in favor of the statute at least in matters of collateral attack. We repeat that, even if the statute were unconstitutional and the tax levy consequently invalid (a question upon which we do not now pretend to pass), the sheriff could not be permitted to retain moneys illegally collected under color of his office. *S. v. Woodside,* 31 N. C., 496; *Clifton v. Wynne,* 80 N. C., 145, and cases therein cited.

This reasoning applies also to the exception that the plaintiff failed to show that a tax list or assessment roll had been delivered to the sheriff. This exception appears more clearly from the brief than from the record, but it is immaterial how it appears, as it is untenable. It seems that he must have had some kind of a list in order to have known the exact amount of taxes to collect from each individual, and it appears that he did have the duplicates in stub books as provided in section 30, ch. 119, Laws 1895. All the taxes, except the special railroad tax, were properly collected and accounted for, and about the amount of the special tax there seems to be no dispute. Even if the sheriff did not receive a technical assessment roll, as its absence does not seem to have
(357) hindered him in the collection of the taxes, it need not hinder him now in paying them over.

A demand is not necessary before suit brought by the treasurer on a sheriff's bond, as the sheriff is required by law to settle on or before a day certain. Moreover, a demand is necessary only to enable the debtor to pay without the expense of an action. If, as in this case, he denies the alleged indebtedness, he cannot have been injured by the want of a demand. *S. v. McIntosh,* 31 N. C., 307; *S. v. Woodside, supra; Commissioners v. Magnin,* 86 N. C., 285.

The exception of defendant Ellis, as to his liability for any part of the special taxes, must be sustained. The only bond that he signed was on the condition that the sheriff "collect and settle and pay over to the county and State Treasurer the *school and poll taxes,*" and this obligation has been fully met. It is true that a part of the money collected as special taxes has been used to pay the school taxes, but this could be a breach only of the general tax bond. A payment in accordance with the terms of the bond cannot be a breach of the bond; and we see no ground for equitable contribution or subrogation. *Liles v. Rogers,* 113 N. C., 197; *Board Education v. Commissioners, ibid.,* 379.

The judgment of the court below is affirmed except wherein it holds the defendant Ellis liable in equity for contribution, as in our opinion he is not liable for any amount whatever. The judgment is therefore

Modified and affirmed.

Cited: Comrs. v. Payne, post, 487, 494; *Glenn v. Wray,* 126 N. C., 732; *Debnam v. Chitty,* 131 N. C., 678.

(358)

IN THE MATTER OF THE WILL OF WILLIAM E. YOUNG.

(Decided 6 December, 1898.)

Nuncupative Will—Evidence—The Code, Section 590.

1. The witness to a will is the witness of the law, and not of the parties; his act of attesting is not a personal transaction with the deceased, within the prohobition of section 590 of The Code.

2. The probate of a will is a proceeding *in rem* to which there is strictly no party, and which the court must retain, determine and settle the issue, and not permit a judgment of nonsuit.

CAVEAT to the nuncupative will of William E. Young, entered before the clerk of the Superior Court of FORSYTH County— and the issue of *devisavit vel non* transferred to the civil issue docket, and tried at August Term, 1898, by *McIver, J.*

The script propounded for probate is in these words:

Send my body to J. R. Chaney, Southerlin, Virginia, all my belongings are to go to J. R. Chaney, now witness this, everything that I have is to belong to J. R. Chaney.

June 23d, 1897.

The foregoing statement was reduced to writing and signed by the witnesses.

Dr. J. P. Fearrington was one of the witnesses and propounded the script for probate. He was also the largest creditor of the deceased.

Dr. J. P. Fearrington, the propounder, was called as a witness on behalf of the propounder, and testified, among other things, as follows: That he was a physician living in the city of Winston, and having his office about two hundred yards, or two blocks, from the Jones Hotel. That he knew William E. Young, and had as a physician attended him.

That at the time of his death William E. Young was stopping at
(359) the Jones Hotel. That the said William E. Young died at his witness's office in Winston, N. C., on 23 June, 1897.

Witness was then asked what disposition he, Young, desired to make of his property, and who he wished to be his legatee or devisee, and all that he said Young said to him as to his wishes in regard to his property.

Caveators objected to the evidence of said Fearrington, on the ground that he was incompetent to testify under section 590 of The Code. That said Fearrington being a party to this action as propounder of the will, and also being the largest creditor of the said William E. Young, was incompetent to testify under said section.

His Honor sustained the objection. The propounder excepted to this ruling, and offered to submit to a nonsuit and appeal to the Supreme Court. Caveators objected to the propounders taking a nonsuit, as not allowed by law.

His Honor rendered the following judgment:

NORTH CAROLINA—FORSYTH COUNTY,

In the Superior Court, August Term, 1898.

In the matter of the probate of the will of W. E. Young.

This cause coming on to be heard before his Honor, Judge J. D. McIver, upon the intimation of his Honor ruling out the evidence of J. P. Fearrington, the propounder submits to a nonsuit, and therefore it is ordered that the defendant caveators go without day and that they recover their costs.

J. D. MCIVER,
Judge Presiding.

(360) From this judgment the propounder appealed to the Supreme Court, under objection from the caveators.

Watson, Buxton & Watson and Jones & Patterson for appellant.
Glenn & Manly for appellee.

FAIRCLOTH, C. J. The script, found in the record, was offered to the clerk as the nuncupative will of W. E. Young for probate, and was caveated by the heirs and distributees of Young. The issue *devisavit vel non* was transferred to the Superior Court for trial. The offer to

probate was made by J. P. Fearrington, one of the witnesses and the largest creditor, no executor being named. On the trial the witness Fearrington was asked to state the declarations of Young. This was objected to by the caveators and excluded by the court as incompetent, under section 590 of The Code. Nonsuit was taken and the propounder appealed.

A similar case was *Hutson v. Sawyer,* 104 N. C., 1, and cases cited, in which it was held that the probate of a will was a proceeding *in rem,* to which there is strictly no party—that whether the acting parties are silent or withdraw, the matter is in custody of the law, and the court must retain, determine, and settle the issue—and that the parties cannot have a judgment of nonsuit and thus relieve the court of its duty. As the caveators did not appeal from the judgment of nonsuit, we do not further consider it.

The witness, not being a party and not a distributee or legatee, is in no way interested in the issue as a creditor, it is immaterial to him how the issue may be determined.

In *Vester v. Collins,* 101 N. C., 114, it was held that the act of attesting the execution of a will is not a personal transaction with the deceased, within the prohibition of section 590 of The Code. (361) Such a witness is the witness of the law and not of the parties. Looking at the law before, and under The Code, we hold that the judgment excluding the testimony of Fearrington was erroneous.

Pepper v. Broughton, 80 N. C., 251, was relied on as contrary decision. It does not clearly appear to be so on close examination. It was a decision under The Code of Civil Procedure, sec. 343. Two wills were offered and both issues submitted to the same jury—Pepper caveating one and Broughton the other. None of the heirs or devisees of the testator took any part in the controversy. The question was as to the conversation between the testator and Broughton at *some time;* when, not stated; and the court excluded Broughton's evidence, he being interested as legatee and in the event of the action, to which Pepper and Broughton were parties. The decision treats the probate as a matter *in rem,* and the case seemed to turn on a matter collateral to the main issue. If, however, the opinion means what is claimed for it under C. C. P., secs. 342 and 343, it must be considered overruled in *Vester v. Collins, supra,* under The Code, sec. 590.

So Fearrington, not being a party and not interested as a legatee or distributee, and being indifferent as a creditor, he can be heard to testify to the testator's declarations as if he were a stranger.

Error.

Cited: Davis v. Blevins, post, 383.

(362)

DAVENPORT & MORRIS v. J. W. GANNON AND WACHOVIA LOAN AND TRUST COMPANY, TRUSTEES OF H. H. REYNOLDS.

(Decided 20 December, 1898.)

Election—Statutes of Other States—Facts to be Proved.

1. Where a debtor in this State makes an assignment to trustees, including therein lands in Virginia; and a creditor, secured in the fourth class, after the date of the trust, but before it is recorded in Virginia, has a judgment confessed to him there, has it docketed, and is proceeding to enforce it against the land, he cannot be required by the trustees, under the doctrine of election, to surrender his judgment lien on the land, or else forego all claim to preference under the assignment.
2. Every court must have jurisdiction of the *subject* before it can adjudge anything, and this court has no jurisdiction over land in Virginia—neither is it presumed to know the existence and bearing of statutory regulations there, in the absence of proof.
3. The duty of the trustee is to perform the trust they have undertaken, in the way directed in the deed.

THIS was a controversy without action, submitted under section 567 of The Code, upon the facts agreed at February Term, 1898, of the Superior Court of FORSYTH County, before *Coble, J.*

His Honor adjudged that the plaintiffs are entitled to prove their entire claim as set forth in the deed of assignment of H. H. Reynolds against the assets in the hands of the assignees for distribution among the creditors of the fourth class.

And that in case of recovery by the plaintiffs out of the lands situate in Patrick County, State of Virginia, a sum more than sufficient to pay the remainder of the debt and costs, that the plaintiffs account with and to the defendants, assignees, for such excess. That plaintiffs recover the costs.

Defendants except, and appeal.

(363) The facts agreed are stated in the opinion.

Glenn & Manly and Jones & Patterson for defendants (appellants). Watson, Buxton & Watson for plaintiffs.

FAIRCLOTH, C. J. Controversy without action upon the following agreed facts: On 26 May, 1893, H. H. Reynolds made an assignment in North Carolina to J. W. Gannon in trust for his creditors, conveying all his real and personal property, including all his land in Patrick County, Virginia. By consent, another was admitted as co-trustee with Gannon. The trust deed provided for certain creditors in the fourth

class, of which the plaintiffs were preferred for $1,500. The deed of assignment was recorded in the clerk's office of Patrick County, Virginia, on 16 June, 1893. The plaintiffs, on 29 May, 1893, recovered a judgment by confession in Virginia against Reynolds for their debt (the same debt referred to in the assignment) and had their judgment docketed in Patrick County, Virginia, on 30 May, 1893, which it is stated became a lien on his land in Virginia. At that time the plaintiffs knew that Reynolds had made an assignment, but did not think that it conveyed the Virginia lands. The plaintiffs have a suit pending in the Court of Chancery in Virginia to sell said lands. They have not received anything on their judgment, but expect to receive $700 or $800 from that source when a final sale is made. The defendants have in hands funds enough to pay about 50 per cent on the claims of the fourth class creditors. The plaintiffs, as fourth class creditors, claim the right to file their whole claim and receive from the trustees their proportion of the fund now in hand and satisfy the balance out of the sale of the Virginia lands if they can, and pay any balance of the said land proceeds to the said trustees. The defendants refuse to pay the plaintiffs any part of the fund now in their hands. The fourth class creditors are not parties to this controversy, the trustees being the only (364) defendants.

The defendants' contention is that the plaintiffs, having taken judgment and levied on the Virginia lands, have not the right now to receive any part of the fund in hand, held for the fourth class creditors.

It is a general rule in law and in equity that a person cannot reject and accept the same instrument—he cannot claim under and against it, and the rule applies to every instrument, whether a deed or a will, the doctrine of election does not apply to the agreed state of facts in this case, and the first call of the law is that it shall fit the facts. This is not, however, the point of difficulty in the case.

We are without jurisdiction over the Virginia lands, because they lie beyond the territorial line of our jurisdiction. Every court must have jurisdiction of the *subject,* at least, before it can adjudge anything.

But it is argued that we can withhold from the plaintiffs any benefit out of the fund now in the hands of the defendants, upon the agreed fact that the plaintiffs have acquired a lien on the Virginia lands. But to do that we must assume to know the *status* of the lands—the nature and effect of the lien, which is a question of law, and the disposition of the proceeds of the sale that will be made by the courts of that State having jurisdiction thereof; in other words, the statute law of Virginia. As to these matters we are not informed. We do presume that the common law prevails in Virginia in the absence of proof to the contrary, but, according to that law, the lands of a debtor were not liable to the

(365) satisfaction of a judgment against him, and no lien was acquired thereon by a judgment. A judgment creditor has no *jus in re,* but only the power to make his judgment effectual by following up the steps of law, by an execution and levy on the lands. The alleged lien in this case was not obtained in this way, but by a docketed judgment, and that is a statutory regulation in each state, and what that regulation is in Virginia we are not informed. The law of another state must be proved like any other matter of fact.

When the defendants accepted the trust created by the assignments, they agreed to administer the proceeds of the property according to the provisions and in the manner directed by the deed, and we do not see any reason why they should not perform their contract. Whilst we cannot, and do not, undertake to make any order affecting the rights of the fourth class creditors in the Virginia lands, we do not see any reason why they may not litigate with each other, in respect thereto, in any court having authority to act, if they are so disposed.

The only exception is to the judgment entered by his Honor, and we see no error therein, and it is affirmed.

No error.

DOUGLAS, J., dissenting: I cannot concur either in the opinion or the judgment of the Court. It finds no support in the case of *Winston v. Biggs,* 117 N. C., 206, for the decision in that case is expressly and repeatedly put upon the ground that the mortgage to Winston was *prior* to the deed of assignment to Biggs. Therefore, Winston could not be required to elect between his prior lien and his *pro rata* share, because the two were not inconsistent. It is only between inconsistent (366) benefits that the doctrine of election can be made to apply. As Winston's mortgage was prior to the assignment, all that the latter deed could convey was the equity of redemption in the property covered by the mortgage. As the assignor is presumed to have known this, it may also be presumed that he intended to give to Winston by the deed of assignment an additional security to his mortgage. Winston, by insisting upon his prior security, did not abstract anything from the assignment. The property covered by his lien had already been specifically appropriated by the debtor to the payment of his debt; and the subsequent assignee, taking in subordination thereto, had no right to complain at its enforcement.

The case at bar is diametrically the opposite. The assignor Reynolds cannot by any possibility be presumed to have intended a duplicate security to the plaintiffs. His expressed intention is to the contrary. In his assignment, he expressly conveyed all his land in Virginia to his trustee for the purposes of the assignment. At that time the plaintiffs

had no lien upon the Virginia land, and their subsequent levy was in derogation of the assignment by diverting a large and valuable part of the assets therein conveyed.

After defeating the assignment to the utmost extent of their ability, they now claim their full *pro rata* share of that repudiated conveyance. I do not think this can be done, certainly not if equity is equality, or if clean hands mean anything but full hands. I think they should be put to their election, and required either to surrender to the trustee the property which they have taken from him, or keep that property and relinquish all claim under the assignment. In the words of my old Scottish ancestors, I do not think they should be permitted to "approbate and reprobate" the same deed; or in the homely Anglo-Saxon of a great English judge, to "blow hot and cold with the same (367) breath."

In *Sigmon v. Hawn,* 87 N. C., 450, 453, this Court, in speaking of the doctrine of election, says: "The foundation of the rule is that no one can be permitted to accept and reject the same instrument."

This rule, originally invoked chiefly in relation to wills, has become practically of universal application to all written instruments in any way operating as conveyances. In fact, the rule appears to me to rest on greater justice than where the grantor deeds away his own property than where the devisor disposes of property that is not his own. There are many cases in our Reports, in my opinion, sustaining the views I have herein expressed; and, as far as I can find, none to the contrary. It seems so clearly enunciated by *Pearson, C. J.,* in *Rankin v. Jones,* 55 N. C., 169, 172, that I can find no better conclusion than the following quotation: "These two prayers are clearly inconsistent; by the one the plaintiffs seek to set up an equity *adverse* and *against* the deed of trust, on the ground that W. F. Jones has no right to make it because of their prior equity or *quasi lien;* by the other they seek to set up an equity *under* the deed of trust. *This cannot be allowed.*"

(368)

H. G. WHITAKER v. OLD DOMINION GUANO COMPANY.

(Decided 29 November, 1898.)

Abbreviations—Commissions—Allowance.

The phrase *et cetera*—"*etc.*" in a contract to pay a commissioner appointed to sell land for payment of a debt "*and the cost and charges of advertising, etc.,*" will not include commissions, where no sale is made. The commissioner will be entitled to a just allowance for his time, labor, service, and expenses in the matter.

CIVIL ACTION to enjoin sale of realty under mortgage pending in Superior Court of SURRY County. There had been made an order in the cause by *Hoke, J.*, at chambers, directing a reference to ascertain balance due on the debt and adjudging that the trustee, W. T. Purvis, is entitled to commissions provided for in deed of trust. This was "5 per cent commissions on the sale of the whole of said land sold, as a compensation for making such sale, out of the proceeds of such sale." In making this order his Honor had before him a written contract executed by Whitaker and Purvis, trustees, wherein "Whitaker agrees to pay the cost and charges of advertising, etc."

The plaintiff excepts to so much of said order as allows Purvis, trustee, 5 per cent commissions.

Upon the coming in of the report ascertaining the balance due upon the mortgage debt, exceptions were filed by the plaintiff and heard by consent before *Starbuck, J.*, at chambers.

There had been no sale of the mortgaged premises—by arrangement with the trustee, Whitaker had by payments reduced the debt from $1,151.50 and interest to $120, for which sum and costs judgment was rendered—also 5 per cent commissions on the amount received by the trustee were adjudged to him.

(369) The plaintiff excepted to the commissions, and appealed.

Virgil E. Holcombe for plaintiff (appellant).
W. F. Carter for appellee.

FAIRCLOTH, C. J. The plaintiff made an assignment to the defendant Purvis in trust to secure his creditors. On default the trustee advertised a sale of the property on 4 April, 1891. After chaffering, the plaintiff and the trustee agreed to postpone the sale until December, 1891, and among other things, they agreed in writing that the plaintiff should make certain payments "and (pay) the costs and charges of advertising, etc., of the mortgage." The trustee afterwards advertised again, and the plaintiff obtained an order restraining the sale on the ground that he had paid the debt, including "all lawful charges thereon." The trust deed provides that the trustee shall receive as a compensation 5 per cent commissions "on the sale of the whole of said land sold, etc." When the cause was heard, his Honor rendered judgment that the trustee "is entitled to commissions provided for in the deed of trust." No sale was made. The plaintiff appealed, and the trustee's right to commissions is the only matter for us to determine.

The same question was presented in *Pass v. Brooks,* 118 N. C., 397, and it was held that the trustee was not entitled to commissions, and the reasons given. It was also held, on the authority of *Boyd v. Hawkins,*

17 N. C., 336 (2 Dev. Eq.), that the trustee was entitled to "a (370) just allowance for time, labor, services, and expenses under all the circumstances that may be shown before a master" when the court sees fit to make it. These cases were followed in a similar case—*Fry v. Graham,* 122 N. C., 773. The defendant, however, insists that the word "etc." in the contract means and includes commissions in its connection, and relies on *Gray v. R. R.,* 11 Hun. N. Y., 70. That was a boat contract, and the defendant agreed to take the boat "provided, upon trial, they were satisfied with the soundness of her machinery, boiler, etc." The Court held that the word "etc." was for construction by the court, and was not for the jury, and that "etc." meant "other things," that is, other material parts of the boat.

In *Hayes v. Wilson,* 105 Mass., 21, the contract was for "sixty-one days work on house, etc." The court allowed the jury to consider whether "etc." included work on the lot around the house. Another case was a sale of "china, wearing apparel, linen, etc.," and the last word was held to include things *ejusdem generis;* also, "all my furniture, etc.," included *things ejusdem generis.*

It would probably be safe to say that in these, and other like cases where the sense of the abbreviation may be gathered from the preceding words, there is sufficient certainty; but where the abbreviation cannot be understood and affects a vital part of the contract or instrument, the uncertainty will be fatal.

The word "etc." (*et cetera*) in the case before us does not necessarily mean commissions. It may mean expenses and moneys necessarily expended in the legitimate discharge of *fiduciary* duties. Commissions mean compensation for selling; charges and expenses are incidental and for money paid out in the discharge of the duties of the office.

Without undertaking to harmonize the nice distinctions above (371) referred to, we think it better to adhere to the plain rule laid down in the first three cases cited above, and in doing so we find the judgment erroneous in allowing commissions, upon the agreed state of facts.

Error.

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

R. W. BROWN v. S. MIENSSET AND E. FRISARD.

(Decided 6 December, 1898.)

Evidence—Contract and Discharge.

Where it was admitted, by plaintiff's counsel on the trial below, that plaintiff's right to recover depended upon the power of certain officers of a corporation to make the assignment and delivery of a lease contract, it was right to allow the defendant to show a release and discharge by the same officers who had made the contract with the assignor of plaintiff.

CIVIL ACTION for rents.

CASE ON APPEAL.

This was a civil action, tried before *Starbuck, J.,* and a jury, at Spring Term, 1898, of MCDOWELL Superior Court, on appeal by defendant from a justice of the peace. The action was brought to recover a certain amount alleged to be owing by defendants on a contract of lease. The following is a copy of said contract:

COPY OF LEASE.

NORTH CAROLINA—MCDOWELL COUNTY.

This lease and contract, made and entered into this 18 April, 1893, by and between the Carolina Investment Company, a corporation, (372) party of the first part, and Stephen Miensset and Emil Frisard, parties of the second part: Witnesseth, that the party of the first part, for the considerations hereinafter set forth, has leased, demised, and let to the parties of the second part, for the term of five years, beginning on 1 May, 1893, and continuing unto the first day of May, 1898, the Round Knob Hotel and grounds in McDowell County, North Carolina, said grounds embracing the bottom lands lying on both sides of Mill Creek from the stone viaduct to the Mill Creek trestle, and also including the apple orchard on the lands of said company outside said boundary lying on a hillside about one-fourth mile southeast of the hotel, the parties of the second part to pay as a rental for said hotel and grounds the following sums: two hundred and fifty dollars ($250) per year for the first two years, three hundred dollars ($300) for the third year, four hundred dollars ($400) for the fourth year, and five hundred dollars ($500) for the fifth, payments to be made quarterly on the first days of August, November, February, and May, during the continuance of this lease.

It is agreed that the rental for the first two years may be expended by the lessees on permanent improvements on said hotel. The parties of the first part, moreover, agree to sell to the parties of the second part

the furniture, linen, bedding, crockery, piano and safe at said hotel, farming implements and cow for the sum of eight hundred dollars ($800), and to loan to the parties of the second part, for the purpose of carrying on a hotel business in said hotel, the sum of five hundred dollars ($500), the amount so loaned, and the amount of the purchase money for said furniture, to be paid to the party of the first part by the parties of the second part in five payments of two hundred and sixty dollars ($260) each, with interest at six per cent per annum, for (373) which the parties of the second part have executed five notes for two hundred and sixty dollars, each due on the first day of May in the years of 1894, 1895, 1896, 1897, and 1898 respectively, title to said furniture, piano, safe, linen, bedding, farming implements and cow to be retained by the parties of the first part until said notes and interest are paid.

The party of the first part is to retain one room in said hotel building suitable for an office for said company. The parties of the second part agree to promptly pay the rent and notes as hereinbefore set forth, to take proper care of the buildings, fixtures and grounds of the said hotel and make no subletting of said hotel or grounds.

In testimony whereof this lease and contract has been signed and delivered in duplicate the date and year first above written.

THE CAROLINA INVESTMENT COMPANY,

M. F. SCAIFE, *President;* [SEAL.]
S. MIENSSET, [SEAL.]
C. C. MILLER, [SEAL.]
E. FRISARD. [SEAL.]

Witnesses as to all by
C. C. MILLER,
W. C. ERVIN.

It is understood and agreed to be a part of this lease and contract that the party of the first part is to take back the furniture, sold by this contract at a price of $500, at the end of this lease, provided said lease is not extended, and provided the same amount of furniture as shown by inventory taken this day, or its equivalent in value and condition, be tendered by the party of the second part at the termination of (374) this lease.

THE CAROLINA INVESTMENT COMPANY,

M. F. SCAIFE, *President;* [SEAL.]
S. MIENSSET, [SEAL.]
E. FRISARD. [SEAL.]

Plaintiff introduced testimony showing that J. W. Wilson had sold to the North Carolina Investment Company, a corporation, the Round Knob Hotel property, in consideration of stock issued to Wilson. The deed was never registered. The company leased said property to defendants Miensset and Frisard by the contract above set out.

J. W. Wilson, witness for plaintiff, testified that he entered into an agreement with the company, the terms of which he began to state, when defendant Frisard objected to the witness stating that an agreement was made with the company, and insisted that the witness would show with what persons the agreement was made, and their authority to bind the company.

The objection was sustained.

Thereupon witness testified that he first spoke to all the officers of the company, except the President, upon the matter of agreement hereinafter mentioned, and that they all expressed their consent. That the agreement was finally made and carried out by and between witness on the one hand and J. R. Ervin, vice-president, S. T. Pearson and W. C. Ervin, directors of the company, on the other, by which said deed was surrendered to Wilson, and Wilson surrendered his stock to the company, and the said contract of lease was assigned and delivered without written endorsement to Wilson, who was to receive the rents under, and assume any obligations imposed upon the company by said contract of
(375) lease. Said lease was transferred by Wilson to plaintiff by the following endorsement:

"Pay R. W. Brown. JAMES W. WILSON."

Plaintiff rested without offering evidence to show authority of said officers to act for and bind the company in making said agreement with Wilson, but defendant did not ask the court to exclude the testimony above set out, and proceeded with his evidence.

Defendant Frisard proposed to show that at a time prior to the delivery of the lease to Wilson he agreed with the same officers who made the agreement with Wilson that if he, Frisard, would procure one C. C. Miller to sign the lease contract and notes therein referred to and to pay $250, then due under the contract, that the defendant should be discharged from all liability on said lease contract, and that this agreement was prior to the delivery of the lease to Wilson, carried into effect by defendant Frisard on the one hand and said officers, to wit, J. R. Ervin, vice-president, S. T. Pearson and W. C. Ervin, directors, claiming to act in behalf of the company, on the other hand.

Plaintiff objected on the ground that the authority of said officers to bind the company had not been shown.

The court inquired of plaintiff's counsel whether he did not, in order to recover, contend that these officers had the power to make the agreement with Wilson by which the lease was assigned. Counsel stated that he did. Thereupon the court stated that if the plaintiff relied upon the assignment of the lease by said officers without their authority to act for the company, the defendant should be permitted to show he had been released from liability by the same officers, and admitted the proposed evidence.

Plaintiff excepted. (376)

The witness Wilson testified he had no notice of the alleged release when the lease was assigned to him.

There was a verdict and judgment in favor of defendant Frisard.

Plaintiff moved for new trial for error assigned. Motion denied. Exception. Appeal by plaintiff. Notice waived in open court. Appeal bond fixed at $50.

Plaintiff assigns as error the admission of the evidence in regard to the alleged release without proof of the authority of said officers to act for and bind the company.

Upon disagreement of parties in stating the case, and after due notice to counsel, the foregoing is certified to be the correct statement of the case on appeal.

H. R. STARBUCK,
Judge Presiding.

R. O. Burton for appellant.
S. J. Ervin and A. C. Avery for appellee.

MONTGOMERY, J. In 1893 the Carolina Investment Company leased to the defendants the Round Knob Hotel and grounds in McDowell County for five years for a certain annual rental. The property had been sold by J. W. Wilson to the company for stock in the same, but the deed had not been registered. The plaintiff claimed to be the owner of the contract of lease, and this action was brought to recover an amount then alleged to be due under it. On the trial J. W. Wilson, a witness for the plaintiff, had proceeded to testify concerning an agreement he had had with the company, by which he came into the possession of the lease contract, when the defendant Frisard objected and insisted that the witness should show with whom the agreement was made and their authority to bind the company. The objection was sus- (377) tained, and the witness testified, in substance, as follows: "That he first spoke to all the officers of the company, except the president, upon the matter of agreement hereinafter mentioned, and that they all expressed their consent; that the agreement was finally made and carried out by and between the witness on the one hand and J. R. Ervin, vice-president, S. T. Pearson and W. C. Ervin, directors of the company on

the other, by which said deed was surrendered to Wilson, and Wilson surrendered his stock to the company, and the contract of lease was assigned and delivered without written endorsement to Wilson, who was to receive the rents under and assume the obligations imposed upon the company by said contract of lease; said lease was transferred by Wilson by the following endorsement: 'Pay R. W. Brown—James W. Wilson.'"

The plaintiff rested his case upon that evidence without offering to show further the authority of the vice-president and the two directors of the company, Pearson and Ervin, to act for and bind the company in the transaction; nor did the defendant ask the court to exclude the evidence on that ground.

The defendant Frisard proposed to show that at a time prior to the delivery of the lease to Wilson he agreed with the same officers who made the agreement with Wilson that if he (Frisard) would procure one C. C. Miller to sign the lease contract and notes therein referred to, and to pay $250 then due under the contract the defendant should be discharged from all liability on the lease contract, and that this agreement was prior to the delivery of the lease to Wilson, carried into effect
(378) defendant Frisard on the one hand and the said officers (Ervin, vice-president, and Pearson and Ervin, directors, claiming to act in behalf of the company) on the other hand. There was objection to the proposed evidence on the part of the plaintiff on the ground that the authority of the officers to bind the company had not been shown by the witness. "The court inquired of plaintiff's counsel whether he did not, in order to recover, contend that these officers had the power to make the contract with Wilson by which the lease was assigned, and counsel stated that he did; thereupon the court stated that if plaintiff relied upon the assignment of the lease by said officers without authority to act for the company, the defendant should be permitted to show that he had been released from liability by the same officers, and admitted the proposed evidence." The plaintiff excepted.

The objection to the evidence complained of is founded on the decisions of this Court in the cases of *Edwards v. Phifer,* 121 N. C., 388, and *Phifer v. R. R.,* 122 N. C., 940. In the latter case, on the cross-examination of the plaintiff as a witness for himself, the defendant's counsel asked the witness if he was *careful* while at work on the bridge, and he answered that he was. On the reëxamination of the same witness he was asked by his own counsel if he was careful, and the answer "Yes" was allowed over the objection of the defendant on the ground that the defendant had drawn precisely the same evidence from the witness, and that that was only a repetition of the same evidence. This Court, however, held on the appeal that the objection ought to have been sustained.

But the case before us presents a much larger question than one of evidence. The plaintiff's right to recover rests upon the power of the vice-president and the two directors named to make the agreement by which the lease contract was assigned and delivered to Wilson. (379) This is apparent from the evidence of the plaintiff as well as by the manner in which the evidence was brought out. The counsel of the plaintiff on the trial below, as we have seen, admitted that the plaintiff's right to recover depended upon the power of the officers above named to make the assignment and delivery of the lease contract. That being so, the court below was clearly right in allowing the defendant to show a release and discharge by the same officers who had made the contract with Wilson, the assignor of the plaintiff.

No error.

A. C. DAVIS ET AL. v. GEORGE BLEVINS AND THOMAS HEATH.

(Decided 13 December, 1898.)

Probate of Will.

1. The probate of wills is a judicial proceeding *in rem*, and the judgment is a judgment *in rem* and is good against the world, and cannot be attacked collaterally.

2. The case of *R. R. v. Mining Co.*, 113 N. C., 24, under The Code practice, where the clerks have jurisdiction of the probate of wills, distinguished from the present case bearing on the probate of will, under the old county court system.

CIVIL ACTION for recovery of land, tried before *Coble, J.*, and a jury, at July Term, 1898, of Superior Court of ASHE County.

As a link in their title the plaintiff proposed to read the will of George Bowers. The defendants objected on the ground of defective probate. Objections sustained, and evidence excluded. Plaintiffs excepted, submitted to judgment of nonsuit, and appealed. (380)

Case agreed, signed by counsel.

Plaintiffs offered in evidence a script, or paper-writing, purporting to be the last will and testament of George Bower, and stated that it was a necessary link in plaintiff's chain of title. It was admitted that Col. George Bower died about the year 1861; that said paper was found in the file of wills for said county, in the proper office; that the same was recorded in the will book in said office, and that there was no entries of proof of any kind upon said will book; that on the back of said script or paper were the following entries:

STATE OF NORTH CAROLINA—ASHE COUNTY.

I certify that the foregoing will has been duly proven and recorded as the law directs.

JAMES WAGG,
Clerk County Court.

COL. BOWER'S WILL.

And said record of said will was offered in evidence by the plaintiffs, who also offered a record in a different book, which was admitted to be the record of the Court of Pleas and Quarter Sessions of said county, of October Term, 1861, and in the minutes of said book appears the following entry, viz.:

"The last will and testament of Col. George Bower was produced in open court for probate and duly proved according to law.

"And on motion, America C. Bower was appointed administratrix with the will annexed (it appearing that no executor had been appointed in said will); and she filed her bond in the sum of one hundred thou-
sand dollars, with C. H. Doughton, Q. F. Neal, and Robert
(381) Gambill as securities. Bond accepted, and the administratrix qualified as the law directs."

His Honor, being of the opinion that said will had not been duly proven, as provided by law, excluded the same as evidence.

Whereupon, plaintiffs submitted to a judgment of nonsuit and appealed to the Supreme Court. Notice of appeal waived. Appeal bond fixed at forty dollars. Appeal bond filed in open court.

It is admitted that J. Z. Neal was appointed trustee for Mrs. A. C. Davis, and was made a party plaintiff after the commencement of this action.

Case agreed.

FIELDS, TODD & PELL,
Attorneys for Plaintiffs.
R. A. DOUGHTON,
BLACKBURN & COUNCIL,
Attorneys for Defendants.

Todd & Pell for appellants.
R. A. Doughton for appellees.

FURCHES, J. This is an action of ejectment, in which the will of George Bower becomes a necessary link in the chain of plaintiff's title. The plaintiff offered this will in evidence, on the back of which was written, "State of North Carolina—Ashe County. I certify that the foregoing will has been duly proven and recorded as the law directs. James Wagg, Clerk County Court."

The plaintiff also offered in evidence the following record on the minute docket of October Term, 1861, of the Court of Pleas and Quarter Sessions of Ashe County: "The last will and testament of Col. George Bower was duly produced in open court for probate, and (382) duly proved according to law."

"And, on motion, America C. Bower was appointed administratrix with the will annexed (it appearing that no executor had been appointed in said will), and she filed her bond in the sum of one hundred thousand dollars with C. H. Doughton, Q. F. Neal, and Robert Gambill as sureties. Bond accepted, and the administratrix qualified as the law directs."

But his Honor still being of the opinion that said will had not been sufficiently probated, sustained the defendant's objection and ruled out the will. Plaintiff excepted, and submitted to a judgment of nonsuit, and appealed.

The only question presented by this appeal is the sufficiency of the probate of the will of George Bower, to be allowed as evidence in the trial of this case. The question presented here is a very different one from what would have been presented upon a caveat, and appeal from the judgment of the county court of Ashe County in 1861. That would have put the sufficiency of the probate directly in issue, and the trial would have been *de novo*. This appeal only attacks the judgment of the county court, collaterally, which in our opinion could not be done.

"The probate of wills is a judicial proceeding *in rem*, and the judgment is a judgment *in rem* and is good against the world." 2 Freeman on Judgments, sec. 608.

It must be presumed that when the county court admitted this will to probate and proceeded to judgment, in which it held that the will "was produced in open court for probate and duly approved according to law," that it was so proved. This view is sustained *In re Young's Will*, at this term. *Hutson v. Sawyer*, 104 N. C., 1; *Jenkins v. Jenkins*, 96 N. C., 254, on pp. 258 and 259; *Moody v. Johnston*, (383) 112 N. C., 798, 800.

On the argument, objection was taken to the record of probate because it was on the minute docket. But this is no ground of objection, as the minute docket is the docket upon which such records were made, as the courts of probate were constituted at that time, and was therefore found just where it should have been found. The defendant cited *R. R. v. Mining Co.*, 113 N. C., 241, in support of the ruling of the court. But in doing so he failed to note the fact that that decision was made under the present statute and The Code practice, and is not in point in this case; and, not being in point, it is not necessary that we should make any ruling as to its correctness, and we do not. But, as it became necessary to consider it, as it was cited as authority by defendant, we

are not willing that it should pass without our calling attention to it, with the suggestion that it may have been put upon incorrect principles.

The clerks now have *jurisdiction* of the probate of wills, and they should not admit one to probate without taking the proof as provided by statute. But as they have *jurisdiction* to admit wills to probate, when they do so—whether their *judgments in rem* are not "binding on the world," and whether they can be collaterally attacked—*quære.*

In our opinion the will of George Bower was competent evidence, and should have been admitted in evidence on this trial. Error.

New trial.

Cited: Cochran v. Improvement Co., 127 N. C., 396.

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(384)

C. E. GRAHAM & CO. v. B. STURGILL, SHERIFF.

(Decided 6 December, 1898.)

Sheriff—Amercement—The Code, Section 2079.

Where judgment *nisi* for $100 is rendered against a sheriff for failure to make due return of process, and no sufficient reason is shown for the failure, the judgment should be made absolute. The Code, sec. 2079.

AMERCEMENT of defendant, sheriff of Ashe County, for not making due return of process of execution in the case of C. E. Graham & Co. v. Vail & Gilbert, heard on appeal from justice's court by *Coble, J.,* at Fall Term, 1898, of Superior Court.

CASE.

This was an appeal from a judgment of justice of the peace setting aside a judgment *nisi* granted upon a motion based upon affidavit, under section 2079 of The Code, against B. Sturgill, sheriff, adjudging that the said sheriff was liable to pay to the plaintiffs the penalty of one hundred dollars, and that the said plaintiffs recover of the said sheriff the sum of one hundred dollars and costs of motion, unless the said Sturgill, sheriff, showed sufficient cause to the justice's court on the first Monday in December, 1897. The court found the following facts: That execution issued from the court of the justice of the peace on 7 July, 1897, for the sum of $196.11 damages, with interest on same from 29 June, 1897, and eighty cents costs; that on said 7 July, 1897, the said execution was delivered and the execution costs paid, allowed by law, to J. W.

Wayman, deputy sheriff, by J. W. Todd, plaintiff's attorney; that (385) the homestead fees were not paid nor tendered; that on the morning of 8 July, 1897, the said Wayman, deputy sheriff, presented the said execution to the said Vail, of the firm of Vail & Gilbert, and demanded payment; that the said Vail refused payment on the ground that he had craved a stay of execution on the day judgment was rendered, and that the time had not expired; that thereupon the said Wayman, deputy sheriff, went to the said J. W. Todd, attorney for the said plaintiffs, and stated that the said Vail demanded the time allowed him by law to stay said execution, whereupon the said Todd, attorney as aforesaid, said to the said deputy sheriff, "Give him until tomorrow, and in the meantime keep your thumb on them." That on the same said 8 July, 1897, the said firm of Vail & Gilbert made an assignment of all their goods, chattels and effects belonging to the said firm of Vail & Gilbert, which assignment was duly recorded on the same day that said conversation with the said J. W. Todd was had; that thereafter his (the said A. R. Vail's) personal property exemption was allotted and nothing left upon which a levy could be made out of which to satisfy said execution; that return was not made upon said execution within sixty days from the said 7 July, 1897, the date of said execution. That the said Wayman, deputy sheriff as aforesaid, states in his affidavit filed before the justice of the peace that the reason return was not made on said execution within sixty days was because of the direction given him by the said Todd as above stated, and the said Wayman further states in said affidavit that after the assignment was duly executed and recorded, that there was nothing whatever upon which to levy out of which to make said debts, and that the said Wayman regarded the (386) execution as of no effect. That on 8 July, 1897, when the said Wayman demanded payment on the execution in the above case, A. R. Vail, of the firm of Vail & Gilbert, said: "If they push me to the wall, I shall demand all the law allows me"; and the said Wayman states in his affidavit that from the expression the said Wayman understood that said Vail demanded his personal property exemption. That fees for laying off personal property exemption had not been advanced to the said Wayman. That the following endorsements appear upon the writ of execution: "Received 7 July, 1897. B. Sturgill, sheriff—J. W. Wayman." "Not satisfied. No property found to satisfy said execution. 7 September, 1897. B. Sturgill, sheriff, per J. W. Wayman." It also appears from the writ of execution that it was returnable in sixty days.

From an affidavit of the said J. W. Wayman, filed at this term the court finds that the said Wayman returned said execution to the justice on the 10th of the month and made his return as of the 7th, and the

justice called attention of the said Wayman to that fact, and said that it was all right, that it made no difference, and he would let it go that way, and to make no change.

Upon the foregoing facts, the court being of the opinion that the said sheriff failed to make due return of said writ of execution, and being further of the opinion that sufficient cause for such failure had not been shown, rendered judgment absolute as follows:

JUDGMENT.

This cause coming on to be heard upon the appeal from the judgment rendered by S. T. Sandefur, justice of the peace, refusing to make
(387) absolute the judgment *nisi* rendered against the sheriff, B. Sturgill, and being heard, and the facts found by the court, it is adjudged that the judgment *nisi* against said sheriff, B. Sturgill, be made absolute. It is, therefore, considered and adjudged that the plaintiffs recover of the said sheriff, B. Sturgill, the sum of one hundred dollars, and the costs of the motion, to be taxed by the clerk.

ALBERT L. COBLE,
Judge Presiding.

SHERIFF APPEALS TO SUPREME COURT.

The said sheriff, B. Sturgill, excepted to said judgment and appealed to the Supreme Court. Notice of appeal waived. Appeal bond fixed at $25. The above is the case on appeal. ALBERT L. COBLE,
Judge Presiding.

R. A. Doughton for appellant.
Todd & Pell for appellee.

FAIRCLOTH, C. J. An execution issued from a justice of the peace to the sheriff, on 7 July, 1897, commanding him to collect and make due return in sixty days. The return was made on 10 September, 1897, more than sixty days. The plaintiff moved for the penalty of $100 against the sheriff for failing to make due return of the execution and obtained judgment *nisi,* and on the hearing the justice refused to enter judgment absolute. An appeal was taken, and in the Superior Court, the judge, after finding as facts that no return was made in sixty days, and that no sufficient cause for such failure was shown, rendered judgment
(388) absolute against the sheriff. There was no error in the judgment. *Waugh v. Brittain,* 49 N. C., 470; The Code, sec. 2079.

Another question was argued before us, but after the above conclusion it would be of no benefit to the defendant to consider it.

Affirmed.

CAROLINA INVESTMENT COMPANY v. HIRAM KELLY, J. W. POTTER, AND JOHN ALLISON.

(Decided 6 December, 1898.)

Appeal—Practice—The Code, Sections 385, 386.

1. Where no answer is filed, an appeal lies from a refusal of judgment by default and inquiry, unless the judge, in his discretion, gives time to answer.
2. But where an answer is filed, the failure of defendant to appear in person or by counsel at the trial term does not entitle the plaintiff to a judgment by default; that is only allowed when defendant has failed to answer. The Code, secs. 385, 386. The plaintiff must go to the jury with his proof upon the issues raised by the pleadings.

CIVIL ACTION for trespass, *quare clausum fregit,* tried before *Coble, J.,* at September Term, 1898, of McDOWELL Superior Court.

The defendants filed an answer denying the allegations of the complaint, but did not appear in person or by counsel at the trial term.

The plaintiff moved for judgment by default and inquiry. Motion refused. Plaintiff excepted, and appealed.

A. C. Avery for plaintiff (appellant). (389)
No counsel contra.

CLARK, J. The defendant filed his verified answer denying all the allegations of the complaint, save the formal one of the incorporation of the plaintiff. This devolved upon the plaintiff the burden of proving them. The allegation of ownership of the lands described in the complaint being denied, an order of survey was made. At the next term the defendant did not appear either in person or by counsel, and his former counsel stated he had retired from the cause a year before by leave of the court. The plaintiff's counsel then moved for judgment by default and inquiry. This was refused by the court on the ground that the answer was on file. From this refusal the plaintiff appealed.

The appeal lay from a refusal of judgment by default and inquiry. *Kruger v. Bank,* at this term, and cases there cited. But we see no error in the refusal. Neither the withdrawal of counsel, nor the failure of the defendant to retain other counsel nor to be present in person could have the effect to strike out the answer. As long as it was on file a judgment by default could not be given, since that is only allowed when the defendant has "failed to answer." Code, secs. 385, 386. The statute is too explicit to admit of discussion as to its meaning. No reason is shown why the plaintiff did not go on with the trial and prove his allegations. The absence of defendant and his failure to provide counsel could not prejudice the plaintiff in any wise.

The record and also the case on appeal settled by the judge state "Plaintiff gives notice of appeal in open court, neither defendant nor counsel for defendant being present." Formerly The Code, sec. 550, required notice of appeal "to be given to the adverse party," but (390) chapter 161, Laws of 1889, amended this by adding, "unless the record shows an appeal taken, or prayed, at the trial which shall be sufficient." See Clark's Code (2d Ed.), sec. 550; *Howell v. Jones,* 109 N. C., 102. The appeal therefore is properly here. It lacks not regularity but merit.

No error.

Cited: Delozier v. Bird, post, 692.

CYNTHIA TAYLOR, NANCY PUGH, WILLIAM MCMILLAN v. JAMES MCMILLAN.

(Decided 13 December, 1898.)

Parol Trust to Convey Land.

Where a debtor's land is sold at execution sale and is purchased by the judgment creditor, who takes the sheriff's deed, and pursuant to an arrangement subsequently made with the debtor and a friend who comes to his assistance receives satisfaction of his debt, and conveys the land to a son of the debtor, to be held upon a parol trust to convey back to the father, as soon as another judgment creditor is settled with, which settlement is made, but the son refuses to reconvey. Equity will enforce the trust, there being no intimation of fraud in the pleadings. *Link v. Link,* 90 N. C., 235.

CIVIL ACTION to enforce a parol trust by declaring the defendant a trustee of land, holding for the benefit of the widow and heirs at law of the late John McMillan, tried before *Coble, J.,* at July Term, 1898, of ASHE Superior Court.

The plaintiffs claimed as heirs of John McMillan, who died in possession; the defendant, a son of John McMillan, claimed to be owner of the land under a deed from John F. Greer.

(391) The plaintiffs read in evidence the deed from John F. Greer to defendant, and then read in evidence the deposition of R. E. Pugh, husband of Nancy Pugh, one of plaintiffs, as follows:

Q. State what trade or arrangement John McMillan made with reference to this land in 1880; go on and give a full detailed statement of the whole transaction.

A. The old man, McMillan, said Greer had had his land sold, and asked me if I could manage any way to help him get it back. I told him I would try; and after studying on it a few days, I went to Laurel Springs, Greer's home, James McMillan went with me, and I succeeded in making the trade with Greer about the land, and he agreed to take my father's notes as payment on the land, and we agreed upon a day for Greer to come down to said McMillan's and bind up the trade; and he came according to said agreement and we bound up the trade. I was to pay Greer his debt, which he claimed was something over $500; and in payment of this I let Greer have my father's notes, amounting to $466.23, and the balance of Greer's claim was paid with property of John McMillan, consisting of a mule and a cow or heifer, and Greer made the deed to James McMillan; and after James McMillan and myself got back from Greer's the old man, McMillan, took me and James McMillan out to ourselves and said he wanted one of us to take the land in our names; that Wash Ray had a judgment against the land, and if he took it back in his name said Ray would have the land sold again, and that he could not pay Ray at that time, but he would pay him and then he must have the deed to his land back, and James McMillan said he would take it, and he should have it back.

Q. Was there any agreement that James McMillan should hold any of the land after the Ray debt was satisfied?

A. The agreement was that James McMillan would hold the (392) deed only till the Ray debt was paid, when he should reconvey the land back to the old man.

G. W. Ray testified: That he held a certain judgment against John McMillan, amounting to about $80, and was paid the judgment by John McMillan. Settlement with me was some time in 1895.

John McMillan died in September, 1895, in possession.

The defendant moved for judgment as of nonsuit, at the close of plaintiff's testimony, on the ground that the testimony offered by the plaintiff, disclosed that the land in question was conveyed to James McMillan for fraudulent purposes, at the instance of John McMillan, to wit: To hinder, delay or defraud one Ray in collecting a debt against John McMillan.

Motion allowed, and plaintiffs except and appeal.

W. W. Barber for plaintiffs (appellants).
R. A. Doughton for defendant.

FAIRCLOTH, C. J. The object of this action is to have a parol trust declared and enforced on land. It is admitted that the land described was sold by the sheriff under an execution against John McMillan, the father of plaintiffs and defendant, and was purchased by, and a deed

made to the judgment creditor, John F. Greer, conveying 114 acres. It is proved that at the time of this sale and subsequent agreement between said McMillan and the defendant (James McMillan), the former was indebted to one Ray by judgment in the sum of $80, which was subsequently paid off and satisfied by John McMillan, who then demanded a deed from the defendant. It was also proved that, after the sheriff's sale John McMillan requested the defendant to take the
(393) deed from Greer, saying "that Wash Ray had judgment against the land, and that if he took it back in his name, said Ray would have the land sold again, and that he could not pay Ray at that time, but he would pay him, and then he must have the deed to his land back, and James McMillan (defendant) said he would take it, and he should have it back."

John McMillan remained on the land till his death. Ray, Greer and other witnesses gave evidence tending to show the above facts.

When the plaintiffs rested their case the defendant moved judgment as of nonsuit on the ground that the plaintiff's testimony "disclosed that the land in question was conveyed to James McMillan for fraudulent purposes at the instance of John McMillan, to wit, to hinder, delay or defraud one Ray in collecting a debt against John McMillan." This motion was allowed and judgment of nonsuit was entered and the plaintiffs appealed. That judgment is erroneous.

A court of equity will not interfere with a contract, if it be illegal and against State policy, where the parties are in *pari delicto*. *Grimes v. Hoit,* 55 N. C., 271.

Where A paid the purchase money for land and had title made to B on a parol trust for A, it was held that such trust was not embraced in the statute of frauds. But where it appeared that the contract was made to defraud creditors, the court will not interfere with the legal title. *Turner v. Eford,* 58 N. C., 106.

Where both parties to an action have united to defraud others, the public, or the due administration of justice, or in a transaction *contra bonos mores,* the courts will not enforce it against either party. *York v. Merritt,* 77 N. C., 213.

(394) The defendant relies upon these and similar decisions, but, unfortunately for him, these decisions do not fit the facts in the present case. There is no allegation in the pleadings that the agreement between the defendant and his father was made to defraud any one, and the plaintiffs do not allege any mistake in the deed or deeds, and ask to have the deeds corrected. They insist that the deeds speak as intended by the parties, and they seek to impress a parol trust on the legal estate by the aid of the court of equity and to have the trust executed according to its terms and provisions.

The sheriff's sale put the land out of the creditor's reach and beyond the debtor's control; it had been applied to his creditors; and the agreement was made between the defendant and his father after the sale, and there is no suggestion of any fraudulent purpose on the ancestor's part, but it does appear that he was moved by the commendable purpose of rehabilitating himself and family at the old homestead. He paid Ray's debt, and the defendant has paid nothing for the land, and his position looks more in bad faith towards the old man than the evidence discloses against the old man. If the evidence be true, the defendant's conduct is inexcusable, and it appeals in vain to the conscience of this Court.

The plaintiffs rely on *Link v. Link,* 90 N. C., 235, which is precisely in point, and so conclusive that we think a reference to it and the cases cited therein, and to the subsequent case of *Hughes v. Pritchard,* 122 N. C., 59, is sufficient. In *Link's case, supra,* the parol agreement was made before and in anticipation of the sheriff's sale, and the agreement was enforced by this Court.

Error.

Cited: McNeill v. R. R., 135 N. C., 734.

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(395)

J. L. WISEMAN v. J. R. GREENE.

(Decided 6 December, 1898.)

Public Road—Title—Location.

1. An action for obstructing a road, not alleged to be a public road, or not alleged to be on plaintiff's land, cannot be maintained.
2. Where the answer admits the ownership by the plaintiff of the land claimed by him, it is unnecessary to show title out of the State.
3. The question of location is one for the jury.

CIVIL ACTION for the recovery of land, being a couple of acres, upon which were situated a grist and sawmill, and damages are claimed for an alleged obstruction by defendant of a road leading to the mills, over his land.

The answer admits the ownership by plaintiff of the mill property, and avers that the plaintiff is in possession thereof, and denies any interference with it by defendant.

At the close of plaintiff's evidence the defendant moved to nonsuit the plaintiff: first, for that the plaintiff had failed to show title out of the State; secondly, the description in the plaintiff's deed is so uncertain as

to be incapable of location; thirdly, because, if capable of location, the plaintiff's evidence was insufficient to locate the land.

The court allowed the motion, and plaintiff excepted. From the judgment rendered the plaintiff appealed.

S. J. Ervin, T. A. Love and W. C. Newland for plaintiff (appellant). No counsel contra.

FURCHES, J. From the complaint and trial of this case, it is difficult for us to determine what the plaintiff complains of—whether it was for possession of land, or for trespass on land, or for stopping up (396) the plaintiff's mill-road. Nor are we able to determine the grounds of the plaintiff's complaint from the evidence introduced, or from the map filed, which shows as near nothing as it could well do, though made under order of the court. It seems not to have been made upon the calls in the deed, nor by the allotment of the homestead; nor does it show the contention of the parties, nor the *locus in quo*.

If the action is for defendant's stopping up the road, it cannot be maintained, as it is not claimed that it is a public road. *Boyden v. Achenback,* 79 N. C., 539, cited with approval in *Collins v. Patterson,* 119 N. C., 602; *S. v. Fisher,* 117 N. C., 733. Unless the point at which it was closed is on the plaintiff's land, it would then be a trespass *quare clausum fregit.*

The complaint alleges a trespass upon the plaintiff's mill property by tearing down one house and by damaging other buildings. But these trespasses are denied by the defendant, and the plaintiff fails to offer any evidence to sustain either of these alleged trespasses.

The plaintiff asked that he be adjudged the owner of the mill and two acres of land, and that he be put in possession of the same. But the defendant in his answer admits that plaintiff is the owner of this mill and two acres of land, and alleges that plaintiff is in possession. And plaintiff offers no evidence to show that he is not in possession.

But singular as it may appear, after the defendant had admitted that plaintiff was the owner of the mill and two acres of land, he contends that it cannot be located; that the description in plaintiff's deed is too indefinite, and asks the court to nonsuit the plaintiff upon the (397) following grounds:

1. "That plaintiff had shown no title out of the State."

2. "That the description in the deed under which plaintiff claims is so uncertain as to be incapable of location."

3. "That if capable of location, the plaintiff's evidence is contradictory to the description in the deed and complaint, and is insufficient to locate the land."

The court allowed the motion and the plaintiff excepted and appealed.

We do not think the judgment of nonsuit can be sustained upon the first cause assigned, as it appears (though not very distinctly) that plaintiff and defendant claimed under a common source (under A. Wiseman, paragraph 4 of the answer).

We do not think it can be sustained under the second assignment, as defendant in the first paragraph of his answer admits the plaintiff's ownership, as follows: "That he denies paragraph 1 of the complaint, but admits that plaintiff is the owner of two acres of land on Toe River, including an old, dilapidated and unused saw and grist mill." After this admission, it is too late to dispute its location.

We do not think it can be sustained under the third assignment, as defendant had admitted the location in his answer. And had this not been so, *the sufficiency of the evidence* was a question for the jury.

This case from start to finish seems to us to be wanting in clearness of conception, and not to have been tried upon any of the issues that might *possibly* have been presented upon the pleadings.

New trial.

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(398)

W. H. HEATON v. A. E. WILSON, AND RICHARD WILLIAMS.

(Decided 6 December, 1898.)

Parties—Partners.

1. It is the general rule that in all suits relating to a partnership, all the partners are necessary parties, plaintiff or defendant.
2. Defect of parties in such case may be taken advantage of by demurrer, motion in arrest of judgment, or upon the general issue.

CIVIL ACTION, with claim and delivery for personal property, tried before *Starbuck, J.*, and a jury at Spring Term, 1898, of MITCHELL Superior Court.

The action was brought in the name of W. H. Heaton alone for a lot of birch logs, eighteen in number.

There was evidence tending to show that the property belonged to Heaton and W. W. Avery as partners, as tenants in common.

In this connection his Honor charged: "And if the relationship between Avery and plaintiff was that of partners in the transaction, then plaintiff and Avery are owners of the logs, and the fact that Avery is not a party would not prevent plaintiff from recovering possession of

the logs in this action, and you should answer 'Yes' as to the number of logs which you may find were severed by plaintiffs and taken possession of by defendants."

To this instruction defendants excepted.

Verdict and judgment for plaintiff. Appeal by defendants.

S. J. Ervin, W. C. Newland and T. A. Love for defendants (appellants.)

No counsel contra.

(399) MONTGOMERY, J. This was an action brought by the plaintiff Heaton against the defendants for the recovery of certain personal property (18 figured birch logs) specified in the complaint. On the trial there was evidence going to show that Heaton was not the sole owner of the property, but that it belonged to him and W. W. Avery as partners or tenants in common. In this connection his Honor instructed the jury that "If the relationship between Avery and the plaintiff was that of partners in the transaction, then the plaintiff and Avery are owners of the logs, and the fact that Avery is not a party would not prevent the plaintiff from recovering possession of the logs in this action, and you should answer 'yes' as to the number of logs which you may find were severed by plaintiff and taken possession of by defendants."

There was error in the instruction. The plaintiff under that charge got all of the logs, the whole of the personal property sued for (the value thereof, as the defendants had converted them) and if he was a partner he got more than he was entitled to. The objection could have been taken advantage of by demurrer, or by motion in arrest of judgment, or upon the general issue as was done here. *Cain v. Cain,* 50 N. C., 282. It is said in *Holmes v. Godwin,* 69 N. C., 467, that the old action of replevin is but a shorter name for the action of claim and delivery. And one of several tenants in common could not maintain an action of replevin. *Cain v. Cain, supra; Heart v. Fitzgerald,* 2 Mass., 509. Certainly it is the general rule that in all suits relating to a partnership all the partners are necessary parties, either as plaintiff or defendant. *Bank v. R. R.,* 11 Wall., 628; *McCaig v. Helt,* 42 Md., 231; *Dunham v. Bistehoff,* 47 Ind., 214.

(400) There are other and more important questions involved in this appeal, but we have concluded for satisfactory reasons to make no decision upon them at this time. For the error pointed out there must be a new trial.

New trial.

W. C. KISER & CO. v. GEORGE BLANTON.

(Decided 23 December, 1898.)

Claim and Delivery—Mortgage—Justice's Jurisdiction.

1. While a justice of the peace has no equitable jurisdiction and cannot try an action to foreclose a mortgage, yet a mortgagee, after default and refusal, may sue in the justice's court for the possession of personal property conveyed to him, in the mortgage, when the property demanded does not exceed the value of $50; or he may sue there for his debt secured by mortgage, when the debt does not exceed the value of $200. The first is a proceeding for *tort*—the latter, to enforce a contract.

2. When the mortgaged property consists of several articles of property—the whole exceeding the value of $50, the mortgagee is not bound to sue for the possession of the whole, but may sue, if he sees fit, for any part thereof, and may bring his action in the justice's court, if that part does not exceed the value of $50.

CIVIL ACTION of claim and delivery for a horse and cow of the value of $25, begun in the justice's court and taken by appeal of defendant to the Superior Court of LINCOLN County, and heard before *Greene, J.*, at Fall Term, 1898.

The plaintiffs claimed the property under a mortgage made to them by defendant to secure a debt of $21.

It was admitted by plaintiff that in this action he had not asked for all the property contained in the mortgage, but for only a part thereof, dividing up the articles mentioned in the mortgage for the purpose of conferring jurisdiction upon a justice of the peace; and (401) it was further admitted that another action prior to this had been brought in the justice's court for all the property contained in the mortgage, and the action had been dismissed because the value of said property was more than $50.

His Honor adjudged that the contract could not be split up into several parcels for the purpose of conferring jurisdiction, and that therefore the plaintiffs could not recover in this action.

To this ruling plaintiffs excepted.

It being admitted that the cow and horse, delivered to the plaintiff by the judgment of the justice, had been sold and could not be returned, a jury was impaneled to ascertain the value of the property taken and damages for retention. The jury found the value to be $17 and the damages nothing.

Judgment in favor of defendant for $17 and costs.

Plaintiffs appealed.

S. G. Finley for plaintiffs (appellants).
No counsel contra.

FURCHES, J. This action was commenced before a justice of the peace by the plaintiff mortgagee against the defendant mortgagor, for the possession of a horse and a cow, conveyed in the mortgage. The debt secured was $21 and the property sued for was found by the jury to be worth $17. The plaintiff gave bond under the statute (Code, sec. 322 *et seq.*) upon which he obtained an order for possession, and the property was taken thereunder and delivered to the plaintiff.

(402) On the return day of the summons the defendant appeared before the justice of the peace who issued the summons, filed an affidavit under the statute alleging that he did not believe he could obtain justice before the magistrate who issued the summons, and the case was removed for trial to another magistrate. The defendant entered a special appearance before the justice to whom the case had been removed, and there moved to dismiss for the reason that service had not been properly made. The court overruled this motion and proceeded to trial and judgment, from which the defendant appealed to the Superior Court. In this court the defendant again entered a special appearance, and again moved to dismiss for the same reason that he had moved to dismiss before the justice of the peace. The motion was overruled by the judge upon the ground that any want of proper service had been waived by defendants appearing and filing an affidavit and having moved for trial, and the defendant excepted.

During the progress of the trial it appeared that other property was included in the mortgage, besides the horse and cow sued for in this action, and that the whole of the property conveyed in the mortgage was worth more than $50. Upon this fact being made to appear to the court, the defendant again moved to dismiss the action for this reason, alleging that it was splitting up the plaintiff's claim for the purpose of acquiring jurisdiction, and for that reason was a fraud upon the jurisdiction of the court. The court allowed this motion, dismissed the plaintiff's action and the plaintiff excepted and appealed, but the defendant did not appeal. As the defendant did not appeal, his exception to the court's refusing to dismiss the action upon his first motion (for want of proper service) cannot be considered on this appeal.

(403) But his second motion and the ruling of the court thereon, from which the plaintiff appealed, it is contended, raises the question of jurisdiction; and to determine this question it is necessary to consider the character of the action—whether it is upon contract or in *tort*. If it is an action on contract (the note) which is for $21, and the proceeding in claim and delivery is ancillary to that, it is held that

the justice would have jurisdiction of the action on the note, whether he had jurisdiction of the claim and delivery proceeding or not, and that the action should not have been dismissed. *Hargrove v. Harris,* 116 N. C., 418.

But this would not give the plaintiff the relief he wanted—the possession of the property. He would be no better off with a personal judgment against the defendant, and nothing more, than he would be if he had no mortgage. It is therefore manifest that it is an action for the possession of the property, which the defendant had refused to deliver to the plaintiff, that he might foreclose the mortgage by a sale of the same, and that it was not an action of debt on the note. *McGehee v. Breedlove,* 122 N. C., 277.

It is said that this is an action to foreclose the mortgage, and that a justice of the peace has no equitable jurisdiction. And it is true that a magistrate has no equitable jurisdiction (*Daugherty v. Sprinkle,* 88 N. C., 300; *Cotton Mills v. Cotton Mills,* 116 N. C., 647), but it is not true that this is an action to foreclose the mortgage. It is a legal action for the possession of property, and is what would have been an action of replevin under the old practice. It would have been a common law action of detinue if the plaintiff had not taken out claim and delivery proceedings. Jones on Chattel Mortgages, secs. 705, 706. After default and refusal to surrender possession to the mortgagee, the (404) mortgagee becomes, in law, the absolute owner of the mortgaged property, though the mortgagor had the right to redeem, until the property is sold; and the mortgagee is entitled to the same remedy against him for the possession that he would have against any other person who had the possession of his property. *Ibid.* And in this action he may have the balance due ascertained and redeemed, if he will. *Ibid.* The same doctrine is held by this Court in *Jarman v. Ward,* 67 N. C., 32, and in *Hopper v. Miller,* 76 N. C., 402. It is true that these cases were not brought by mortgagees. But as a mortgagee, after default and refusal to deliver the property, occupies the same position as a stranger, they apply with equal force to this case, as if the mortgagor had been a stranger.

The right of the mortgagee to the possession continues as long as any part of the mortgaged debt remained due. *Jordan v. Farthing,* 117 N. C., 181; Jones on Chattel Mortgages, *supra,* sec. 707.

This being an action for the possession of the property (and not on contract) the justice's jurisdiction is limited to $50 in amount. The property sued for in this action was found by the jury to be worth only $17. So there is no want of jurisdiction, unless the plaintiff was compelled to bring his action for all the property named in the mortgage.

The fact that plaintiff brought his action for a part of the property conveyed in the mortgage does not fall within the rule against splitting up a debt on contract to acquire jurisdiction, for the reason that it is not brought on contract. But if you apply the principle of that rule, by way of analogy, it will not sustain the defendant's contention and the ruling of the court. This rule only applies to the splitting up of a (405) *single contract,* as a note for $400 split into two actions of $200 each. But if it were an unsettled account, consisting of a dozen items and amounting to $400, it might be split up in several accounts, and more than one action brought, or they might all be included in one action. *Caldwell v. Beatty,* 69 N. C., 365.

But it seems to have been settled by this Court that the plaintiff, if he chooses to do so, can bring an action for a part of the articles only, included in the mortgage. *Boone v. Darden,* 109 N. C., 74; *Smith v. Tindall,* 112 N. C., 82.

Therefore, upon principle and authority, we are of the opinion that there is error.

New trial.

Cited: Norvell v. Mecke, 127 N. C., 403; *Hamilton v. Highlands,* 144 N. C., 287.

W. H. PHIFER, ADMINISTRATOR OF HATTIE M. VONHURST, v. TRAVELLERS INSURANCE COMPANY.

(Decided 13 December, 1898.)

Mistake, Excusable, Inexcusable—The Code, Sec. 374—Verification of Pleadings—Corporations.

1. All pleadings of a corporation must be verified by an officer thereof, whenever verification is necessary; verification by a general agent is insufficient. The Code, sec. 258.

2. Mistaken legal advice by counsel, acted on by client, is not remediable under The Code, sec. 274, by motion to set aside—being a mistake of law and not of fact.

CIVIL ACTION upon a policy of insurance issued by the defendant to Charles L. Vonhurst, deceased husband of intestate of plaintiff, for his wife's benefit. The action was instituted in the Superior Court (406) of UNION County, and at January Term, 1898, was heard before *Green, J.,* upon a motion for judgment for want of a proper verified answer to the verified complaint. The answer was verified by

a general agent of the company, but who was not an officer of the company. The defendant moved for a continuance to amend verification—motion disallowed, and judgment rendered for the plaintiff and defendant appealed.

Afterwards, at August Term, 1898, of Union Superior Court, before *Starbuck, J.*, the defendant upon notice and affidavits moved to set aside said judgment on the ground of mistake, surprise, or excusable neglect, under section 274 of The Code. The affidavits stated that the defendant had a meritorious defense, and had employed local counsel to appear and file answer, who had done so after being put in possession of the facts. That inquiry was made by defendant, through one of its nonresident attorneys, of the local attorney, what would be necessary under the laws and practice of North Carolina to make a proper verification of the answer, and as to who was the proper person to make the verification, and the defendant was advised by its local counsel that it would be sufficient under the laws and practice in this State to have said answer verified by one of its general agents, having supervision of its business in North Carolina—and the answer was verified accordingly and filed. The local counsel by affidavit corroborated the sworn statement as to merits and as to the advice given by him, stating that he had been misled by an incorrect citation of an opinion of the Supreme Court contained in one of the digests.

His Honor was of the opinion, and so stated, that the facts contained in the affidavits do not constitute a case which would authorize the court, in the exercise of a sound legal discretion, to vacate the judgment under section 274 of The Code—and he adjudged, as (407) a matter of law, that the motion to vacate be denied, and that plaintiff recover of defendant his costs expended in this motion, to be taxed by the clerk.

Defendant appealed.

Jones & Tillett for defendant (appellant).
Adams & Jerome for plaintiff.

DOUGLAS, J. This is an application under section 274 of The Code to set aside a judgment taken against the defendant through his excusable neglect.

The original action was upon a policy of insurance, and was brought by plaintiff against defendant on 31 March, 1897, to the August Term, 1897, of Union Superior Court. About 22 April, 1897, a local attorney, not the counsel now representing it here, was employed on behalf of defendant to appear for it and make its defense in said action. At the appearance term he entered an appearance for defendant, and an order

was made by consent granting both parties time to file pleadings. Prior to the appearance term the defendant had put its local attorney in possession of the facts upon which it based its defense, and insisted that it had a valid and meritorious defense. The complaint was filed 20 October, 1897, and the answer about 30 December, 1897. The defendant inquired of its attorney as to what would be necessary under the law and practice of this State to make a proper verification of the answer, and inquired also as to who was the proper person to make the verification. Its attorney prepared the answer and sent it to Richmond, Virginia, with instructions that it could be properly verified by a general agent of defendant who resided in Richmond, and the answer was (408) so verified and returned to its attorney, who filed it in court. A short time before court adjourned the attorneys for the plaintiff on the last day of court made a motion before *Greene, J.*, for judgment upon the complaint and took the ground that the answer had not been properly verified, for the reason that it was verified by an agent and not by an officer of the defendant. The defendant then asked the judge to grant a continuance of the action in order that the answer might be properly verified, but this motion was refused and a judgment was rendered for plaintiff for the full amount of the policy. The defendant's attorney thereupon in open court gave notice of an appeal, and a short time thereafter informed the defendant of the judgment. The judge held as a matter of law that this was not a proper case for the exercise of the discretion to set aside the judgment, and as a matter of law refused to grant defendant's motion, and defendant appealed.

The defendant insists that in fact it was not guilty of any neglect whatever, as it had promptly employed local counsel, and, having strictly followed his instructions, was not responsible for his neglect.

It is admitted that the verification of the answer is invalid, as all pleadings of a corporation must be verified by an officer thereof, whenever their verification is necessary. Code, sec. 258; *Banks v. Mfg. Co.*, 108 N. C., 282. The local attorney retained by defendant filed two affidavits setting forth substantially the above facts, and further alleging that he had so advised the defendant after investigating the questions involved; that in such investigation he had used a well known digest of the decisions of this Court, upon which he had relied in view (409) of the standing and antecedents of its author; that he had been misled by a false citation in said digest, and in reliance thereon had failed to examine the cited case, which in fact held the reverse of the citation. There are some contradictory statements of attorneys as to a verbal agreement, which were not passed on by his Honor and which it is neither necessary nor practicable for us to determine.

We are of opinion that the judgment should be affirmed. The defendant cites in support of its contention the cases of *Ellington v. Royster,* 87 N. C., 14; *English v. English, ibid.,* 497; *Whitson v. R. R.,* 95 N. C., 385, and *Gwathmey v. Savage,* 101 N. C., 103. These authorities would be conclusive were they applicable to the case at bar, which we think comes under the decision of *Skinner v. Terry,* 107 N. C., 103, being a mistake of law and not of fact. The attorney did not neglect to file an answer, nor did he neglect to have it verified. He states that after an investigation he informed the defendant that the verification by an agent of the defendant corporation would be sufficient. This was merely his opinion upon a matter of law and was a legal conclusion, which, however erroneous, binds the defendant who voluntarily acted upon it. It is not the neglect of any duty, but its improper performance under a mistake of law. In *Mauney v. Gidney,* 88 N. C., 200, 205, this Court says: "As to the adult defendant, there is absolutely no ground for disturbing the judgment as to her. She took the advice of counsel, and having acted upon it, must abide the result." It is true that the neglect and the bad advice of counsel may lead to the same result in the injury of the client, but arising from different causes, they do not primarily come within the same rule. While it is always matter of regret that any one should suffer by following the advice of licensed (410) attorneys, we cannot ignore the rights of adverse parties, or disturb the orderly procedure of the courts without sufficient cause. The client selects his own attorney, and in this selection he should be influenced, as in all other business matters, by the diligence and capacity of him to whom he commits the management of his affairs. The judgment is

Affirmed.

Cited: Cantwell v. Herring, 127 N. C., 83.

W. H. PHIFER, ADMINISTRATOR OF HATTIE M. VONHURST, v. TRAVELLERS INSURANCE COMPANY.

(Decided 13 December, 1898.)

Verification of Pleadings.

1. The verification must be to the effect that the pleading is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true. The Code, sec. 258.

2. A verification to a complaint which says, "W. H. Phifer makes oath that the facts stated in this complaint of his own knowledge are true, and those stated on information and belief he believes to be true," does not conform to the requirement of the law, so as to require a verified answer.

THIS IS THE SAME CASE, between the same parties, decided at the present term, adjudging the insufficiency of the verification of the answer. The point is now presented for the decision of the Court as to the sufficiency of the verification of the complaint so as to require a verified answer.

The facts are presented in the opinion.

(411) The same counsel appear for the parties.

DOUGLAS, J., delivers the opinion. FURCHES, J., dissents.

DOUGLAS, J. This is an appeal from the judgment rendered in the above-entitled action, which is the same original action in which the motion was made to set aside the judgment for excusable neglect under section 274 of The Code. In this appeal two errors are assigned: (1) That the complaint was not properly verified, and that therefore the answer required no verification; (2) that the judgment, if at all regular, should have been by default and inquiry, and not by default final.

Under our view of the law, it is not necessary to consider the second exception, or the facts relating thereto.

The complaint and answer both appear to have been filed in time, so that the only questions before us arise upon their verification. The answer was verified by an agent of the defendant corporation, but it is admitted that this is not a proper verification under section 258 of The Code. It must therefore be treated as an unverified answer, and, if the complaint had been properly verified, the plaintiff would have been entitled to judgment by default as for want of an answer. An unverified answer is equivalent to no answer at all, where verification is required. This, therefore, reduces this case to the single point as to whether the complaint was itself properly verified, so as to require a verified answer. The verification to the complaint is as follows: "W. H. Phifer makes oath that the facts stated in this complaint of his own knowledge are true, and those stated on information and belief he believes to be true."

Section 258 of The Code requires that, "The verification must be
(412) to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true." Section 257 provides that, "When any pleading is verified, every subsequent pleading, except a demurrer, must be verified also." Where there is no verification to the complaint none is required to the answer. The object of the statute is to give the pleader a convenient substitute for the old bill of

discovery in equity, and to eliminate all issues of fact that the parties are not willing to support by the sanctity of an oath. All allegations in the complaint, not specifically denied in the answer, are deemed to be admitted; but where the defendant is not under oath, he frequently looks upon his answer as being equivalent to a plea of the general issue, and feels at liberty to deny any and all of the allegations of the complaint, regardless of any knowledge or belief he may have as to their truth. The plaintiff may, at his option, verify his complaint so as to require the defendant to answer each and every allegation under oath, subject to the penalties of perjury. But to do this, his own verification must be directly applicable to each allegation, so as to render him also subject to the same penalties if false. All facts alleged by him in good faith necessarily come under one of two classes. They are either known to him of his own personal knowledge, or they rest upon sufficient information to justify a positive belief. The law requires that his verification shall separate them into their appropriate classes, so that each may come under the direct application of his oath. In the usual complaint, the majority of the allegations are simply stated without specifying how they are known to the pleader. It would therefore be difficult to convict of willful perjury in any case, if they were simply sworn to as being true. To remedy this, The Code says he must (413) swear that the pleading itself in its entirety is true *to his own knowledge,* except as to those matters stated on information and belief. He may believe an allegation to be true without knowing it, but he always knows whether or not it is true of his own knowledge. This distinction is required by the statute, and is reasonable and necessary for the protection of the opposing party.

If the verification under consideration is in effect equivalent to the statute, then it is sufficient; but otherwise it must be rejected, and the pleading considered as an unverified complaint, admitting an unverified answer.

This verification says: "That the facts stated in this complaint of his own knowledge are true, and that those stated on information and belief he believes to be true." It seems clear to us that the words "of his own knowledge" relate to and qualify the words "stated." In other word, he makes oath that the facts which he states in the complaint are true of his own knowledge, are true; while those he states are true as he is informed and believes, he believes to be true. This excludes those allegations which are not verified in the complaint either as resting on personal knowledge or on information and belief. This class of allegations comprise nearly the entire complaint, which therefore cannot be regarded as verified according to the letter or spirit of the law. Any immaterial variation in the mere words, which would not affect the legal

effect of the verification, would be disregarded by us; but here its very intention is defeated. Even if there was only a reasonable doubt as to the meaning of this verification, this mere doubt would destroy the certainty required in a conviction for perjury, and suggest the
(414) danger of permitting such a variation from the statutory form, which itself admits of no doubt.

We do not think that the form of verification now under consideration has ever been directly considered and passed upon by this Court. In the case of *Alspaugh v. Winstead,* 79 N. C., 526, the verification was similar to this, with the exception that the word "except" takes the place of the conjunctive "and" used in the case at bar, which might be a material variation; but in that case the only point apparently raised was an attempted distinction "between a statement of facts and the facts themselves."

As we are compelled to hold that the complaint was not properly verified, the answer must be considered and the judgment stricken out.

Reversed.

FURCHES, J. I do not concur in this opinion.

Cited: Cole v. Boyd, 125 N. C., 497; *Payne v. Boyd, ibid.,* 502; *McLamb v. McPhail,* 126 N. C., 220; *Best v. Dunn, ibid.,* 561; *Carroll v. McMillan,* 133 N. C., 141; *Godwin v. Tel. Co.,* 136 N. C., 258; *Barber v. Justice,* 138 N. C., 22; *Streator v. Streator,* 145 N. C., 338.

ELIZABETH MORRISON v. CHARLOTTE ELECTRIC RAILWAY, LIGHT AND POWER COMPANY.

(Decided 13 December, 1898.)

Contributory Negligence.

1. Where the plaintiff is injured by the negligence of the defendant, contributory negligence on the part of the plaintiff is matter of proof, not of conjecture.

2. It is not error in the court to omit to give elaborate hypothetical special instructions when not sustained by proof.

(415) CIVIL ACTION for damages for injuries received by plaintiff as a passenger on defendant's street car through its alleged negligence, tried before *Starbuck, J.,* and a jury, at October Term, 1898, of MECKLENBURG Superior Court.

The evidence was that while plaintiff was in the act of stepping off the car, it was started, and she was thrown upon the ground and injured very badly.

The defendant relied upon the defense of contributory negligence, in that plaintiff did not get off sooner, and did not use due care in getting off.

The evidence was conflicting as to the time and manner of plaintiff's stepping off the car.

The charge of his Honor was excepted to by the defendant, and is quoted in the opinion.

There was a verdict and judgment for the plaintiff. Appeal by defendant.

Burwell, Walker & Cansler and Osborne, Maxwell & Keerans for defendant (appellant).

Jones & Tillett for plaintiff.

FURCHES, J. On 12 September, 1897, about 7 or 7:30 p. m., the plaintiff and her sister, Mrs. Grier, took passage on the defendant street railway in the city of Charlotte. They notified the conductor that they wished to get off at Sixth Street. The car stopped at Sixth Street for 10 or 12 seconds, when it started again, while plaintiff was in the act of getting off, and she was thrown on the ground or pavement and injured. There was no dispute or conflict in the evidence but what the car started to move while plaintiff was in the act of getting off, and that she was thrown to the ground and injured by the fall.

There was some conflict in the evidence as to where she was and (416) as to what position she occupied when the car started to move. The plaintiff testified that she and her sister occupied the same seat; that her sister was nearest the side on which they wished to alight; that when the car stopped, she at once arose and stood up but waited for her sister to get off before she moved to the side of the car where she wished to alight; that as soon as her sister got off, she undertook to do so, and while she was on the "running board" and before she got on the ground, the car started, throwing her upon the ground, from which fall she received serious and permanent injuries.

The defendant's evidence tended to show that she did not arise from her seat and stand up when the car stopped, and did not until the car started; that she had ample time to have gotten off; that she undertook to get off with her face towards the rear end of the car, and that her injury was caused by her own negligence, or, if her negligence was not the sole cause of her injury, that it contributed to her injury, was the proximate cause thereof, and that she cannot recover. This car was

what is called an open car, in which the seats ran clear across the car and the passengers alighted from the side. From the evidence there was not more than a dozen passengers aboard, if that many.

The negligence of the defendant was not contested in the argument here. The finding of the jury on the first issue settled that question. But the defendant filed eleven lengthy prayers for instruction on the contributory negligence of the plaintiff, all of which it seems to us might have been reduced to two or three, if the learned counsel had had more time to prepare them. None of them were given by the court, except as they may be covered by the charge. The defendants' counsel
(417) contended that the car stopped long enough for the plaintiff to get off, and if she got hurt by the car starting before she got off, it was her own fault—negligence. The defendant also contended that she got off with her face turned the wrong way, and that this was her fault—negligence; that these contributed to her injury and were the proximate cause of the same.

It would be difficult to see how this could be so, from any view of the evidence, when it was admitted that she was injured by the car starting while she was in the act of getting off, even if it be admitted that 10 or 12 seconds is sufficient time to allow a woman to get off the car, and that she did not move as quickly as she might have done; still the defendant was guilty of the grossest negligence in starting the car when she was getting off in plain view of him. He must necessarily have seen her if he was paying attention to his duties; and if he was inattentive to these duties and started the car without seeing her, he was guilty of gross negligence. This being so, and it being shown—admitted—that her injury was caused by starting the car, over which she had no control, it is difficult to see how the manner in which she was getting off contributed to and was the proximate cause of the injury; or that the length of time—ten or twelve seconds—could have contributed to and have been the proximate cause of the injury.

But the court charged the jury that "if the plaintiff did not arise and start to get off before the signal to start the car was given, then in no view can you answer the first issue 'Yes.'"

The issues were as follows: 1. "Was the plaintiff injured by the negligence of the defendant?" Answer: "Yes." 2. "Did the
(418) plaintiff by her own negligence contribute to her injury?" Answer: "No." There was no objection as to the third issue.

The court further charged the jury upon the second issue as follows: "It was the duty of the plaintiff, in her manner of stepping off the car, to exercise the care reasonably to be expected of a person of ordinary prudence under the circumstances, and a failure to observe such care was contributory negligence."

"If the plaintiff stepped off in the opposite direction to that in which the car was moving then—if the car was not moving as she started to take the last step—she was not negligent in stepping off in this manner. If the car was moving, it was for the jury to say whether, under the circumstances, in stepping off in the opposite direction she failed to exercise the care of a person of ordinary prudence. If it was a failure to exercise ordinary care, the jury should answer the second issue 'Yes.'"

If the question of contributory negligence was presented by the evidence (and it seems to us that it was not), the court has complied with the law in presenting it to the jury. *Hinshaw v. R. R.,* 118 N. C., 1047, which has been since cited with approval in a number of cases.

This case is very much like *Crawford v. R. R.,* 111 N. C., 597, except that the facts in this case are more favorable to the plaintiff than were those in that case. In that case (which was an open street car), the car stopped two minutes and the conductor claimed that he did not see her getting off; and, in that case as in this, the defendant claimed the plaintiff (Mrs. Crawford) had time to have gotten off, and that it was her own negligence not to have done so, and that the conductor did not see her. But the court held that it was his duty to have (419) seen her, and held the road liable. In that case *Justice Clark* dissented and *Shepherd, C. J.,* concurred in the dissenting opinion. But this dissent was not as to the merits of the case, but as to a question of abuse of privilege by counsel.

Affirmed.

HUGH W. HARRIS, ADMINISTRATOR DE BONIS NON OF MRS. M. M. WILLIAMS, v. JOHN D. BROWN.

(Decided 23 December, 1898.)

Sale of Land for Assets—Infants—Irregularity of Judgment.

1. In an *ex parte* proceeding to sell land for assets infant heirs are represented by a guardian or next friend, and the order of sale must be approved by the judge.

2. While it is irregular for the administrator in such case to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of purchaser. *Syme v. Trice,* 96 N. C., 246.

3. Neither will the circumstance of the death of one of the petitioners, who had made no objection to the order of sale, have that effect, although he left minor heirs, who were not made parties. *Everett v. Reynolds,* 114 N. C., 367.

MONTGOMERY, J., concurring: (1) For the reason, that the purchaser sought to relieve himself entirely of his purchase without tendering the amount he really owed after the allowance of his counterclaim set up in his answer.

(2) The decree of confirmation stands so far as the minor heirs of the deceased petitioner are concerned unless they show damage growing out of the decree.

DOUGLAS, J., concurs in the concurring opinion.

(420) PROCEEDING under section 941 of The Code to collect notes given by the defendant at a judicial sale made under an order in the case W. P. Williams, administrator of Mrs. M. M. Williams, *ex parte*.

The heirs joined in the application for sale. Among them was an infant, Patick H. Williams, represented by W. P. Williams, his father, the administrator, and also commissioner appointed to conduct the sale. After the order of sale was made, but before the confirmation, one of the heirs, W. B. Withers, a petitioner, died, leaving infant heirs, who were not made parties. The sale took place in 1883 and the defendant purchaser gave his note for the price bid, $1,771, with interest from 1 September, 1883, at 8 per cent, and has been in possession ever since, has paid the taxes and part of the purchase money. The purchase was made at that price under an arrangement between the administrator, heirs, and the purchaser: That the administrator, who was the husband of the intestate, would surrender his right as tenant by the curtesy; that the purchaser would purchase at the stipulated price; that a debt which the defendant held against the estate, amounting to $888.83, should be allowed as a credit on the price bid for the land; and that the land should be sold for assets.

W. P. Williams, the administrator, was subsequently removed, and the plaintiff Harris was substituted in his place, and he had the rule issued against the defendant to show cause why he should not pay his purchase note.

In answer to the rule and notice, the defendant alleged the irregularities, to wit, the circumstances of the previous administrator and commissioner representing a minor heir, and that the minor heirs of Withers were not represented at all—as grounds affecting the validity of (421) the sale, and asking that the sale might be set aside; or, if it should be held that the sale was valid, that he might be allowed his debt against the estate, according to the original agreement, under which he had made the purchase. The plaintiff filed a demurrer to the grounds alleged in the answer for setting aside the sale, which demurrer was sustained so far as it related thereto. Defendant excepted, and a reference was ordered to George E. Wilson, Esq., to ascertain and report the existence and amount of the alleged debt. The referee filed his

report, ascertaining that the alleged debt claimed by the defendant was just and valid, and that after allowing it as a credit, there remained due of the purchase money and interest the sum of $1,826.52, with interest on $846.94 from 6 June, 1898, at 8 per cent.

The defendant excepted to the report, and contended that the sale should be set aside on account of the irregularities in the proceedings already stated.

The report and exceptions thereto came on to be heard before *Starbuck, J.*, at October Term, 1898, of MECKLENBURG Superior Court. His Honor overruled the exceptions and confirmed the report, and rendered judgment accordingly against the defendant for $1,826.52, with interest on balance of principal money, $846.94, at 8 per cent and costs.

It was further adjudged, that if this judgment was paid within 60 days from 17 October, 1898, that the plaintiff, appointed commissioner for that purpose, shall execute to the defendant a deed for the land, and if not paid, that the commissioner shall advertise and sell the land, make title to the purchaser, apply the proceeds to the judgment, and the remainder, if any, to be paid to defendant.

Defendant appealed from the judgment and ruling of the court. (422)

Burwell, Walker & Cansler for defendant (appellant).
Osborne, Maxwell & Keerans for plaintiff.

FAIRCLOTH, C. J. This proceeding is for the purpose of collecting the balance of the purchase price of certain land bought by the defendant, under an order of the clerk to sell said land for assets in an *ex parte* petition by the administrator and the heirs, entitled "M. Williams and others *ex parte*." One of the heirs was a minor and appeared by his guardian and next friend, who was the administrator of the intestate, and was appointed commissioner to sell the land. The sale was made and approved and confirmed by the judge of the Superior Court, and a deed ordered to be made as soon as the purchase price was paid by the defendant, who was the purchaser. The sale was in 1883, and the defendant has been in possession ever since, receiving the profits, paying taxes, and has paid a part of the purchase price.

Before the petition was filed, the administrator guardian of his minor son, the other heirs at law and the defendant entered into an agreement: (1) That the father would surrender his rights as tenant by the curtesy. (2) That the defendant would purchase the land at the stipulated price. (3) That the defendant's debt against the estate should be a credit on the price bid for the land. (4) That the land should be sold for assets. After this notice to defendant of a motion in the proceeding for a judgment for the balance, a reference was had to ascertain the balance due,

(423) charging the defendant with the purchase price and crediting him with all he had paid out and with the amount of his claim against the estate according to agreement, and, for the balance thus ascertained, judgment was entered and the defendant appealed to this Court. The plaintiff succeeds the original administrator, and A. B. Withers, one of the adult petitioners, died, leaving minor heirs, after the sale was ordered, but before it was confirmed. There was no objection made by any one to the sale and its confirmation.

In apt time, the defendant objected to the rendition of judgment against him on the ground that he could not get a good title because of irregularities in the proceeding, that is to say, that the administrator was also commissioner to sell and guardian of the minor, and because the minor heirs of A. B. Withers were not made parties before the confirmation of the sale. There is no force whatever in the objection that the administrator was also commissioner to make sale. It was irregular that he should represent the minor as guardian, but irregularities do not always render the judgment void.

It does not appear that A. B. Withers, during his lifetime, made any objection to the order of sale, and it is to be presumed that he was content therewith. In adversary proceedings the parties are at arm's length and each one fights for victory. In such cases, if minors are parties without guardian, general or special, it is irregular, and on arriving at maturity they may reject or accept at their option. But in *ex parte* proceedings they must be represented by a guardian or *next friend;* and the law has wisely provided further protection by requiring that no order or judgment of the clerk on the merits of the case, capable of being prejudicial to the infant, shall be valid "unless submitted to and approved by the judge of the court, in or out of term." The (424) Code, section 286. This is an important duty on the part of the circuit judges. The Code, section 1439. These duties must be presumed to have been performed before the judge approved and confirmed the sale. After fully considering the record, we are not moved to disturb the judgment.

There is no suggestion or contention that any unfair advantage in the sale, confirmation, or elsewhere in the course of the proceeding was taken. The petitioners performed their agreement in all respects, and now demand that the defendant shall do the same.

"Even an irregular judgment, where it appears from the record or otherwise that the infant suffered no substantial injustice, will not be set aside." *Syme v. Trice,* 96 N. C., 246. Where there is no suggestion that the sale was unfair, or that the land did not bring its full value, or that the parties were prejudiced, the Court will not set aside the sale

where the defendant died before confirmation and his heirs were not made parties to the action. *Everett v. Reynolds,* 114 N. C., 367.

The sale was made 15 years ago, and if the defendant believed the record would not protect him, he should have made his fears known at an earlier day.

Affirmed.

MONTGOMERY, J., concurring: I concur in the opinion of the Court that the judgment ought to be affirmed. And this for the reason that the defendant ought to relieve himself entirely of his purchase of the land and without tendering the amount he really owed after the allowance of his counterclaim set up in his answer. The case of *Everett v. Reynolds,* 114 N. C., 367, does not apply in this case, in my opinion, for the reason that the *heirs at law themselves* in that case who were not parties to the proceedings at the time of the confirmation of (425) the sale, made the motion after becoming parties to set aside the decree of confirmation for irregularity. The Court held that as they had not shown that they had been injured, the decree of confirmation would not be disturbed. In the case before us, the heirs at law of Withers, one of the owners of the land, who were infants at the time of the decree of confirmation, have not been heard from. They may yet claim injury growing out of the decree of confirmation. The decision of the Court in this case binds them before a hearing.

DOUGLAS, J. I concur in the concurring opinion.

Cited: Morris v. House, 125 N. C., 555, 561; *Card v. Finch,* 142 N. C., 149.

THOMAS MOORE v. J. P. CARR AND R. A. BEATTIE.

(Decided 20 December, 1898.)

Promissory Note—Endorsers—Statute of Limitations—Payments.

1. Endorsers liable as sureties on a note and may be sued without demand. The Code, sec. 50.
2. A payment by either principal or surety is a payment as to all.
3. The statute of limitations operates only from the last payment. *LeDuc v. Butler,* 112 N. C., 458.

MOORE *v.* CARR.

CIVIL ACTION on a promissory note for $100, dated 19 March, 1892, at 12 months after date, made by J. M. Little and endorsed by defendants in blank. Payment of interest, annually, was received down to 20 March, 1898.

(426) The case originated in the justice's court, 15 April, 1898, and was carried by appeal to the Superior Court of MECKLENBURG County, and tried before *Starbuck, J.,* at October Term, 1898, a jury trial being waived. The defendants, endorsers, pleaded the statute of limitations. His Honor held that the action was not barred and rendered judgment against them, and they appealed.

Burwell, Walker & Cansler for appellants.
Osborne, Maxwell & Keerans for plaintiff.

FAIRCLOTH, C. J. By consent, his Honor found the facts: J. M. Little borrowed $100 from the plaintiff and gave his note, and the defendants endorsed their names in blank on the note before it was delivered to the payee, the plaintiff. Annual payments were made by the maker, and the last payment made by him was on 13 April, 1898, and this action was brought on 15 April, 1898. The statute of limitations was pleaded. The defendants claim that, as they were endorsers and as more than three years had elapsed since the maturity of the note, they are discharged notwithstanding the recent payment by the maker of the note. His Honor held that they are liable, and the endorsers appealed.

Bearing in mind that the law should fit the facts in all cases, it would seem that this question ought to be understood by this time.

The act of 1827 (The Code, sec. 50) declared that endorsers shall be liable as sureties to any holder, and that they may be sued without demand on the principal debtor. Many decisions have been made construing this statute, and they all hold the endorsers liable as sureties, upon facts like those now before us, and that they are of the class

(427) of original promissors. A payment by either of them or by the principal is a payment by all, because the benefit of the payment inures to each one, and it follows that the statute of limitations operates only from the last payment. In *LeDuc v. Butler,* 112 N. C., 458, attention is called to quite a number of decisions, pointing out the rights and liabilities of endorsers, among themselves, to the holder of the note, etc., and with the principal debtor according to the conditions in each case, and several more cases since *LeDuc's case* have followed the principles above referred to.

Baker v. Robinson, 63 N. C., 191, is a case in which the facts are on "all fours" with those in the case at bar—citing *Ray v. Simpson,* 22

Howard, 341. In each of these cases the endorsers were held to be original promissors and were as liable as if they had signed as sureties on the face of the note.

Martin v. Good, 95 U. S., 90, is a case in point. Two persons signed a note as maker thereof, and Good wrote his name across the back of the note before it was delivered to the payee. It was held that the endorser is presumed to have endorsed as surety of the maker for his accommodation, and to give him credit with the payee; and that if the presumption is not rebutted by evidence, he is liable on the note as maker; in other words, he is surety for the principal debtor.

There are conflicting decisions in the states, but all agree that a construction of the contract should be given which will carry into effect the intention of the parties. The statute declares such endorser's liability is that of a surety, and a blank endorsement before delivery is construed and presumed to be intended as a suretyship. No difficulty can arise if the endorsement is special, and proper words are used to show the intention of the party to be otherwise than that presumed from (428) a blank endorsement. 1 Parson's Contracts (6 ed.), 243; Story on Pr. Notes, sec. 58. The same conclusion was adopted in *Johnson v. Hooker,* 47 N. C., 29.

These principles must govern between the holder of the note and the maker, sureties and such endorsers. The rights and liabilities of endorsers among themselves, and in their relations to the maker and his sureties, are not affected by these decisions. These questions are not presented here, and we say nothing about them.

Affirmed.

Cited: Garrett v. Reeves, 125 N. C., 532.

BARNHARDT & CO. v. THE STAR MILLS (CORPORATION).

(Decided 13 December, 1898.)

Novation.

1. The discharge of a debt due from one man and charging it to another man, with the consent of all the parties concerned, illustrates the doctrine of novation. The discharge of the original debtor is a sufficient consideration for the promise of the substituted debtor to assume the debt.

2. While this is permissible, between individuals, yet the president of a corporation cannot, without a just consideration moving to the body, create an indebtedness against it by undertaking to assume for it a liability for an individual debt of his own.

CIVIL ACTION on a money demand, tried before *Green, J.*, and a jury, at March Term, 1898, of MECKLENBURG Superior Court, on appeal from justice's court.

The Star Mills was a corporation, and its president was W. M. Crowell, who owned 70 out of 72 shares of its capital stock; the (429) other two shares stood in the name of two other stockholders—one share to each—for which they had paid nothing.

The validity of the corporation, however, is not now in question.

It was admitted by both parties that the account sued on in this case was for goods sold and delivered to W. M. Crowell, individually, solely on his individual credit, and that the ledger of plaintiffs will show that on 15 March, 1897, the balance on W. M. Crowell's account was charged to the Star Mills, which closed the account. Whether this was done with the consent of Crowell, the evidence was conflicting.

His Honor charged the jury as follows:

If the jury believe from the evidence that the balance of Barnhardt & Company's original account against W. M. Crowell was a valid indebtedness on 15 March, 1897, and that Barnhardt & Company, the Star Mills, and W. M. Crowell then agreed that this balance should be charged against the Star Mills, and the account against said Crowell should be closed and extinguished, and that Barnhardt & Company accepted the Star Mills as their debtor instead of W. M. Crowell, then the jury should find that the Star Mills owes the plaintiff the amount of this balance of the account.

Defendant excepted.

Verdict and judgment for plaintiff. Appeal by defendant.

Burwell, Walker & Cansler for defendant (appellant).
H. W. Harris for plaintiff.

MONTGOMERY, J. It is an admitted fact in this case that the debt which is sought to be recovered was originally a balance due by W. M. Crowell to the plaintiffs, and that it was contracted for goods sold (430) and delivered to him by the plaintiffs. The credit was extended by the plaintiffs to Crowell on his own personal account. It is a further admitted fact that the amount due to the plaintiffs by Crowell was afterwards charged on the ledger of the plaintiffs to the Star Mills, an incorporated business company of which Crowell was president. On the trial, T. M. Barnhardt, one of the plaintiffs, testified that when the

account on the plaintiff's books against Crowell was charged to the defendant, the Star Mills, it was done by agreement between the plaintiffs and Crowell; that Crowell told the plaintiffs that all the goods which he had bought on his own personal account from the plaintiffs were bought in realty for the Star Mills, and that the corporation got them. The witness also testified that if those statements had not been made to him by Crowell he would not have made the transfer of the accounts. He further said that he did not know that Crowell was insolvent at the time the account was charged to the defendant, but he knew that he could claim his exemptions and that the corporation could not. The testimony of Crowell, a witness for the defendant, was contradictory of Barnhardt's in all of its material particulars. There was evidence tending to show that the capital stock of defendant company consisted of 72 shares, 70 of which were subscribed by Crowell and the other two shares by two other persons (one share each), and that the two other subscribers to stock simply subscribed for the purpose of organizing the corporation, and had never paid anything on their shares; and that Crowell had had the management of the business of the corporation since its formation.

The plaintiffs, however, are not seeking to treat the corporation as a fraudulent contrivance to defeat creditors, as well as an abuse of the statutory law authorizing the formation of corporations, (431) but they recognized the legality of its organization and insist on making a recovery of their debt out of its assets. The basis of their claim rests entirely on the doctrine of novation, and the well considered argument of their counsel here was directed along that line. The plaintiff's contention is that upon the satisfaction and discharge of the account of Crowell to the plaintiffs, and the charging of the account to the defendant by the direction of Crowell, who was the president and manager of defendant corporation, Crowell was discharged and the debt became, by novation, a debt against the defendant. Such a transaction between individuals undoubtedly would have the effect to discharge the original debtor and to charge the new promisor. The consideration which would support the promise to pay under the novation would be the injury or hurt the promisee would have sustained by his having discharged his original debtor at the request of the promisor, and upon the agreement that he would assume the debt. That is familiar learning and needs no authority for its support. But the matter presented here for decision is very different from that.

The question here is, Can the president, even though he be the business manager of a corporation, without a just consideration moving to the body, create an indebtedness against it by undertaking to assume for it liability for an individual debt of his own? We are of the opinion

that he cannot. The president or managing agent of a corporation, as a general rule, can only use his power to advance the interest of his principal, the corporation, and for no other purpose. Morawitz on Private Corporations, secs. 517 and 518. His Honor substan-
(432) tially instructed the jury to the contrary, and in so doing there was error.

New trial.

COMMISSIONERS OF BUNCOMBE COUNTY v. W. R. PAYNE, COUNTY TREASURER.

(Decided 6 December, 1898.)

County Bonds—Invalid, When.

1. The Act of 1858-'59, Private Laws, ch. 166, authorizing the issue of county bonds not having been acted on until after the adoption of the Constitution of 1868, could then confer no such authority.

2. The adoption of the new Constitution, with the restrictions as to issue of municipal bonds, annulled all special powers remaining unexecuted, and not granted in strict conformity with its requirements. *Commissioners v. Call, ante*, 308.

3. A general act authorizing counties to issue bonds for railroad purposes, would be invalid, especially when it is necessary to exceed the constitutional limitation, to pay interest or principal.

4. The bonds issued in aid of the Asheville and Spartanburg Railroad Company, in 1876-'77, were not issued in conformity with the requirements of the Constitution of 1868, and are therefore unconstitutional and void.

5. The payment of interest from year to year on the bonds is not an estoppel, and does not validate them.

6. If the bonds issued in 1876-'77 and '78 were invalid, the new bonds, in renewal, under the Act of 1893, ch. 172, are equally invalid.

CIVIL ACTION to declare invalid and void $98,000 of Buncombe County refunding bonds, issued in 1895, and to enjoin the payment of principal and interest by the defendant, the county treasurer, heard before *Norwood, J.*, at January Term, 1898, upon motion to continue the restraining order until final hearing.

(433) Motion allowed, and defendant appealed.

In consideration of the importance of the cause, both in respect to the principles concerned and the amount involved, the pleadings, judgment and exhibits from the court below are subjoined:

Be it remembered that on 28 December, 1897, a summons was duly issued out of the Superior Court of Buncombe County, directed to the sheriff of said county, in the following words and figures:

SUMMONS FOR RELIEF.

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth, and T. H. Weaver), and T. C. Brown,
against
W. R. Payne, Treasurer of Buncombe County.

To the Sheriff of Buncombe County—GREETING:

You are hereby commanded to summon W. R. Payne, treasurer of Buncombe County, the defendant above named, if he found within your county, to be and appear before the judge of our Superior Court, at a court to be held for the county of Buncombe at the courthouse in Asheville, on the second Monday of March, 1898, it being 14 March, 1898, and answer the complaint, which will be deposited in the office of the clerk of the Superior Court of said county, within the first three days of said term, and let the said defendant take notice that if he fail to answer the said complaint within the time required by law, the plaintiffs will apply to the court for the relief demanded in the complaint. (434)

Hereof fail not and of this summons make due return.

Given under my hand and seal of said court, this 28 December, 1897.

J. L. CATHEY,
Clerk Superior Court.

Received 28 December, 1897. Served 28 December, 1897, by reading the within summons and delivering a true copy thereof to W. R. Payne, treasurer of Buncombe County, the defendant therein named.

W. M. WORLEY,
Sheriff of Buncombe County.

We acknowledge ourselves bound unto W. R. Payne, treasurer of Buncombe County, the defendant in this action, in the sum of two hundred dollars, to be void, however, if the plaintiffs, the board of commissioners for the county of Buncombe, and T. C. Brown, shall pay to the defendant all such costs as the defendant may recover of the plaintiffs in this action.

Witness our hands and seals, this 28 December, 1897.

H. LAMAR GUDGER. [SEAL.]

(435) COMPLAINT.

NORTH CAROLINA—BUNCOMBE COUNTY.
SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth and T. H. Weaver, Commissioners, and T. C. Brown, Plaintiffs.

against

W. R. Payne, Treasurer of Buncombe County, Defendant.

The plaintiffs complain and allege that T. C. Brown, chairman, S. J. Ashworth and T. H. Weaver compose the board of county commissioners of Buncombe County, the plaintiff above named, and that the said T. C. Brown, a plaintiff, in his individual capacity is a resident, citizen and taxpayer of the county of Buncombe.

2. That the defendant William R. Payne is treasurer of Buncombe County, having been duly qualified and elected, and is charged with the duty of receiving and disbursing the moneys belonging to said county.

3. That the General Assembly of North Carolina, in the year 1855, passed an act entitled "An act to incorporate the Greenville and French Broad Railroad Company," which was ratified on 13 February, 1855, and is printed in the Laws of 1854-55 as chapter 229; that in the year 1872 the General Assembly of North Carolina passed an act to amend an act to incorporate the Greenville and French Broad Railroad Company, which was duly ratified on 15 January, A.D. 1872, and which is published in the Laws of 1871-72 as chapter 48; that in the year 1873 the General Assembly of North Carolina passed an act to amend
(436) an act entitled "An act to incorporate the Greenville and French Broad Railroad Company," ratified 13 February, 1855, and act amendatory thereto, and that said last-mentioned act was duly ratified on 22 December, 1873, and is published as chapter 38 of the Laws of 1873-74; that in the year 1874 the General Assembly of North Carolina duly passed an act to amend the charter of the Greenville and French Broad Railroad Company, which authorized its consolidation with the Spartanburg and Asheville Railroad Company of South Carolina, under the corporate name of the Spartanburg and Asheville Railroad Company, and which was duly ratified on 9 December, 1874, and is published as chapter 27 of the laws of 1874-75, and that in pursuance of the authority granted by the Legislature of North Carolina and of South Carolina, the said two original companies were consolidated, under the corporate name of the Spartanburg and Asheville Railroad Company.

4. That neither the said charter granted in the year 1855, nor any of the said amendments thereto, authorized or empowered either the Green-

ville and French Broad Railroad Company or the Spartanburg and Asheville Railroad Company to receive subscriptions of stock from any county, nor was any authority granted in the said charter enacted in 1855, nor any amendments thereto subsequently passed, to any county in the State of North Carolina, to subscribe to the capital stock of either of said companies, or to issue bonds in payment of such subscription.

5. That the plaintiff T. C. Brown, who, as chairman of the board of county commissioners, has the oversight of the records of the said board, and free access to them, has made diligent search, but has failed to find the minutes of the proceedings of the board of county com- (437) sioners of Buncombe County covering the period of time from 6 January, 1874, up to 1 January, 1876, and that plaintiffs believe and are satisfied, after said search, that the said records have been lost or destroyed.

6. That, as plaintiffs are informed and believe, in the year 1875 an election was held by virtue of an order of the board of county commissioners of Buncombe County, at which election a majority of the qualified voters of said county cast their ballots in favor of subscribing one hundred thousand dollars to the capital stock of the said Spartanburg and Asheville Railroad Company, and of paying for the said capital stock in coupon bonds of the county of Buncombe, in denominations of from fifty to one thousand dollars, and thereby did attempt to authorize a subscription of one hundred thousand dollars to the capital stock of said Spartanburg and Asheville Railroad Company, and in payment of such subscription, during the years 1876-77-78, as the work of completing the grading of the said railroad through the county of Buncombe progressed, the said board of county commissioners did issue and deliver in payment of said subscription the coupon bonds of the said county, ranging in denominations as aforesaid, which said bonds were in form as set forth in "Exhibit A," hereto attached, and that during the year 1877 the General Assembly of North Carolina attempted to impart validity to the said subscription and the said issue of bonds by passing an act entitled "An act concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad Company," ratified 27 February, 1877, and published as chapter 40 of the Private Laws of 1876-77. But, as plaintiffs are advised, informed, and believe, (438) the said act was ineffectual to render valid the said subscription or to impart validity to the bonds issued as aforesaid, and that if the Legislature were empowered to render valid a void subscription and the issue of illegal bonds, the said act was ineffectual to cure the invalidity of said bonds because it appears from the Journals of the House of Representatives and Senate that the said act was passed on its second

and third readings in both the Senate and House of Representatives on the same day, and without a call of the ayes and noes on either of said readings in said body.

7. That, as plaintiffs are informed and believe, said subscription was made and the said bonds were issued without color of authority from the Legislature of North Carolina other than that claimed to have been given by the act of 1868-69, ch. 171, secs. 1, 2, 3, 4, and 5, which were brought forward in The Code of North Carolina in the year 1883, as sections 1996 to 2000, both inclusive, and that, as plaintiffs are advised, informed and believe, when the said act of 1868-69 was ratified no part of the line of the said Greenville and French Broad Railroad Company had been completed and no part of the line of the Spartanburg and Asheville Railroad Company, subsequently consolidated with the said Greenville and French Broad Railroad Company, had been completed outside of the boundaries of the State of South Carolina, and that when said subscription was made and said bonds were issued as aforesaid, the citizens of said county of Buncombe had no pecuniary interest in the said Spartanburg and Asheville Railroad Company, nor any interest other than that which any citizen of the State of North Carolina has in any public improvement.

(439) 8. That, except such orders as may have been embodied in the minutes of the board of county commissioners of Buncombe County from 6 January, 1874, to 1 January, 1876, which have been lost or destroyed as aforesaid, all orders made by said board in relation to the said subscription of $100,000 to the capital stock of the Spartanburg and Asheville Railroad Company, or the bonds issued in payment for the same, are set forth in a paper hereto attached, marked "Exhibit B."

9. That in the year 1893 the General Assembly passed an act entitled "An act to authorize the county of Buncombe to fund its bonded indebtedness," which act was ratified on 25 February, A.D. 1893, and which authorized the issuance of $98,000 in coupon bonds of the said county of Buncombe "as a continuation of the bonded indebtedness of said county created for the purposes" of funding the bonded indebtedness of the said county, purporting to have been originally created by the issuance of $100,000 in bonds as aforesaid, in payment of said subscription, and that claiming to act under the authority purporting to be given in said last named act the board of county commissioners of Buncombe County did, on 1 July, A.D. 1895, issue $98,000 in coupon bonds, all of the denomination of one thousand dollars, and bearing 5 per cent interest per annum, payable semiannually on 1 January, and the first day of July of each year, the said bonds maturing on the first day of July in the year 1915, the said bonds being in form as set forth

in a paper hereto attached, marked "Exhibit C," and the proceedings and the order of the commissioners in relation to issuing them being set forth in a paper hereto attached, marked "Exhibit D."

By using the said bonds, issued, as plaintiffs are advised, in- (440) formed and believe, without authority under the Constitution and laws of North Carolina, the board of county commissioners of Buncombe County, on 1 July, 1895, were enabled to recall and get possession of the $98,000 in coupon bonds of the county of Buncombe theretofore issued as aforesaid, giving in exchange the said bonds purporting to be issued under the authority of the said act of 1893.

10. That, as plaintiffs are advised, informed and believe, the Legislature of North Carolina had no power to authorize the issue of said bonds on 1 July, 1895, for the purposes of paying the said invalid bonds which then upon their face purported to have become due.

11. That between the years 1877 and 1895 the board of county commissioners of Buncombe County every year levied and caused to be collected a tax sufficient to discharge semiannually the interest purporting to accrue on the said bonds issued in 1875-76-77-78, and to take up the coupons thereto attached and $2,000 of the principal of said indebtedness, leaving only $98,000 of bonds outstanding, and that since 1 July, 1985, the said board of commissioners have, during each year, levied and caused to be collected, a sufficient tax to pay semiannually the interest purporting to accrue on said $98,000 in bonds, last issue.

12. That the defendant, as treasurer of the county of Buncombe, now has in hand a sufficient sum levied and collected for the purpose of paying the coupons attached to said $98,000 in bonds purporting to fall due on 1 January, 1898, to wit, about the sum of $2,450, and threatens to disburse the same by the payment of said coupons falling due on said 1 January, 1898, unless restrained by the court from paying said coupons. (441)

Wherefore, plaintiffs demand judgment:

1. That the said $98,000 of bonds, all in denominations of $1,000, issued on 1 July, 1895, be declared invalid and void.

2. That the defendant be perpetually restrained and enjoined from paying any part of the principal or interest purporting to be due, or hereafter to fall due, upon said bonds issued on 1 July, 1895.

3. For such other and further relief as to the court may seem just.

4. For costs of action.

A. C. AVERY,
MARK W. BROWN,
MOORE & MOORE,
Attorneys for Plaintiffs.

NORTH CAROLINA—BUNCOMBE COUNTY.

T. C. Brown, chairman of the board of county commissioners of Buncombe County, and one of the plaintiffs above named, maketh oath that the facts set forth in the foregoing complaint as upon the knowledge of the plaintiffs are true, and those facts stated on information and belief he believes to be true.

T. C. BROWN,
Chairman.

Sworn to and subscribed before me, this 28 December, 1897.

H. L. MORRIS,
Justice of the Peace.

EXHIBIT A.

UNITED STATES OF AMERICA
STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

No..... $50.00

The county of Buncombe, in the State of North Carolina, is justly indebted to....., or bearer, in the sum of fifty dollars,
(442) and will pay the same to the holder hereof on the first day of July, in the year of our Lord one thousand eight hundred and ninety-five, at the town of Asheville, upon the surrender of this bond, the interest at the rate of six per centum per annum to be paid semiannually upon the first days of January and July in each and every year ensuing the date hereof, at the town of Asheville, upon the delivery of the several coupons hereto subjoined as they shall respectively become due. The commissioners of the county of Buncombe legally representing the body of the county aforesaid having made a corporate subscription to the capital stock of the Spartanburg and Asheville Railroad Company, which stock, together with all dividends accruing therefrom, is in the hands of trustees for the use of the holders of these bonds and pledged for the payments of the interest as it shall become due and for the final payment of said bonds and having ascertained the sense of the qualified voters thereof to favor a corporate subscription to the capital stock of said railroad company by an election duly held for that purpose have caused this bond to be issued to meet the installments due upon the county subscription to said company, and the whole is done under the authority conferred and in conformity with the Constitution of the State of North Carolina and by authority of acts of the General Assembly of the said State.

In testimony whereof, the said county commissioners have caused this bond to be signed by their chairman and countersigned by the clerk of their board, and to be sealed with the seal of the said county.

Done at the town of Asheville, in the year of our Lord eighteen (443) hundred and seventy-five.

.....,
Chairman Board County Commissioners.

.....,
Clerk.

EXHIBIT B.

June 3, 1878.

Ordered that the bonds of Asheville and Spartanburg Railroad issue per estimate of engineer for the sum of $5,500.

July 1, 1878.

Ordered that the bonds of Asheville and Spartanburg Railroad Company be issued as the amount of engineers certificate filed for.

EXHIBIT C.

(Form of Bond.)

UNITED STATES OF AMERICA
STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

No..... $1,000.00

FUNDING BONDS OF 1895.

The county of Buncombe, in the State of North Carolina, for value received, hereby acknowledges itself indebted to, and promises to pay the bearer hereof the sum of one thousand ($1,000) dollars in gold coin of the United States of America, of the present standard of weight and fineness, on the first day of July, nineteen hundred and fifteen, at the office of Messrs. Blair and Company, in the city of New York, in the State of New York, together with interest thereon at the rate of five per centum per annum, payable semiannually, in like gold (444) coin, on the first day of January and July in each year, upon presentation and surrender of the annexed coupons as they shall severally become due. This bond is one of a series of ninety-eight bonds of like tenor, date and amount, issued by the county of Buncombe for the purpose of funding ninety-eight thousand par value bonds of said county lawfully issued in the year A.D. 1875, under a proper authority and by a vote of a majority of the qualified voters of said county, falling due 1 July, 1895, and are issued by authority of, in accordance with and full conformity to an act of the General Assembly of North Carolina, entitled "An act to authorize the county of Buncombe to fund its bonded

indebtedness," ratified 25 February, 1893, and by virtue of the resolutions of the board of commissioners of Buncombe County, duly and regularly passed in pursuance of and in conformity to the aforesaid act on 19 June, 1895. It is hereby certified that all things essential to the validity of this bond have been duly performed; that all the requirements of law have been fully complied with by the proper officers in issuing this bond, and that the same is a valid and binding obligation upon the county of Buncombe. It is further certified that this issue of ninety-eight funding bonds constitutes a continuation of the bonded indebtedness of said county duly created in the year A.D. 1875, under a lawful and proper authority, and that all of the bonds funded by the issue of which this bond is a part were simultaneously with the issuance and delivery of this series of bonds called in, retired and canceled by said county, and that the entire indebtedness of said county, including this issue (445) of bonds, is within the limit prescribed by the Constitution and laws of the State of North Carolina.

Given under the corporate seal of the county of Buncombe, and signed by the chairman of the board of county commissioners of said county, and countersigned by the clerk of said board, this 1 July, 1895.

.....,
Chairman Board of County Commissioners.

Countersigned:

.....

(Form of Coupon Attached to the Foregoing Bond.)

$25.00 $25.00

The county of Buncombe, in the State of North Carolina, will pay to bearer on surrender hereof $25 in gold coin of the United States of America, at the banking house of Blair and Company in the city and State of New York, on the first day of....., 18....., being six months interest due that day on its funding bond No....., issued on the first day of July, 1895.

.....,
Chairman Board of County Commissioners.

.....,
Clerk of Board of County Commissioners.

EXHIBIT D.

Whereas, the General Assembly of North Carolina, by an act entitled "An act to authorize the county of Buncombe to fund its bonded indebtedness," ratified 25 February, 1893, being chapter 172 of the Public Laws of North Carolina, Session of 1893, duly authorized the board of commissioners of said county to issue and sell under the conditions and

regulations prescribed in said act, the coupon bonds of the county (446) to an amount sufficient to pay the unpaid and outstanding bonded indebtedness of said county, created in the year 1875, to pay for the said county's subscription to the stock of the Spartanburg and Asheville Railroad Company; and, whereas said bonded indebtedness will become due to the extent of about $100,000 on 1 July of the present year, now, in pursuance of the authority conferred by said act, the board of commissioners of Buncombe County do hereby order and direct that J. E. Rankin, chairman of the board, forthwith cause to be printed in such form and in such denomination as he may be advised is proper, bonds of the county of Buncombe to the amount of one hundred thousand dollars, to bear date when issued, and running twenty years from 1 July, 1895, with coupons for interest attached, at a rate not exceeding six per centum per annum, payable, both principal and interest, at such place as he may think best, and such bonds, if he shall think proper, shall have expressed on their face that the principal and interest are payable in gold coin of the United States of the present standard of weight and fineness, and when issued said bonds shall be regarded as a continuation of the bonded indebtedness aforesaid, and shall be used for no other purpose. He is further authorized to enter into negotiations for the sale of the bonds to be issued as aforesaid, and may employ counsel for the purpose of advising and assisting him in preparing and selling said bonds. He will report to the next regular meeting of this board, or to a called meeting, what he may have done in this behalf, but no bonds shall be signed or issued until the further orders of this board.

This 4 February, 1895.

May 7, 1895. (447)

Ordered, that J. E. Rankin, chairman, if he find it necessary, proceed to New York and the other cities for the purpose of selling one hundred thousand dollars Buncombe County five per cent gold refunding bonds, to be dated 1 July, 1895; said bonds having been authorized by act of the General Assembly Session 1893, chapter 172, and by an order of this board of county commissioners, made February, 1895, the said J. E. Rankin, chairman, being hereby empowered to negotiate the sale of said bonds upon such terms as he may deem best, and to sign contract for said sale.

June 19, 1895.

Whereas, during the year 1875, the county of Buncombe, by a vote of the majority of the qualified voters therein, became lawfully indebted in the sum of one hundred thousand dollars to pay for the subscription of said county to the stock of the Spartanburg and Asheville Railroad Company, which indebtedness was evidenced by the six per cent coupon

bonds of said county lawfully issued to the amount of one hundred thousand dollars, par value, of which said bonds, ninety-eight thousand dollars par value, are still outstanding and unpaid, and will fall due on 1 July, 1895; and, whereas J. E. Rankin, in pursuance of the authority on him conferred by a resolution of this board heretofore duly passed on 4 February, 1895, for the purpose of providing means for funding the said bonded indebtedness of the said county, entered into a contract with Blair and Company, bankers, of the city of New York, for the sale to said Blair and Company of the funding bonds of this county to
(448) an amount of one hundred thousand dollars, par value, which contract is as follows, to wit:

For and in consideration of the sum of one dollar, receipt of which is hereby acknowledged, we agree to sell to Messrs. Blair and Company of New York, one hundred thousand dollars ($100,000) refunding five (5) per cent gold bonds of Buncombe County, North Carolina, to be dated 1 July, 1895, due 1 July, 1915, at par, and Messrs. Blair and Company hereby agree to purchase said $100,000 refunding five per cent gold bonds of the board of county commissioners of Buncombe County, at par, same to be delivered to Messrs. Blair and Company by 1 July, 1895. It is further agreed that the principal and interest of said bonds shall be made payable at the office of Messrs. Blair and Company in the city of New York, and that Messrs. Blair and Company are to be appointed fiscal agents for the said county of Buncombe, and to receive in consideration of their services as fiscal agents 1/8 per cent commissions of all moneys paid out by them. It is further agreed that the commissioners of said county shall pay to Messrs. Blair and Company the sum of five hundred dollars for expenses in preparing said bonds. It is further understood and agreed that Messrs. Blair and Company, in payment of the above five per cent bonds, dated 1 July, 1895, will honor all drafts of J. E. Rankin, chairman of the board of county commissioners of Buncombe County, to the amount of about ninety-eight thousand dollars ($98,000), said drafts to be accompanied by the 6 per cent bonds of Buncombe County, which mature 1 July, 1895, amounting to about ninety-eight thousand dollars, and the balance, if any, up to
(449) one hundred thousand dollars, will be paid direct by Messrs. Blair and Company to the treasurer of said county of Buncombe.

J. E. RANKIN,

Chairman Board County Commissioners, Buncome County.

BLAIR & COMPANY,

New York, 11 May, 1895.

Whereas it has since appeared that there remain outstanding and unpaid at the present time but $98,000 of the said bonds of this county

which fall due on 1 July, 1895; and, whereas Blair and Company have agreed to purchase said ninety-eight bonds at par, under all the conditions and provisions of the contract of 11 May aforesaid: *Now*, therefore, be it resolved by the board of commissioners of the county of Buncombe that the contract aforesaid be and the same is hereby approved, adopted, and made binding upon the county of Buncombe, save only that 98 bonds instead of 100 bonds shall be sold and delivered to said Blair and Company under the said contract. That for the purpose of carrying out on the part of said county the provisions of the contract aforesaid, the coupon bonds of said county to the number of ninety-eight be forthwith lithographed or engraved substantially in the form and tenor following, to wit: (For form of bonds see "Exhibit C," filed herewith.)

That said funding bonds, when engraved or lithographed, be signed by the chairman of the board, countersigned by the clerk of the board, and sealed with the seal of the county of Buncombe, and that the signature of said officers to the coupons on the said bonds be lithographed or engraved, and that said bonds be thereafter simultaneously with the requirements and cancellation of the bonds are intended to refund issued and delivered to Blair and Company, in accordance with the terms and provisions of the contract hereinabove set forth. That (450) the money received from the sale of the funding bonds hereinabove authorized be and the same is hereby appropriated to the payment of the said 98 bonds of this county, falling due 1 July, 1895, and that said money shall be used for no other purpose whatsoever. That for the purpose of paying the interest on the 98 funding bonds hereinabove authorized, and of providing a fund for the payment of the principal of said bonds when the same shall become due, the board of commissioners and justices of this county, or other persons or body having power and authority to levy taxes in said county, shall provide by taxation upon the taxable property of the county from year to year the amount necessary to meet the interest on said bonds, and to pay the principal thereof when they shall become due and payable, and said taxes shall be collected in like manner as other county taxes, and be paid into the hands of the county treasurer, to be used for the purposes aforesaid. That all resolutions or parts of resolutions inconsistent herewith be and the same are hereby repealed. The above preamble and resolutions were unanimously adopted and ordered to be entered of record.

June 28, 1895.

In compliance with instruction from the board of county commissioners, J. E. Rankin, chairman, and J. J. Mackey, clerk, this day

executed and delivered to the Southern Express Company, for Blair and Company, New York City, 98 funding bonds of said county, the proceeds of which to be used in payment of a like amount of bonds of said county issued in 1875 to Spartanburg and Asheville Railroad Company.

These bonds were signed and delivered in the presence of W. W.
(451) Bernard, president National Bank of Asheville. Bonds numbered from 1 to 98 inclusive. Adjourned.

J. J. MACKEY, *Clerk.*

RESTRAINING ORDER.

NORTH CAROLINA—BUNCOMBE COUNTY.

SUPERIOR COURT, at chambers at Waynesville, N. C., 29 December, 1897.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth and T. H. Weaver, Commissioners, and T. C. Brown, Plaintiffs,

against

W. R. Payne, Treasurer of Buncombe County, Defendant.

On motion of Moore & Moore, Mark W. Brown, and A. C. Avery, attorneys for plaintiffs, and upon reading the foregoing complaint used as an affidavit, and exhibits thereto attached; it is considered and adjudged by the court that upon the filing by the plaintiffs of an undertaking in the sum of two hundred and fifty dollars, in form as required where restraining orders are granted, the clerk will cause a copy of the complaint and this order to be served upon the defendants as notice to show cause before the undersigned judge of the Twelfth Judicial District; at chambers at Waynesville, N. C., on 17 January, 1898, why an order shall not be granted restraining the said defendant perpetually from paying any part of the interest or principal of the bonds mentioned in the complaint as issued, on 1 July, 1895, and that meantime the
(452) said defendant be enjoined and restrained from paying any part of the interest or principal of said bonds.

W. L. NORWOOD,
Judge of Twelfth Judicial District.

NORTH CAROLINA—BUNCOMBE COUNTY.

To the Sheriff of said county of Buncombe—GREETING:

The plaintiffs in the above order having filed the undertaking required by said order, which has been properly justified and duly approved, you

are hereby commanded and required forthwith to execute said order upon the defendant named therein by delivering a copy of the foregoing complaint and a copy of said order to him.

This 29 December, 1897.

J. L. CATHEY,
Clerk Superior Court.

Received the above order 31 December, 1897, and served the same upon the defendant W. R. Payne, treasurer of Buncombe County, 31 December, 1897, by delivering true copies of the foregoing complaint and order to him.

This 31 December, 1897.

W. M. WORLEY,
Sheriff of Buncombe County.
By ROBERT GREENWOOD, *Deputy Sheriff.*

ANSWER. (453)

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe *et al.*

against

W. R. Payne, Treasurer of Buncombe County.

The defendant, answering the complaint of the plaintiffs herein:

1. Admits the truth of the allegations contained in paragraph one of said complaint.

2. Admits the truth of the allegations contained in paragraph two of the said complaint.

3. Admits the truth of the allegations contained in paragraph three of said complaint.

4. That the allegations contained in paragraph four of said complaint are matters of public law, and speak for themselves; and the conclusions of law to be drawn therefrom are for the determination of the courts.

5. That this defendant has no information sufficient to form a belief as to the truth of the allegations contained in paragraph five of the said complaint, and therefore denies the same.

6. That this defendant admits the truth of so much of the allegations of paragraph six of the said complaint as allege "that in the year 1875 an election was held by virtue of an order of the board of commissioners of Buncombe County, at which election a majority of the qualified voters of said county cast their ballots in favor of subscribing $100,000 to the capital stock of the Spartanburg and Asheville Railroad Company and

(454) to pay for the said capital stock in coupon bonds," as therein set forth; but he denies the correctness of the conclusions of law therein alleged.

7. He denies the truth of the allegations contained in paragraph seven of said complaint.

8. That he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph eight of said complaint; and demands strict proof of the same.

9. He admits the truth of the allegations of facts contained in both paragraphs of paragraph nine of said complaint; but denies that anything was done by the commissioners of Buncombe County contrary to the laws or Constitution of North Carolina.

10. That he denies the truth of the allegations contained in paragraph ten of the said complaint.

11. That he admits the truth of the allegations contained in paragraph eleven of said complaint.

12. He admits the truth of the allegations contained in paragraph twelve of said complaint.

For further, separate and distinct defenses to the said action, he alleges:

(1) That he is treasurer of Buncombe County, and acts under the direction of the board of county commissioners of said county, and has no personal interest in the event of this suit beyond his duty of citizenship, and an earnest desire faithfully to administer the public office he now holds; that he is entitled to have and therefore asks for the direction of the court as to his duties in the premises; that the holders of the bonds set forth in paragraph nine of the said complaint are the real parties in interest as defendants, and should be made parties hereto, with the right to interpose such defenses as they may see proper,

(455) and he is advised and avers that so long as they are not parties they will not be bound by any decision of this court in this case.

(2) That he is informed and believes and so alleges, that the action of the board of commissioners of Buncombe County in submitting the question of subscription to the stock of the Spartanburg and Asheville Railroad Company to the voters of Buncombe County in the year 1875, was not under section 707 of The Code of North Carolina, but under subdivision 4 of section 8 of the Laws of 1868, ch. 20, as printed on page 272 of Battle's Revisal, which is as follows:

"4. To submit to a vote of the qualified electors in the county any proposition to contract a debt or loan the credit of the county under section 7, Art. VII, of the Constitution; to order the time for voting upon such proposition, which shall be upon public notice thereof, at one or more places in each township in the county, and publication in

one or more county newspapers, if there be any, for three months next immediately preceding the time fixed on; and such election shall take place, and be conducted under the laws as prescribed for the election of members of the General Assembly; and the commissioners shall provide for giving effect, in case of the adoption of the proposition to the expressed will of a majority of the qualified voters in such election."

Which said act the Legislature of North Carolina was authorized to enact by and under the Constitution of the said State. That the election held in 1875 for such subscription was duly authorized by a proper and legal resolution of the said board of commissioners, all the requirements of the law were duly complied with, and all action and orders (456) taken and made relative thereto were duly recorded in the proper books of the said county; and if the record of the same has been lost or destroyed, the fact of their existence at the time said election was held can still be abundantly proved by persons still living who saw and read the same; that the register of deeds for Buncombe County, who is ex officio the clerk of said board, and not the chairman of said board, is the proper custodian of the records of the commissioners of the said county; that at the said election the qualified electors of the said county adopted the proposition to authorize the subscription by said county of the said $100,000, to the stock of the said railroad company by a majority of all the qualified electors of said county; that such subscription was duly made by C. B. Way and M. E. Carter, agents for Buncombe County, on 11 August, 1875, and the bonds of Buncombe County were duly issued in pursuance of said resolution and election; that said subscription, the issuing of the said bonds, and the levy of taxes in pursuance thereof were ratified and confirmed as "lawful and valid subscription and action of the county of Buncombe through proper authority, and binding on said county accordingly," by the General Assembly of North Carolina by an act which was ratified on 27 February, 1877, entitled, "An act concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad, which said act and the bill preceding it shows that it and they were duly signed by the presiding officers of the two houses of the General Assembly, declaring it to have been read three times in each house." That this defendant is advised and believes that, as there is no allegation in the said complaint (457) setting forth that the act of 1868, ch. 20, nor the act of February, 1893, authorizing the finding of the debt of Buncombe County, were not passed in accordance with section 14, Art. 2, of the Constitution of North Carolina, requiring the passage thereof in the House and Senate on three separate days and the recording of the yeas and nays on the second and third readings thereof, the said complaint states no cause of action.

For a further, separate and distinct defense to the said action the defendant alleges:

(3) That said subscription to the capital stock of said railroad company was made pursuant to regular, valid and legal proceedings duly had by the board of commissioners of said Buncombe County, all of which were duly recorded in the proper books of said county, the subscription was legally and properly made, the bonds legally and properly issued and the taxes regularly and legally levied and collected for the payment of the interest falling due thereon from the date the said bonds were so issued until they were founded, when all said bonds were redeemed and cancelled by the said commissioners of said Buncombe County, and the right to make, or the legality of, the said subscription can no longer be in question, since the same has not only been made, but paid in full, and are no longer a claim against said county.

(4) That this defendant is informed and believes that said county of Buncombe sold the bonds authorized to be issued under the act of February, 1893, and received the money therefor; that said bonds
(458) were issued by the legal and recognized authorities of the said county; that the said bonds were and are negotiable, and are now in the hands of innocent purchasers for value and without notice, which, under the Constitution of the United States and the decisions of the United State Supreme Court are a valid and binding obligation upon said county.

(5) That this defendant is advised and believes that the plaintiffs as county commissioners of Buncombe County, are estopped to deny the validity of the said bonds until they tender to the holders thereof the money they received therefor, both because they have paid the interest due thereon in January and July, 1897, and received and cancelled the coupons belonging to said bonds for said dates; that the commissioners of Buncombe County are estopped to deny the validity of the said bonds for the reason that the commissioners of the said county from 1875 till July, 1897, have paid the interest on the bonds originally issued on the said subscription, and those refunding them; the Legislature has twice ratified the same, and the people of the county of Buncombe have never questioned them.

(6) That at the time these refunding bonds were issued by the county of Buncombe, the Supreme Court of North Carolina had decided that where a bill had been duly signed by the presiding officers of the Assembly the court cannot go behind such ratification to inquire how such bill was passed, and, as under it the act of 1877, and the act of February, 1893, were duly certified to by the presiding officers, the decision in
(459) the case of *Bank v. Oxford,* 119 N. C., p. 214, could not operate to make invalid bonds which were so issued, as that would in effect

violate the obligation of contract and therefore the Constitution of the United States; that the said bonds for the said subscription were valid and binding upon the said county when issued, as were those issued to refund them, and no decision of the Supreme Court of North Carolina overruling its former decisions can affect them, and the holders of the said bonds, being the only parties defendant in interest in this action will not be bound by a decision in this case, and the only effect of continuing this injunction will be to continue to injure the credit of Buncome County and the State of North Carolina, already sadly damaged by the institutoin of this action. The bonds in controversy were issued not under the act of 1877, but under that of February, 1893, which independently of the act of 1877 was sufficient authority for the issuance of the same, the Constitution of the State having been satisfied by a vote of the people, and the act of 1893 was a complete ratification of all that had been done before.

(7) That the people of Buncombe County had great personal and pecuniary interest in the construction and completion of the Spartanburg and Asheville Railroad at the time they voted to make such subscription, and as the property and population of said county and of the city of Asheville have more than doubled since its completion, the wisdom and value to them of making such subscription have been more than vindicated.

Wherefore the defendant prays judgment:

1. That the restraining order heretofore issued against him in this case be dissolved, and that he be directed to make payment to the proper parties of the interest now due on the bonds in controversy.

2. That he go hence without day, and that he recover his rea- (460) sonable costs.

3. For such other and further relief as in the nature of the case he may be entitled to.

EUGENE D. CARTER,
Attorney for Defendant.

NORTH CAROLINA—BUNCOMBE COUNTY—SS.:

William R. Payne, the treasurer of Buncombe County, and the defendant above named, being duly sworn, deposes and says that he has heard the foregoing answer read; that the facts set forth therein of his own knowledge are true; that the facts set forth therein on information and belief he believes to be true.

WILLIAM R. PAYNE,
County Treasurer.

Sworn to and subscribed before me this 25 January, 1898.

J. L. CATHEY,
Clerk of the Superior Court of Buncombe County.

REPLY.

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth and T. H. Weaver, Commissioners), and T. C. Brown, Plaintiffs,

against

W. R. Payne, Treasurer of Buncombe County, Defendant.

(461) Replying to the new matter set up in the defendant's answer the plaintiffs say:

(1) That as they are advised, informed and believe, they have a right to maintain this action against the defendant above named and the holders of the bonds of the county of Buncombe referred to in the pleadings are not necessary nor essential parties to this controversy.

Plaintiffs are not informed as to what persons are the holders of the bonds and could not make such persons parties defendant without further information, but plaintiffs are advised that such bondholders or any of them have the right to move the court to admit them as parties defendant if they so desire.

(2) The plaintiffs are advised, informed and believe that the section of the act of 1868, which is reprinted on page 272 of Battle's Revisal, and which is set forth in the second paragraph of the new matter set up in defendant's answer as constituting the delegation of authority by the Legislature to the board of commissioners for the county of Buncombe, to order and hold the election upon the question of subscription referred to in the pleadings, conferred no power upon said board to submit to the people of Buncombe County the question whether said county should subscribe to the capital stock of the Spartanburg and Asheville Railroad Company, but was intended to provide and did provide only the machinery for holding such elections in cases where the authority to hold them had been granted by some other statute.

The other allegations contained in said paragraph two are not true and are denied, except so much of said allegations as contain a repetition of what had already been admitted in the complaint of the plaintiffs.

(462) (3) That the allegations contained in the third paragraph of said new matter are not true.

(4) That the allegations contained in the fourth paragraph of said new matter are not true, except the allegation that the said bonds were sold.

(5) That the fact set forth in the fifth paragraph of the said new matter are not true except the allegation that the commissioners have

paid interest on said bonds and the plaintiffs are advised, informed and believe that the proposition of law contained in said paragraph is not a correct and true statement of the law.

(6) That it is not true, as alleged in paragraph six of said new matter that the questions of law involved in this controversy were adjudicated by the Supreme Court of North Carolina at any time prior to the rendition of the opinion in the case of *Bank v. Oxford,* 119 N. C., p. 214, nor is it true, as the plaintiffs are advised, informed and believe, that the said bonds are rendered valid by any such decision previously rendered.

It is not true, as alleged in said paragraph, that the board of commissioners of Buncombe County were lawfully empowered by the act of February, 1893, to issue the new funding bonds therein referred to, nor is it true that the said last named act could have the legal effect of ratifying acts of the commissioners which were *ultra* (463) *vires* and void.

(7) It is not true that the citizens of Buncombe County had any pecuniary interest in the said Spartanburg and Asheville Railroad or any interest other than that which they had in common with the citizens of the whole State of North Carolina.

A. C. AVERY,
MARK W. BROWN,
MOORE & MOORE,
Attorneys for Plaintiffs.

T. C. Brown, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he is also a member of the board of commissioners for the county of Buncombe, and is the chairman of said board; that he has heard the foregoing reply read and knows the contents thereof; that the facts stated in said reply are of his own knowledge true, except those facts herein stated on information and belief; and that he believes those facts to be true.

T. C. BROWN.

Sworn to and subscribed before me on 26 January, 1898.

W. L. NORWOOD,
Judge Superior Court.

HOUSE OF REPRESENTATIVES, 2 February, 1893.

Bills and resolutions are introduced, read the first time and disposed of as follows:

By Mr. Starnes, H. B. 625, a bill to be entitled An act to authorize the county of Buncombe to fund its bonded indebtedness. Referred to the Committee on Finance. (464)

HOUSE OF REPRESENTATIVES, 4 February, 1893.

Reports of Committees:

By Mr. Roscoe from the Committee on Finance, the following bills with favorable recommendations:

H. B. 625, a bill to be entitled An act to authorize the county of Buncombe to fund its bonded indebtedness.

HOUSE OF REPRESENTATIVES, Monday, 6 February, 1893.

H. B. 625, a bill to be entitled An act to authorize the county of Buncombe to fund its bonded indebtedness passes its second and third readings and is ordered engrossed and sent to the Senate.

Wednesday, 8 February, 1893.

By Mr. Wicker from the Committee on Engrossed Bills, reports that the following are correctly engrossed, and they are ordered to be sent to the Senate for the concurrence of that body.

H. B. 625, a bill to be entitled An act to authorize the county of Buncombe to fund its bonded indebtedness.

HOUSE OF REPRESENTATIVES, Monday, 13 February, 1893.

A message is received from the Senate returning H. B. 625, a bill to be entitled An act to authorize the county of Buncombe to fund its bonded indebtedness in accordance with an order of the House. Placed on the calendar.

CALENDAR.

Upon motion of Mr. Starnes, H. B. 625, a bill to be entitled An act to authorize the county of Buncombe to fund its bonded indebtedness is recalled and placed on the calendar.

(465) Mr. Starnes moves to reconsider the vote by which H. B. 625, S. B. 519, a bill to be entitled An act to authorize the county of Buncombe to fund its bonded indebtedness, passes its second and third readings. The motion is adopted. The bill passes its second reading and takes its place on the calendar, by the following vote. Those voting in the affirmative are: Messrs. Anderson, Arledge, Axley, Barlow, Blair, Brooks, Byrd, Carraway, Carter, Clarke, Covington, Crews, Crouse, Daniel, Dey, Ellis, Erwin of Cleveland, Erwin of Mecklenburg, Eubanks, Eure, Fuller of Durham, Fuller of Randolph, Gilmer of Guilford, Gilmer of Haywood, Harper, Harris, Hoffman, Holbrook, Holt, Hoyle, Hudson, Jetton, Jones of Caldwell, Jones of Camden, King of Bladen, King of Iredell, Lawhon, Lawrence, Lee, Long of Alamance, Long of Warren, McCurry, McGlohon, McLelland, McNeil, Merritt, Midgett, Moore, Nash, Norton, Oliver, Parker of Jones, Parker of Perquimans, Petrie, Pritchard, Robertson, Rowe, Rucker, Russell, Satterfield, Schul-

ken, Self, Shepard, Shore, Smith, Starnes, Starr, Stevens, Tatem, Tathem, Taylor of Hertford, Thagard, Thomas, Vance of Buncombe, Vance of Mitchell, Venable, Venters, Walker, Ward, Watkins, Watson of Forsythe, Watson of Vance, White of Cabarrus, White of Gaston, Williams of Henderson, Williamson, Witherington, Wood. Ayes—89.

Those voting in the negative, none.

HOUSE OF REPRESENTATIVES, Tuesday, 14 February, 1893.

On motion of Mr. Starnes, H. B. 625, a bill to be entitled An act to authorize the county of Buncombe to fund its bonded indebtedness is substitute for engrossed copy.

H. B. 625, a bill to be entitled An act to authorize the county (466) of Buncombe to fund its bonded indebtedness, passes its third reading by the following vote, and is ordered sent to the Senate without engrossment. Those voting in the affirmative are:

Messrs. Adams, Allen, Anderson, Arledge, Axley, Barlow, Bellamy, Blair, Blue, Brake, Brooks, Byrd, Carraway, Clarke, Covington, Crouse, Daniel, Dey, Ellis, Erwin of Cleveland, Eure, Fuller of Durham, Gilmer of Guilford, Gilmer of Haywood, Hamilton, Harper, Harrell, Hoffman, Holbrook, Howard, Hoyle, Hudson, Jetton, Jones of Camden, King of Bladen, Lawhon, Lawrence, Lee, Lillington, McGlohon, McKenzie, McNeil, Merritt, Midgett, Moore, Nash, Norton, Oliver, Parker of Jones, Parker of Perquimans, Petree, Roscoe, Robertson, Rowe, Rucker, Russell, Satterfield, Schulken, Self, Shepard, Shore, Smith, Spruill, Starr, Stevens, Tatem, Tathem, Taylor of Granville, Taylor of Halifax, Taylor of Hertford, Thagard, Thomas, Vance of Buncombe, Vance of Mitchell, Venable, Venters, Walker, Watkins, Watson of Vance, Westbrook, Whitley, Wicker, Williams of Henderson, Williamson, Witherington, Wood. Ayes—86. Noes—Those voting in the negative are none.

HOUSE OF REPRESENTATIVES, Saturday, 25 February, 1893.

Mr. Holt, from the Committee on Enrolled Bills, reports the following bills and resolutions as properly enrolled, which are duly ratified by the Speaker of the House:

S. B. 652, H. B. 625, An act to authorize the county of Buncombe to fund its bonded indebtedness.

SENATE CHAMBER, 8 February, 1893.

Messages were received from the House of Representatives transmitting the following bills and resolutions, which were read the first time and disposed of as follows:

H. B. 625, S. B. 519, bill to authorize the county of Buncombe (467) to fund its bonded indebtedness. Referred to the Committee on Finance.

SENATE CHAMBER, 10 February, 1893.

From the Committee on Finance.

H. B. 625, S. B. 519, bill to authorize the county of Buncombe to fund its bonded indebtedness, recommending it do pass.

SENATE CHAMBER, 13 February, 1893.

A message was received from the House of Representatives asking the return of H. B. 625, bill to authorize the county of Buncombe to fund its bonded indebtedness. The bill was ordered returned.

SENATE CHAMBER, 15 February, 1893.

Messages were received from the House of Representatives transmitting the following bills and resolutions, which were read for the first time and disposed of as follows:

H. B. 625, S. B. 652, bill to authorize the county of Buncombe to fund its bonded indebtedness. Referred to the Committee on Finance.

SENATE CHAMBER, 17 February, 1893.

From the Committee on Finance:

H. B. 625, S. B. 652, bill to authorize the county of Buncombe to fund its bonded indebtedness, recommending it do pass.

SENATE CHAMBER, 21 February, 1893.

H. B. 625, S. B. 652, bill to authorize the county of Buncombe to fund its bonded indebtedness, on its second reading. The bill
(468) passed its second reading by the following vote. Those voting in the affirmative:

Messrs. Abbott, Armstrong, Atwater, Blalock, Brown, Burch, Campbell, Cheek, Cooper, Davis, Day, Fields, James, Jones, Leatherwood, Little, Lucas, Marsh, McDowell, McLauchlin of Iredell, McRae of Richmond, McRae of Robeson, McLauchlin of Cumberland, Means, Merritt, Newell, Olive, Owen, Patterson, Philips, Posey, Pou, Schoolfield, Sherrill, Stack, Twitty—36.

SENATE CHAMBER, 22 February, 1893.

H. B. 625, S. B. 652, bill to authorize the county of Buncombe to fund its bonded indebtedness, on its third reading. The bill passed its third reading by the following vote; was ordered engrossed and sent to the House of Representatives. Those voting in the affirmative: Messrs. Abbott, Armstrong, Aycock, Battle, Blalock, Brown, Burch, Campbell, Cheek, Cooper, Cranor, Davis, Day, Fields, Gattling, James, Jones, King, Leach, Leatherwood, Little, Lucas, Marsh, McDowell, McLauchlin

of Cumberland, McLauchlin of Iredell, McRae of Robeson, Means, Merritt, Mitchell, Newell, Olive, Owen, Parrott, Patterson, Philips, Potter, Pou, Schoolfield, Sherrill—40.

SENATE CHAMBER, 25 February, 1893.

Mr. Campbell, from the Committee on Enrolled Bills, reports the following bills and resolutions as properly enrolled, which are duly ratified and sent to the office of the Secretary of State:

S. B. 652, H. B. 625, An act to authorize the county of Buncombe to fund its bonded indebtedness.

NORTH CAROLINA—DEPARTMENT OF STATE.

RALEIGH, N. C., 15 January, 1898.

I, Cyrus Thompson, Secretary of State, do hereby certify (469) that the foregoing and annexed five sheets contain a full and accurate transcript of the Journals of the Senate and House of Representatives of the State of North Carolina, for the session of the General Assembly in the year 1893, or so much of said journals as relates to H. B. 625, S. B. 519, a bill to be entitled An act to authorize the county of Buncombe to fund its bonded indebtedness, the title as published, of chapter one hundred and seventy-two of the Public Laws of the session of 1893.

Done in office at Raleigh, this 15 January, A.D. 1898.

CYRUS W. THOMPSON,

The Great Seal of North Carolina. *Secretary of State.*

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.

IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth and T. H. Weaver, Commissioners), and T. C. Brown, Plaintiffs,

against

W. R. Payne, Treasurer of Buncombe County, Defendant.

Harvey M. Ramseur maketh oath that he was a civil engineer employed on the Western North Carolina Railroad, between Asheville and Murphy during the year 1869, and that no part of the grading on the line of railroad between Asheville and Spartanburg, known (470) as the Spartanburg and Asheville Railroad or on the Greenville and French Broad Railroad had been done until after the end of the year 1868. H. M. RAMSEUR.

Sworn to and subscribed before me 26 January, 1898.

FRED MOORE,

Notary Public.

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth and T. H. Weaver, Commissioners), and T. C. Brown, Plaintiffs,

against

W. R. Payne, Treasurer of Buncombe County, Defendant.

J. M. Green being first duly sworn, deposes and says that he is now 57 years of age and has lived in Buncombe County, North Carolina, all his life; that when the county of Buncombe subscribed one hundred thousand dollars to the capital stock of the Spartanburg and Asheville Railroad Company said county had no interest in the railroad of said Spartanburg and Asheville Railroad Company, nor the railroad of the Greenville and French Broad Railroad Company, which had shortly prior thereto been consolidated with said Spartanburg and Asheville Railroad Company, a South Carolina corporation; and that when
(471) said county made said subscription to the capital stock of said railroad company no part of said railroad had been completed, and the construction of said railroad had not been commenced in the State of North Carolina. J. M. GREEN.

Sworn to and subscribed before me on this 25 January, 1898.

FREDERICK W. THOMAS,
Notary Public.

UNDERTAKING UPON INJUNCTION.

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth and T. H. Weaver, Commissioners), and T. C. Brown, Plaintiffs,

against

W. R. Payne, Treasurer of Buncombe County, Defendant.

Know all men by these presents, That we, the board of commissioners for the county of Buncombe, and T. C. Brown, as principals, and H. Lamar Gudger, as surety, undertake and become bound to William R. Payne, Treasurer of Buncombe County, the defendant in the above-entitled action, in the sum of two hundred and fifty dollars ($250), lawful money of the United States of America, well and truly to be paid to him, his executors or administrators, to be void, however, if the plaintiffs in the above-entitled action shall pay to said defendant such dam-

ages not exceeding said sum of $250 as he may sustain by reason (472) of the restraining order or injunction granted by his Honor, W. L. Norwood, judge, etc., on 29 December, 1897, if the court shall finally decide that said plaintiffs were not entitled to said restraining order or injunction.

This 29 December, 1897.

THE BOARD OF COMMISSIONERS FOR THE COUNTY OF BUNCOMBE.

A. C. AVERY,
MARK W. BROWN,
MOORE & MOORE,
Attorneys.
H. LAMAR GUDGER.

NORTH CAROLINA—BUNCOMBE COUNTY.

H. Lamar Gudger, being first duly sworn, deposes and says that he is a resident and freeholder in Buncombe County, North Carolina, and is worth the sum of two hundred and fifty dollars ($250) over and above his debts and liabilities, and his property exempt from execution by virtue of the Constitution and laws of the State of North Carolina.

H. LAMAR GUDGER.

Sworn to and subscribed before me, and the foregoing undertaking approved by me 29 December, 1897.

J. L. CATHEY,
Clerk Superior Court.

JUDGMENT. (473)

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth and T. H. Weaver, Commissioners), and T. C. Brown, Plaintiffs,

against

W. R. Payne, Treasurer of Buncombe County, Defendant.

This cause coming on to be heard upon the return of the notice to show cause why the restraining order theretofore granted should not be continued to the hearing was on the return day continued by consent of counsel for the plaintiffs and the defendant to Saturday, 22 January, 1898, when it was again continued by consent of counsel for the parties to be heard at chambers at Waynesville, North Carolina, on 26 January, 1898.

On said 26 January, 1898, at chambers at Waynesville, after hearing the pleadings and affidavits, as well as the exhibits, and copies of records

of the proceedings of the board of commissioners for the county of Buncombe, and all the entries relative to the acts of 1876-77 and 1893, hereinafter mentioned, contained in the written journals of the General Assembly of North Carolina, and after argument of counsel for the plaintiffs and the defendant, the court found the following facts:

1. That the corporation known as the Greenville and French Broad Railroad Company was created by an act of the General Assembly of 1854-55, ratified 13 February, 1855, and published as chapter 229 (474) of the acts of 1854-55; that the said charter of said corporation was amended by an act of the General Assembly of 1871-72, which was ratified on 15 January, 1872, and is published as chapter 48 of the acts of 1871-72; that the said charter of said corporation was again amended by an act of the General Assembly of 1873-74, which was ratified 22 December, 1873, and published as chapter 38 of the Laws of 1873-74; that the said charter of said corporation was further amended by an act of the General Assembly of 1874-75, which was ratified 9 December, 1874, and published as chapter 27 of the Laws of 1874-75, and which authorized its consolidation with the Spartanburg and Asheville Railroad Company, a South Carolina corporation, under the corporate name of the Spartanburg and Asheville Railroad Company.

2. That neither the said charter of said Greenville and French Broad Railroad Company nor any of the said amendments thereto authorized the corporation thereby created, either under the corporate name of the Greenville and French Broad Railroad Company or the corporate name of the Spartanburg and Asheville Railroad Company to receive subscriptions to its capital stock from any county or other municipal corporation, nor did any of said statutes empower or purport to grant authority to any county or other municipal corporation to make such subscriptions to the capital stock of said corporation under either of said corporate names, or to issue bonds or pledge its faith in order to pay for such subscription to said capital stock, and that no amendment passed by the General Assembly of North Carolina prior to the year 1877 ever authorized or purported to authorize a subscription by the county (475) of Buncombe to the capital stock of either the Greenville and French Broad Railroad Company or the Spartanburg and Asheville Railroad Company or the issuing of bonds for the purpose of paying such subscription.

3. That no statute was offered in evidence or relied upon as authority to the county of Buncombe to subscribe to the capital stock of the Spartanburg and Asheville Railroad Company, except sections 1, 2, 3, 4 and 5 of chapter 171 of the Laws of 1868-69, and subdivision 4 of section 8 of chapter 20 of the Laws of 1868.

4. That it was admitted that in the year 1875 an election was held by virtue of an order of the board of commissioners for the county of Buncombe, at which election a majority of the qualified voters of said county cast their ballots in favor of subscribing $100,000 to the capital stock of the said Spartanburg and Asheville Railroad Company, and of paying for said capital stock in coupon bonds of the county of Buncombe in denominations of from $50 to $1,000, said bonds being in the form set forth in "Exhibit A" to the plaintiffs' complaint, though the record of the said board of commissioners embracing the orders in reference to said election has been lost or destroyed. It was also admitted that the vote cast at said election was canvassed by the board of commissioners for the county of Buncombe, and that the said board found and declared and set forth upon their records that a majority of the qualified voters of Buncombe County had cast their votes in favor of said subscription.

5. That claiming to act by virtue of authority granted by the General Assembly of North Carolina under the said acts of 1868 and 1868-69, and by virtue of the authority claimed to have been granted by the qualified voters of Buncombe County at said election, the board of commissioners for the county of Buncombe during the years (476) 1876, 1877 and 1878, as the work of grading the line of railroad of said Spartanburg and Asheville Railroad Company through said county of Buncombe progressed issued $100,000 in coupon bonds of the county of Buncombe in denominations as aforesaid. The proceedings of the board of commissioners for the county of Buncombe relating to the issuing of said bonds, except such portions of said proceedings as have been lost or destroyed as aforesaid are set forth in a paper attached to the plaintiffs' complaint and marked "Exhibit B."

6. That the General Assembly of North Carolina at its session of 1876-77 passed an act entitled "An act concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad," which was ratified on 27 February, A.D. 1877, and published as chapter 40 of the Private Laws of 1876-77, and that said act of the General Assembly was not passed in accordance with the requirements of section 14 of Article II of the Constitution of North Carolina, as appears from a certified copy of all the entries in the journals both of the Senate and House of Representatives of the General Assembly of North Carolina at its session of 1876-77, a copy of said certified copy of said entries being hereto attached marked "Exhibit No. 1" and made a part of this finding of fact.

7. It was shown by the uncontradicted testimony offered by the plaintiffs on the hearing, and is therefore found as a fact that no part of the line of the Spartanburg and Asheville Railroad Company lying within

the State of North Carolina had been completed prior to the time when said election was held as aforesaid in the year 1875, by order of the board of commissioners for the county of Buncombe upon the
(477) question whether a subscription should be made to the capital stock of said company or prior to the time when said subscription to said capital stock was attempted to be made by C. B. Way and M. E. Carter, who at said time purported to be agents for Buncombe County, and that no work whatever had been done in the way of grading or construction on any part of the line of said Spartanburg and Asheville Railroad Company lying within the State of North Carolina prior to the holding of said election and the making of said attempted subscription in the year 1875. Copies of the affidavit of J. M. Green marked "Exhibit No. 2" and the affidavit of Harvey M. Ramseur marked "Exhibit No. 3," are hereto attached and made part of this finding of fact.

It is further found as a fact that when said election was held as aforesaid and said subscription was attempted to be made in the year 1875, neither the citizens of the county of Buncombe nor said county had any pecuniary interest in said Spartanburg and Asheville Railroad Company or its said projected line of railway or any interest in said company or said line other than such as they had in common with the other citizens of the State of North Carolina, unless it be that because said line of railway was projected when said election was held and said attempted subscription made, and because said line of railway was ultimately constructed through a portion of said county of Buncombe lying between the line of Henderson County and the city of Asheville, they felt a greater interest in said projected line of railway than the citizens of the other counties of the State.

8. That the General Assembly in the year 1893 passed an act entitled, "An act to authorize the county of Buncombe to fund its bonded indebtedness," which act was ratified 25 February, 1893, and pub-
(478) lished as chapter 172 of the Public Laws of 1893, and which purported to authorize the issuance of $98,000 in coupon bonds of said county of Buncombe, "as a continuation of the bonded indebtedness of the said county created for the purposes aforesaid," for the purpose of funding the bonded indebtedness of said county.

9. That the board of commissioners for the county of Buncombe, claiming to act under the authority which said act of 1893 purported to give to them, on the first day of July, 1895, issued $98,000 in coupon bonds, all of the denomination of $1,000, bearing interest at the rate of 5 per cent per annum, payable in equal semiannual installments on the first day of January and the first day of July of each year, until the maturity of said bonds on the first day of July, 1915. The said bonds are in the

form set forth in "Exhibit C," attached to plaintiffs' complaint, and the orders of the board of commissioners for the county of Buncombe under which said bonds were issued are set forth in "Exhibit D" attached to plaintiffs' complaint.

10. That said $98,000 in bonds issued as aforesaid on the first day of July, 1895, were used and applied in payment of and funding the said $100,000 in coupon bonds issued in the years 1876, 1877 and 1878 as aforesaid and purported to have been issued for said purpose by virtue of authority conferred by the said act of 1893.

11. That between the years 1877 and 1895 the board of commissioners for the county of Buncombe every year levied and caused to be collected a tax sufficient to pay semiannually the interest purporting to accrue on said bonds issued in the years 1876, 1877 and 1878 as (479) aforesaid and to take up the coupons thereto attached and also to pay $2,000 of which purported to be the principal of said bonds.

Since the first day of July, 1895, said board of commissioners have levied and caused to be collected a sufficient tax to pay semiannually the interest purporting to accrue on said $98,000 in bonds last issued.

12. The defendant as treasurer of the county of Buncombe now has in his hands a sufficient sum of money so levied and collected for the purpose of paying the coupons attached to said $98,000 in bonds, to wit: about the sum of $2,450, to pay the coupons attached to said bonds which purported to fall due on the first day of January, 1898, and had said money in his hands when the restraining order heretofore issued in this action was granted and was threatening to pay the same for said coupons purporting to fall due on said first day of January, 1898, on said $98,000 in bonds.

Upon the foregoing facts and on motion of A. C. Avery, Mark W. Brown and Moore & Moore, attorneys for the plaintiffs, it is ordered by the court:

1. That the defendant and his successors in office are enjoined and restrained from paying any part of the principal or interest purporting to be now due or hereafter fall due upon said bonds issued on the first day of July, 1895, as aforesaid, until the final hearing of this cause.

It was thereupon agreed by counsel for the plaintiffs and the defendant that the court might make its finding of fact and enter its judgment after said 26 January, 1898, at chambers at Waynes- (480) ville, North Carolina.

W. L. NORWOOD,
Judge of the Twelfth Judicial District of North Carolina.
At Chambers at Waynesville, N. C., 28 January, 1898.

From the foregoing judgment the defendant appealed. Notice of appeal was waived and an appeal bond in the sum of $25 was adjudged sufficient.

W. L. NORWOOD,
Judge of the Twelfth Judicial District of North Carolina.

EXHIBIT No. 1.

HOUSE OF REPRESENTATIVES, Wednesday, 31 January, 1877.

The following bills were introduced, read the first time and referred as follows: . . . ; and by Mr. Carter of Buncombe a bill concerning the subscription of Buncombe County to the Asheville and Spartanburg Railroad, all of which were referred to the Committee on the Judiciary.

HOUSE OF REPRESENTATIVES, Friday, 2 February, 1877.

Mr. Carter of Buncombe, from the Committee on the Judiciary, reported favorably on:

H. B. 403, a bill to be entitled An act concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad.

HOUSE OF REPRESENTATIVES, Tuesday, 6 February.

On motion of Mr. Carter of Buncombe the rules were suspended and H. B. 403, a bill concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad was put on its several readings and passed, and was ordered to be engrossed and sent to the Senate.

(481) HOUSE OF REPRESENTATIVES, Wednesday, 7 February, 1877.

Mr. Geffroy for Committee on Engrossed Bills reported the following bills, resolutions as correctly engrossed which were transmitted to the Senate for concurrence:

H. B. 403, a bill to be entitled An act concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad.

HOUSE OF REPRESENTATIVES, Tuesday, 27 February, 1877.

The following bills and resolutions, reported as correctly enrolled by Committee on Enrolled Bills, were duly ratified and transmitted to the Senate:

H. B. 403, S. B. 528, An act concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad.

SENATE CHAMBER, 7 February, 1877.

Message from the House of Representatives:

H. B. 403, S. B. 528, Bill concerning the subscription of Buncombe County in the Spartanburg and Asheville Railroad.

Placed on the Calendar.

SENATE CHAMBER, 19 February, 1877.

H. B. 403, S. B. 528, Bill concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad on second reading. On motion, it was referred to Judiciary Committee.

SENATE CHAMBER, 22 February, 1877.

Reports from Standing Committees were submitted as follows:

H. B. 403, S. B. 528, Bill concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad, recommending that it do pass.

SENATE CHAMBER, 24 February, 1877. (482)

The following named bills and resolutions were acted upon as follows:

H. B. 403, S. B. 528, Bill concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad on second reading.

Bill passed its second and third readings.

SENATE CHAMBER, 27 February, 1877.

The following bills and resolutions, reported as correctly enrolled by Committee on Enrolled Bills, were duly ratified and transmitted to the office of the Secretary of State.

H. B. 403, S. B. 528, An act concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad.

NORTH CAROLINA—DEPARTMENT OF STATE.

RALEIGH, N. C., 15 January, 1898.

I, Cyrus Thompson, Secretary of State, do hereby certify that the foregoing and annexed two sheets contain a full and accurate transcript of the Journals of the Senate and House of Representatives of the State of North Carolina for the session of the General Assembly in the year 1877, of so much of said Journals as relates to H. B. 403, S. B. 528, a bill to be entitled An act concerning the subscription of Buncombe County to the Spartanburg and Asheville Railroad, the title, as published, of chapter 40 of the Private Laws of the Session of 1876 and 1877.

Done in office at Raleigh, this 15 January, A.D. 1898.

CYRUS THOMPSON,
Secretary of State.

The Great Seal of North Carolina.

(483) EXHIBIT No. 2.

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth and T. H. Weaver, Commissioners), and T. C. Brown, Plaintiffs,

against

W. R. Payne, Treasurer of Buncombe County, Defendant.

J. M. Green, being first duly sworn, deposes and says:

That he is now fifty-seven years of age and has lived in Buncombe County, North Carolina, all his life; that when the County of Buncombe subscribed one hundred thousand dollars to the capital stock of the Spartanburg and Asheville Railroad Company said county had no interest in the railroad of said Spartanburg and Asheville Railroad Company, nor in the railroad of the Greenville and French Broad Railroad Company which had shortly prior thereto been consolidated with the Spartanburg and Asheville Railroad Company, a South Carolina corporation; and that when said county made said subscription to the capital stock of said railroad company no part of said railroad had been completed, and the construction of said railroad had not been commenced in the State of North Carolina. J. M. GREEN.

Sworn to and subscribed before me on this 25 January, 1898.

FREDERICK W. THOMAS,
Notary Public.

(484) EXHIBIT No. 3.

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners of Buncombe County, and T. C. Brown,

against

W. R. Payne, Treasurer of Buncombe County.

Harvey M. Ramseur maketh oath that he was a civil engineer employed on the Western North Carolina Railroad between Asheville and Murphy during the year 1868, and that no part of the grading on the line of railroad between Asheville and Spartanburg, known as the Spartanburg and Asheville Railroad, or on the Greenville and French Broad Railroad, had been done until after the end of the year 1868.

H. M. RAMSEUR.

Sworn to and subscribed before me 26 January, 1898.
(Notarial Seal.)

FRED. MOORE,
Notary Public.

DEFENDANTS' EXCEPTIONS.

NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe, and T. C. Brown,

against

W. R. Payne, Treasurer of Buncombe County.

And now comes the defendant, William R. Payne, county treasurer of Buncombe County, by his attorney, Eugene D. Carter, and makes and files in this cause, pursuant to the provisions of Rule (485) No. 27 of the rules of the Supreme Court, exceptions to the findings of fact, conclusions of law and the judgment of his Honor, William L. Norwood, judge, made at chambers at Waynesville, N. C., on 26 January, 1898, as follows:

1. To the findings of fact and the conclusions of law expressed therein, on the ground that they are not warranted by the pleadings, affidavits or other evidence in the cause, nor by the law.

2. To the ruling of his Honor granting injunction prayed for until the final hearing of this cause, upon the ground that as the correctness of said ruling is to be tested by the judgment appealed from, which was rendered solely upon the pleadings, affidavits, documents filed in the cause, and which judgment was not justified by anything appearing in said pleadings, affidavits, documents, or any of them, and was therefore erroneous and void.

EUGENE D. CARTER,
Attorney for Defendant.

AGREEMENT.

STATE OF NORTH CAROLINA—BUNCOMBE COUNTY.
IN THE SUPERIOR COURT.

The Board of Commissioners for the County of Buncombe (T. C. Brown, Chairman, S. J. Ashworth and T. H. Weaver, Commissioners), and T. C. Brown, Plaintiffs,

against

W. R. Payne, Treasurer of Buncombe County, Defendant.

In the above-entitled action it is agreed between the plaintiffs and the defendant that the pleadings, exhibits and affidavits and other documentary evidence offered at the hearing, together with the (486) findings of fact and the documentary evidence referred to in the opinions of fact by the court, the judgment of the court, the restraining

order granted on 29 December, 1897, the summons, defendant's undertaking, defendant's exceptions, and this agreement shall constitute the record and case on appeal to the Supreme Court in said action.

This 28 January, 1898.

A. C. AVERY,
MARK W. BROWN,
MOORE & MOORE,
Attorneys for the Plaintiffs.

EUGENE D. CARTER,
Attorney for the Defendant.

Battle & Mordecai for defendant (appellant).
A. C. Avery, Moore & Moore and Mark W. Brown for plaintiffs.

CLARK, J., delivers the opinion of the Court.

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

CLARK, J. The bonds whose validity is impeached by the present action contain no recital of the authority for their issue, but the order of the board of county commissioners upon which the question of their issue was submitted to popular vote in 1875, recites as authority chapter 166, Private Laws 1858-59, to "Amend the charter of the Greenville and French Broad Railroad Company." That act could confer no such authority after the adoption of the Constitution of 1868, which, by section 14, Article II, requires such acts to be passed in the manner therein prescribed. This is held in *Comrs. v. Call,* at this term, and the reason there given is that the adoption of the new Constitution (487) with the restrictions as to issue of municipal bonds "annulled all special powers remaining unexecuted and not granted in strict conformity with its requirements." This has been repeatedly held by the United States Supreme Court. *Norton v. Brownsville,* 129 U. S., 479, 490; *R. R. v. Falconer,* 103 U. S., 821; *Wadsworth v. Supervisors,* 102 U. S., 534, 537; *Concord v. Savings Bank,* 92 U. S., 625.

Such was evidently the legislative view, also, for by chapter 48, acts 1871-72, the General Assembly created a new body politic under the name and style of the "Greenville and French Broad Railroad Company" and gave it all the rights and immunities conferred by the incorporation act of 1854-55, and the amendatory act of 1858-59. Whether this be treated as an entirely new act or as an attempt to revive and renew powers conferred by the prior acts above recited it could grant no valid power to issue these bonds, or order an election upon the subject, because of noncompliance with the requirements of the Constitution, Article II, section 14, in that the bill was not "read three several times in each House of the General Assembly and passed three several readings, which

readings were not on three different days, and agreed to by each House respectively, and the yeas and nays on the second and third reading of the bill were not entered on the Journal." *Comrs. v. Call, supra; Charlotte v. Shepard,* 122 N. C., 602; *Rodman v. Washington, ibid.,* 39; *Comrs. v. Snuggs,* 121 N. C., 394, and *Bank v. Oxford,* 119 N. C., 214, and *McGuire v. Williams,* at this term, in all of which this constitutional provision has been carefully considered.

The defendants further contend that conceding the invalidity of the act of 1858-59 and confirmatory act of 1871-72 as authority to issue the bonds, still the commissioners had authority to order (488) the election by virtue of chapter 171, Laws 1868-69 (which is now The Code, sec. 1996), but the county had theretofore no interest in the railroad and no work was done thereon in this State till after the said election in 1875. The bonds were therefore not authorized because not "necessary to aid in the completion of any railroad." *Comrs. v. Snuggs, supra; Comrs. v. Call, supra.*

Besides the reasons given in those cases, there is this further consideration, that even if it be conceded that a general act might authorize elections to issue bonds as to all railroads partly completed (in which counties were interested) at the adoption of the Constitution, to aid in their completion, this corporation was never organized till after the charter of reincorporation of 1871, and hence could acquire no rights except those conferred in conformity with the provisions of the Constitution of 1868. Not only must the bonds be authorized by a popular vote (Const., sec. 7, Art. VII), and the authority to hold the election granted by a statute passed in the mode required by Constitution, section 14, Article II, but to exceed double the State tax (which is necessary) the special purpose must be authorized by a special act of General Assembly. Const., sec. 6, Art. V. A general act authorizing any and all counties to issue bonds for railroad purposes would be invalid, especially when (as is the case here) it is necessary to exceed the constitutional limitation to pay interest or principal. *Tate v. Comrs.,* 122 N. C., 812 (at p. 815); *Herring v. Dixon, ibid.,* 420 (at p. 424).

The bonds were issued in 1876-77-78 by virtue of an unauthorized election, and are unconstitutional and void—counties being expressly prohibited from issuing bonds unless authorized in the manner prescribed by the Constitution. *Lewis v. Shieveport,* 108 U. S., (489) 282 (at p. 286); *Ottowa v. Cary, ibid.,* 110, 123. The payment of interest on the bonds by the county authorities is not an estoppel, nor does it validate them. Such payments were as much without constitutional warrant as the original issue, and one illegal act cannot validate another. *Doon v. Cummins,* 142 U. S., 366, citing (at p. 376) *Marsh*

v. Fulton, 10 Wall., 676; *Loan Asso. v. Topeka,* 20 Wall., 655; *Daviess v. Dickinson,* 117 U. S., 657; *Norton v. Shelby,* 118 U. S., 425, 451.

There is an act of the Legislature (and only one) that purports to validate these bonds. Private Laws 1876-77, ch. 40. But that can have no effect because it was not passed in the mode required by Constitution, Art. II, sec. 14. Whether if it had been enacted in the constitutional mode it could have supplied the original lack of power to submit the question to popular vote is a question not before us.

The later act of 1893, ch. 172, does not purport to validate these bonds. It simply recites that the bonds had been issued by proper authority (which is a judicial and not a legislative question), and under that erroneous impression, the Legislature proceeded to authorize the issue of new bonds, payable "in gold coin"—which is a deviation from the terms of the original bonds—to be exchanged for the said bonds, or sold and with the proceeds purchase or pay them. The act did not submit the issue of the new bonds to popular vote as was the case in *County of Jasper v. Ballou,* 103 U. S., 745, but specially provides that the new bonds "shall be regarded and held as a continuation of the bonded indebtedness created as aforesaid," so that if the bonds issued in 1876-77-78 were invalid, the new bonds are equally so. Whether or not (490) a subsequent Legislature can validate bonds issued upon the strength of an election which was held without authority it is very certain they cannot be validated by inference from an act authorizing a sale of new bonds (issued without a popular vote) to take up the first bonds. The validating act must be a directed enactment.

The wisdom of the sovereign people has inserted in the organic law as a protection to taxpayers, the provision to be found in section 14, Article II, and legislation coming within its scope is void unless the constitutional requirement is observed. It is put there for that purpose. Holders of county bonds, who have taken them without ascertaining if there was constitutional authority for their issue, cannot expect the courts to disregard the Constitution to save them from the consequences of their negligence. The judgment below is

Affirmed.

FURCHES, J., dissenting: The purpose of this action is to have declared void certain coupon bonds issued by plaintiffs in 1895, 1896, and 1897 to the amount of $98,000.

In 1855 the Legislature passed an act chartering a railroad company by the name and title of the "Greenville and French Broad Railroad Company." Acts 1854-55, ch. 299. This act was amended by the Legislature of 1858-59, in which amended act it is provided "That it shall be competent for any county through which said road is intended to

pass to subscribe to the capital stock of said company any sum or sums that may be determined on by the Court of Pleas and Quarter Sessions of such county." Acts 1858-59, ch. 166.

The next act of the Legislature affecting the question under consideration is the act of 1868-69, ch. 171. This act expressly authorizes the commissioners of any county to submit the question of sub- (491) scription to a vote, and if a majority of the qualified voters of the county vote for the proposition, to make the subscription. This act seems to have been literally complied with by the commissioners of Buncombe in making this submission to the voters of the county.

The Legislature of 1871-72 passed another act, as amendatory of the act of 1855, chartering the Greenville and French Broad Railroad Company, in which new directors are appointed, and this act closes by saying that the original act and all other acts amendatory thereof are reënacted. Acts 1871-72, ch. 48.

The Legislature of 1873-74 passed another amendment to the original act of 1855 chartering this road, appointing other incorporators, and giving further time to complete its organization. Acts 1873-74, ch. 38.

The Legislature of 1874-75 passed another act ratifying a consolidation of the Greenville and French Broad Railroad Company with the French Broad Railroad Company, under the name of the "Spartanburg and Asheville Railroad Company." Acts 1874-75, ch. 27. And under this legislation and organization the commissioners of Buncombe County, in 1875, submitted a proposition to the voters of said county to subscribe $100,000 to the capital stock of the "Spartanburg and Asheville Railroad Company," and to issue coupon bonds therefor. A majority of the qualified voters of said county having voted in favor of the proposition, the subscription was made, and the bonds issued and put upon the market.

These bonds ran for 20 years, and not having been paid, the Legislature of 1893 passed an act authorizing the issue of new bonds in the place of the old bonds issued in 1875, known as the Funding Act. Acts 1893, ch. 172. It is admitted that this act was passed according to the constitutional requirements. But there was no submission (492) to the people, after the passage of this act.

After the passage of the act of 1893, the commissioners of Buncombe County issued the bonds they are now seeking to have declared unconstitutional and void; sold them to Blair & Company of New York at par value for cash, with which money they paid off and discharged the original bonds issued in 1875. It is these last bonds that the plaintiffs are now trying to avoid the payment of.

This case is very much like the case of *Comrs. v. Call,* decided at this term, but different in some respects that the Court considered material

in that case. In *Comrs. v. Call* it appeared in the face of the bonds that they were issued under the act of 1879, which was admitted not to have been passed according to the constitutional provisions so as to authorize their issue; and this was held by the Court to be an estoppel. But there is no such question as that in this case. The submission to the voters of Buncombe County was made: "In pursuance of the provisions of, and in accordance with the powers granted by an act of the General Assembly of the State of North Carolina, passed at its session of 1858-59, and ratified on 16 February, 1859, entitled An act to amend the charter of the Greenville and French Broad Railroad Company." The submission was in September, 1873. But before the bonds were issued in 1875, the act of 1874 had been passed, consolidating this company with another railroad company and called the "Spartanburg and Asheville Railroad Company."

(493) The bonds are payable to bearer, and it is stated in their face that they are issued to pay the subscription to the "Spartanburg and Asheville Railroad Company"—this being the new name of the consolidated company, made under the act of 1874-75.

It is admitted that if the original bonds issued in 1875 were valid these bonds are valid. This is true, and the admission does the plaintiff no harm. And it may be that the present bonds are valid, even if the original bonds were not. But I do not propose to discuss that question now; I may do so further on.

I have discussed many of the questions presented in this case so fully in my dissenting opinion in *Comrs. v. Call,* at this term, that I shall not enter into so full a discussion in this case, as I otherwise might have done. But I refer to that opinion for arguments that might have been made here.

It seems to me that if the acts I have cited are law, there can be no doubt but what these bonds are valid. And while I recognize the doctrine contained in *Bank v. Oxford,* 119 N. C., 214; *Charlotte v. Sheppard,* 122 N. C., 602, and *Comrs. v. Snuggs,* 121 N. C., 394, I propose to show that all these acts are valid law for the purposes of issuing the bonds of 1875, except the act of 1871-72, and that that act is not necessary to the validity of these bonds; and that there is no conflict between their validity and the doctrine in *Bank v. Oxford, Comrs. v. Snuggs,* and *Charlotte v. Sheppard, supra.*

It is stated, and admitted as true, that the ayes and nays were not taken and recorded in the Journals upon the passage of the act of 1858-59 and the act of 1871-72. But it is not alleged, admitted, or shown that they were not taken and entered, according to the requirements of the Constitution, upon the passage of the other acts cited by me

(494) in this opinion.

When an act is passed and ratified by the Legislature it is presumed that it was passed according to law. *Gatlin v. Tarboro,* 78 N. C., 119; *McGuire v. Williams,* at this term; and, if it is not, the burden is on the plaintiff (in this case) to show that they were not so passed. And it not being shown, but what these acts were passed according to the constitutional requirements, they must be taken to have been so passed. It must therefore be held that the ayes and nays were called on the passage of each one of these acts, except the act of 1858-59 and the act of 1871-72. It makes no difference that the ayes and nays were not taken and recorded on the passage of the act of 1858-59, as there was no provision in the Constitution at that time requiring that it should be done.

This act of 1858-59 provided that counties through which the road was intended to pass might subscribe to the capital stock of the company "if a majority of the lawfully qualified voters of such county voted for the subscription." But the second section of this act provides that if a majority of the votes cast are for subscription, it shall be declared to have been carried. It is true that this election was to be ordered and held under the direction and supervision of the county court; and the submission to the voters in this case, as in *Comrs. v. Call,* was by the commissioners of the county. The commissioners are the successors of the county court in all such matters. It is so held in *Belo v. Comrs.,* 76 N. C., 489, and is expressly so provided in section 1997 of The Code.

It is contended in the opinion of the Court that the act of 1858-59 was repealed by the Constitution of 1868. There is no provision of the Constitution of 1868 repealing this or any other law of the State. So if it is repealed, it must be by implication on account of the (495) repugnance of the act (the charter) to the Constitution. I admit that any part of this act repugnant to the Constitution of 1868 could not be enforced on account of the repugnance. But I deny that the act was repealed by the Constitution. If this were true, no corporation could have been organized under its provisions, and the "Spartanburg and Asheville Railroad Company" would be without any legal authority—would be a nullity. If this were true, no railroad company could be chartered, unless the act chartering it passed according to Article II, section 14, of the Constitution. This cannot be law. The passage of the act according to Article II, section 14, of the Constitution, is only necessary where it is used as a basis for raising money by means of a corporation subscription and tax. Suppose a railroad company is chartered by legislative enactment without complying with Article II, section 14, and a company is organized thereunder (as I have no hesitation in saying it may be) can it be contended that if the Legislature passes another act, as required by Article II, section 14, of the Constitution, authorizing a subscription to said road, a submission made to the voters,

and an issue of bonds under this act, it would be unconstitutional and the bonds void? That is the case. The railroad company was organized under the act of 1858-59, but the provision of this act authorizing counties to subscribe was repugnant to the Constitution of 1868 in that it provided that a subscription might be made and bonds issued, upon a majority of those voting, and not upon a majority of the whole qualified vote of the county. But the act of 1868-69 (now section 1997 of The Code), which was passed, or presumed to have been passed, accord-
(496) ing to Article II, section 14, of the Constitution, supplied that defect in the act of 1858-59. This act was not called to the attention of the learned judge who tried the case. Had it been, he would, in my opinion, have decided it differently.

The act of 1858-59 and the amendments thereto (outside of the act of 1871-72) authorized the organization of the "Spartanburg and Asheville Railroad Company," and authorized Buncombe County to subscribe to the capital stock of said company; and the act of 1868-69 authorized a submission to the voters of said county as required by Article II, section 14, of the Constitution, and in my opinion the bonds are valid.

There is another ground upon which it is claimed that their legality may be maintained, that of ratification.

There is no dispute but what the question of subscription was fairly submitted to the qualified voters of Buncombe County, and that a majority voted for the subscription. The act of 1893, which is admitted to have been passed according to the requirements of Article II, section 14, of the Constitution, expressly recognizes the old bonds as a valid indebtedness of Buncombe County, in the following terms: "That said indebtedness having been created in the year 1875, under proper authority, to pay for the subscription of the said county to the stock of the Spartanburg and Asheville Railroad Company." This act further provides in section 3 as follows: "And when issued they shall be regarded and held as a continuation of the bonded indebtedness of said county, created for the purposes aforesaid, and they shall not be exchanged or sold for less than their par value." It is contended that this is a
(497) ratification of the acts under which the original bonds were issued. This is an interesting question, but, as I am of the opinion that the bonds are valid for the reasons given by me, outside of the doctrine of ratification, I do not pursue the discussion further.

FAIRCLOTH, C. J., also dissents.

Cited: Glenn v. Wray, 126 N. C., 732; *Cotton Mills v. Waxhaw,* 130 N. C., 294; *Debnam v. Chitty,* 131 N. C., 678; *Graves v. Comrs.,* 135 N. C., 52.

HENRY B. STEVENS ET AL. v. C. L. SMATHERS ET AL.

(Decided 20 December, 1898.)

Appeal.

Where an appellant's case on appeal has been excepted to in apt time, the appellant should forward the case and exceptions to the trial judge to be settled by him; should the case be sent to this Court without having been settled, it is optional with the Court either to take the appellant's case as modified by the exceptions, or to remand the case to be settled by the judge below, or to affirm the judgment in the absence of a "case settled," where there is no error on the face of the record proper.

THIS was an appeal from the Superior Court of HAYWOOD County, Spring Term, 1898, *Hoke, J.*, presiding.

Judgment rendered in favor of plaintiff.

Appeal by defendant Smathers.

The appellant's case on appeal was duly served, and the appellee's exceptions thereto, within five days, were handed to appellant's counsel, who accepted service thereof, but failed to apply to his Honor to settle the case, but had his "case on appeal" sent up, as if it had not been excepted to.

In this Court the appellant insisted his case was the true case (498) on appeal, and the appellee moved to dismiss for that there was no legal case on appeal.

The case being one of some complication, was remanded to be settled by the judge below.

Ferguson & Ferguson for defendant (appellant).

Merrimon & Merrimon and George A. Shuford for plaintiff.

CLARK, J. The appellant's case on appeal was duly served, and in five days thereafter the appellee's exceptions were handed to the appellant's counsel, who accepted service thereof, as appears on the papers sent up. The appellant, however, thinking this insufficient, did not apply to the judge to settle the case, as he should have done, but instead sent up his "case on appeal" as if it had not been excepted to, and insists that it is the true case on appeal, and the appellee moves to dismiss on the ground that there is no legal case on appeal.

The case of *McDaniel v. Scurlock*, 115 N. C., 295, is on "all fours" with this. It is there held that the appellant cannot complain that his statement of case on appeal was not returned to him within five days, when in fact the appellee's exceptions thereto were duly served on him within the five days, and that if in such case the appellant fails to apply to the judge to settle the case, this Court may either take the appellant's

"statement" as modified by the appellee's exceptions as the case on appeal (*Russell v. Davis,* 99 N. C., 215; *Owens v. Phelps,* 92 N. C., 231); or, in case of complication, remand the case to be settled by
(499) the judge. *Arrington v. Arrington,* 114 N. C., 115; *Hinton v. Greenlee,* 115 N. C., 5.

The latter is the condition here, and the case will be remanded that the judge may settle the "case on appeal," though it is optional with the Court in such cases whether it shall not affirm the judgment in the absence of a "case settled" on appeal (there being no errors on the face of the record proper). *Mitchell v. Tedder,* 107 N. C., 358; *Hinton v. Greenlee, supra.*

Remanded.

M. C. FELMET v. SOUTHERN EXPRESS COMPANY.

(Decided 20 December, 1898.)

1. Unless the statement of the case on appeal contains the evidence upon which special instructions are asked, the refusal by the trial judge to give them cannot be considered by this Court.

2. The appellant must show that there has been error, or the judgment must be affirmed.

ACTION on a money demand, commenced in the court of a justice of the peace, and appealed by defendant to the Superior Court of HAYWOOD County, and tried before *Greene, J.,* at Fall Term, 1898.

The plaintiff complained orally that the defendant as a common carrier during the year 1896 had undertaken to transport for plaintiff 98 pounds of Ginseng from Marshall, N. C., to a consignee in New York City, and that while in transit 6 1%16 pounds were lost through negligence of defendant to the damage of the plaintiff $22.52, for which judgment was asked. The defendant denied the allegation of plaintiff and liability for shortage. The receipt of defendant for the package contained the contract of shipment between the parties, and in it were conditions
(500) which limited the liability of defendant for loss or damage to its own line.

The defendant asked the court for the following special instruction: "If the defendant company delivered the Ginseng in question in good condition to the Adams Express Company, a connecting line at Washington, D. C., it would not be liable for damage or loss of Ginseng after the same was received by the Adams Express Company, unless there was a special contract; and the burden is on the plaintiff to prove the special contract."

His Honor refused to give the instruction. Defendant excepted.

The statement of the case does not contain any evidence of a delivery to the Adams Express Company.

There was verdict and judgment for plaintiff for $22.52, and defendant appealed.

W. T. Crawford for defendant (appellant).
No counsel contra.

MONTGOMERY, J. The plaintiff delivered to the defendant, the Southern Express Company, at Marshall, a package of goods to be transported to a consignee in New York City. The receipt for the package contained the contract of shipment between the parties, and in the same there were conditions which limited the liability of the defendant for loss or damage to the property to its own line. The goods were found to be short, in weight, by the consignee, and this action was brought to recover damages for the loss.

The defendant requested the court to instruct the jury that if the defendant company delivered the goods to the Adams Express Company at Washington, D. C., for the purpose of having them forwarded to their destination, the defendant would not be liable for the loss (501) after the goods were received by the Adams Express Company, unless there was a special contract to that effect, and that the burden of proof was on the plaintiff to show such contract. The court refused to give the instruction.

The question sought to be presented by the defendant's appeal we cannot consider for the reason that it nowhere appears in the statement of the case that there was any evidence tending to show that the goods were delivered by the defendant to the Adams Express Company, a connecting express line; nor is such delivery admitted as a fact in the case. No part of the evidence is sent up with the case, and the only admitted facts were the delivery of the goods at Marshall to the defendant company, the receipt to the plaintiff for the same, and the shortage in the weight of the goods discovered by the assignee in New York.

It is always to be desired that appeals should be heard on their merits, but this cannot be done at the expense of sacrificing important and necessary rules of practice. Instructions of law given by the court to the jury must be founded on some phase of the evidence or on the admitted facts when there is to be an application of the law to facts admitted or found by the jury, and unless there appears in the statement of the case on appeal the admitted facts or the evidence upon which instructions were asked, we cannot tell whether the instructions are merely theoretical propositions of law or not.

From what we have said, the second and third exceptions of the defendant need not be considered, for if it should be conceded that the defendant's views of the law, as set out in the instructions to which those exceptions were made, be the correct views, they can avail (502) the defendant nothing. The rulings of his Honor would only be a dissertation on the law, and, even if erroneous, could have no bearing on the case as it is constituted on the appeal. The appellant must show to this Court that there has been error in the court below, or the judgment of that court must be affirmed; and if error is shown, but the error is harmless, the judgment will not be disturbed.

Affirmed.

REDMAN & WILBAR v. RAY & EDWARDS, AND J. G. WILLIAMS, INTERPLEADER.

(Decided 20 December, 1898.)

Interpleader—Burden of Proof—Bill of Sale Absolute, but Intended as Security.

1. The burden of proof is upon an interpleader, claiming property in dispute, to show title to the same.
2. A bill of sale, absolute upon its face, but intended as a security for past indebtedness and for future advances, is incapable of being registered and is void as to creditors and subsequent purchasers, although probably good between the parties.

CIVIL ACTION for the possession of a lot of sawed lumber, known as the Shelton yard lumber, tried before *Greene, J.*, and a jury, at Fall Term, 1898, of MADISON Superior Court.

J. G. Williams, upon his application, was allowed to interplead for said lumber, alleging that he was the owner.

The court ordered that the issues between Williams, interpleader, and the plaintiffs be made up and submitted to the jury first.

(503) The court submitted the following issues:

1. Is the interpleader, J. G. Williams, the owner of the lumber described in this action?

2. What is the value of said lumber?

The interpleader objected to the form of the first issue, as putting the burden of proof on him, and excepted.

As evidence of title he read in evidence a bill of sale to himself from defendants —Exhibit "A"—as follows:

EXHIBIT "A."

NORTH CAROLINA—MADISON COUNTY.

Know all men by these presents, that we, W. M. Edwards and W. C. Ray, of the county of Madison and State of North Carolina, for and in consideration of the sum of $500 in hand paid by J. G. Williams of county of Buncombe and State of North Carolina, do by these presents sell, transfer and deliver to the said J. G. Williams all lumber that is to be manufactured on said yards, known as the Whitt & Shelton yards, which is now being logged on Upper Laurel, in Madison County, thereby giving the said J. G. Williams all the rights we have to sell or remove said lumber, with all our rights of ingress and egress to the same at each and every place where said lumber is situated, and giving to said J. G. Williams all rights that we have in regard to said lumber.

This 10 January, 1896. WILLIAM M. EDWARDS,
W. C. RAY.

Attest: W. A. SWAIN,
C. F. WILLIAMS.

Proved and registered 28 January, 1896, in Madison County. (504)

Williams testified that at the time of the execution of the said bill of sale the said defendants owed him four or five hundred dollars, and that the said bill of sale was given as security for what the defendants then owed him, and for advancements thereafter made. I agreed with Redman & Wilbar to release what interest I had in the Whitt yard for $250. I got $200 and there are $300 still due on the bill of sale. I notified Redman that I had a bill of sale on the said lumber.

W. C. Ray, one of the defendants, testifying for the interpleader, says: That the defendants owed said Williams $400 to $500 at time the said bill of sale was executed. That while the said bill of sale purported to be an absolute sale on its face, it was only given as a security for what the said defendants owed Williams and advancements made to the defendants thereafter.

Two contracts were introduced by plaintiffs Redman & Wilbar, one dated 3 September, 1896, marked Exhibit "B," the other dated 10 February, 1897, marked Exhibit "C," as follows:

EXHIBIT "B."

We agree to let Redman & Wilbar have the Shelton yard lumber according to contract, and all the other lumber that we have logged to that yard. The Carter timber we, Redman and Wilbar, agree to furnish $100 worth of goods on the logging the Carter timber in—there will be 50,000 feet of the Carter timber. We are to pay for the Carter timber before the lumber is moved.

This 3 September, 1896. RAY & EDWARDS.

(505) EXHIBIT "C."

MARSHALL, N. C., 10 February, 1897.

This is to certify that all the lumber that S. P. Peck sawed for us, and are to saw for us is in this contract to Redman & Wilbar, that he saws on the D. N. Shelton yard, and all the debt on the lumber is paid except for Boon timber and the Carter timber. This contract is for the shipping lumber. Ray & Edwards is to haul the lumber between now and Christmas. We are to get $4.50 per one thousand for hauling the lumber, to be paid by Redman & Wilbar every fifteen days, in cash, if we don't trade it out, and the hauling is to be charged to us out of the lumber. RAY & EDWARDS.

Witness: J. C. WILBAR.

There were exceptions taken by the interpleader to the admission of evidence and to the judge's charge, but from the view taken by the Court of the case, it becomes unnecessary to note them.

The jury found the first issue in the negative—against the interpleader, who moved for judgment *"non obstante veredicto"*—motion overruled, and he excepts. Judgment for plaintiffs, and Williams, interpleader, appealed.

J. M. Gudger, Jr., for interpleader (appellant).
W. W. Zachary for plaintiffs.

FURCHES, J. This is an action commenced by Redman & Wilbar against Ray & Edwards to recover a lot of sawed lumber. Their claim is based on two contracts of Ray & Edwards with plaintiffs—one of 3 September, 1896, and the other of 10 February, 1897. By leave of court, J. G. Williams was allowed to interplead in this action, and he claims that the lumber sued for belongs to him. He bases his
(506) claim on what he calls a bill of sale from Ray & Edwards, which is in the following terms:

"Know all men by these presents, that we, W. M. Edwards and W. C. Ray, of the county of Madison and State of North Carolina, for and in consideration of the sum of $500 in hand paid by J. G. Williams of the county of Buncombe, said State, do by these presents sell, transfer and deliver to the said J. G. Williams all lumber that is to be manufactured on said yards, known as the Whitt & Shelton yards, which is now logged on Upper Laurel in Madison County, thereby giving the said J. G. Williams all the rights we have to sell or remove said lumber, with all our rights of ingress and egress to the same at each and every place where said lumber is situated, and giving to said J. G. Williams all rights that we have in regard to said lumber. This 10 January, 1896." (Signed) William M. Edwards, W. C. Ray.

This instrument is prior in date to either of the contracts under which plaintiffs claim, and was *in form* probated and registered in Madison County before the date of plaintiff's contracts. But it was admitted by the interpleader Williams on the trial, and is stated in the case on appeal, that Ray and Edwards were indebted to Williams at the date of said contract in the sum of $400 or $500, and that he was furnishing them supplies to enable them to operate their business, and that the same was given to secure said past indebtedness, and also to secure further advancements that he might make to them.

The appellant Williams being an interpleader, the only issue presented, so far as he is concerned, is as to whether he is the owner of the lumber sued for or not; and the burden of this issue—to show that he is—was upon him. *Wallace v. Robinson,* 100 N. C., 206; (507) *Bank v. Furniture Co.,* 120 N. C., 475.

The instrument under which the interpleader claims title has no clause of defeasance, or conditions that show that it was a mortgage or security to Williams, and did not need to be registered. But it was shown and admitted that it was in fact intended as a security, and this fact not appearing in the instrument, it was incapable of being registered, and was "void as to creditors and subsequent purchasers." *Gulley v. Macey,* 84 N. C., 434; *Barnhardt v. Brown,* 122 N. C., 589.

It is probable that Williams' claim would be good as against Ray & Edwards, as a verbal mortgage may be good against the mortgagor of personal property.

Therefore, while no issue could be tried on this interplea, except as to Williams' title to the lumber, still, as he showed an apparent title as against Ray & Edwards, the original owners, and as plaintiffs also claimed to have derived their title from Ray & Edwards at a subsequent date to that of Williams' claim, this called in question their title. The plaintiffs are only entitled, as against Williams, upon the ground that they are "subsequent purchasers" from Ray & Edwards; and if their claim, apparently an unconditional sale, was in fact a mortgage—a security for debt, as Williams' bill is—they would have no title as against Williams, who is a good "prior creditor," and who has a bill of sale, good as against Ray & Edwards, the debtors.

But so far as we can see from the evidence and from the statement of the case on appeal, it was shown that the sale to the plaintiffs was absolute in terms, and that the plaintiffs had paid Ray & Edwards for the lumber. And no exception of the interpleader presents the question that it was not an absolute sale by Ray & Edwards to the (508) plaintiffs Redman & Wilbar.

The interpleader has some exceptions to the admission of evidence, also an exception to the first issue submitted by the court, which is as

follows: "Is the interpleader, J. G. Williams, the owner of the lumber described in this action?" which issue was answered in the negative. He also asked the court to instruct the jury that upon the evidence the first issue should be answered "Yes."

The exceptions have all been considered, and none of them can be sustained.

Affirmed.

Cited: Maynard v. Ins. Co., 132 N. C., 713.

A. H. LYMAN v. E. T. HUNTER.

(Decided 20 December, 1898.)

Tax Title—Statute of Limitations—Revenue Act.

1. Under the Revenue Act, ch. 119, sec. 69, Laws 1895, an action for recovery of land sold for taxes is barred by lapse of three years after such sale, unless the owner be under legal disability.
2. Where prior to the listing of the land for taxes, for the non-payment of which the land was sold, the owner had conveyed the property to a trustee in trust to pay a debt, the tax collector's deed divested the title of trustor, trustee, and *cestui que* trust, and was superior to the deed of the purchaser at the trustee's sale.

CONTROVERSY without action submitted for decision, upon facts agreed, to *Norwood, J.*, at Asheville, on 12 December, 1898.

His Honor rendered judgment in favor of defendant, and plaintiff appealed.

(509) The facts agreed are stated in the opinion.

Moore & Moore for plaintiff (appellant).
Davidson & Jones for defendant.

MONTGOMERY, J., delivers the opinion.

DOUGLAS, J., *dubitante.*

FURCHES, J. I concur in the judgment upon the last ground stated in the opinion.

MONTGOMERY, J. This is a controversy submitted without action under section 567 of The Code, at the September Term, 1898, of Buncombe Superior Court, and a lot or parcel of land in the city of Asheville

is the subject of controversy. The defendant is in possession of the property, claiming title thereto, but the plaintiff alleges that he is the owner of the same in fee and entitled to the possession. The decision of the matter is to be made upon the following facts:

The lot was listed and assessed for taxation in 1892 as the property of T. A. Cummings, was sold regularly by the tax collector upon the failure of the owner, Cummings, or any one for him to pay the taxes, and a deed therefor was executed and delivered by the tax collector on 11 June, 1895, and registered at once. By virtue of that deed, the defendant is now in possession of the land and claims title thereto. Before the lot was listed for taxes, Cummings conveyed the same by deed of trust to D. C. Waddell, Jr., to secure a debt to Youmans. The deed of trust was duly registered. There was default made by Cummings in the payment of the debt; the trustee after due notice and in compliance with all the provisions of the deed of trust sold the lot of land on 11 May, 1897, when the plaintiff Lyman became the purchaser thereof, received a deed therefor from the trustee, and now claims (510) title thereunder.

The first question of law arising upon the facts submitted is this: Is the plaintiff barred by the statute of limitations contained in section 69, chapter 119, of the Laws 1895, from maintaining an action for the recovery of the lot? That section reads as follows: "No action for the recovery of real property sold for the nonpayment of taxes shall lie, unless the same be brought within three years after the sheriff's deed is made as above provided: Provided, that where the owner of such real property sold as aforesaid at the time of such sale be a minor or insane or convict in the penitentiary or under any other legal disability, three years after such disability shall be removed, shall be allowed such person, his heirs or legal representatives, to bring action." His Honor held that the plaintiff's claim was barred by that statute, and we think there was no error in this ruling.

The question is not before us as to whether that section 69, chapter 119, of the Laws 1895, would be a bar against the claims of infant *cestuis que trust,* where the lands, held in trust for the security of a debt in which they had an interest, had been sold for taxes on account of the failure of the owner, trustor, to pay the taxes; nor is the question before us as to whether that section would be a bar against the claims of infant heirs at law of a deceased mortgagee, who had died before the time allowed by law to pay the taxes on the mortgaged land had expired, and the land had been sold for the taxes; and we express no opinion on these matters. The case before us is free from either of these complications.

The other question in the case — whether the tax sale had divested the title of Cummings, and that of the trustee, and vested (511

it in the purchaser, the defendant—it is not really necessary to decide; for, upon our decision of the first question, the right of the plaintiff to maintain an action for the land has been answered in the negative. But the case of *Powell v. Sykes,* 119 N. C., 231, leaves no doubt that the defendant in that case got a good title under the tax collector's deed.

Affirmed.

DOUGLAS, J., *dubitante.*

FURCHES, J. I concur in the judgment upon the last ground stated in the opinion.

Cited: Collins v. Pettitt, 124 N. C., 729; *King v. Cooper,* 128 N. C., 348; *Stewart v. Pergusson,* 133 N. C., 285.

FLORENCE P. TUCKER, EXECUTRIX OF R. S. TUCKER, v. J. H. SATTERTHWAITE AND SALLIE (HIS WIFE), RHODA LITTLE, G. R. SATTERTHWAITE, B. B. SATTERTHWAITE, J. J. SATTERTHWAITE, AND J. E. O'HEARNE.

(Decided 6 December, 1898.)

Trespass—Boundary—Course and Distance.

1. The general rule is that from a known or agreed point, course and distance must govern, unless there is some natural object called for in the deed or grant, that is more certain than the course and distance called for.

2. To locate a line, the original order of survey must be observed and followed; and a positive line cannot be controlled by a reversed survey.

CIVIL ACTION in the nature of *trespass* to try title to land, tried before *Timberlake, J.,* at December Term, 1898, of the Superior Court of PITT County.

The plaintiff claimed under the John Brinkley grant represented on the map, and it was agreed she was the owner of the land covered (512) by it.

The defendants claimed under the William Smith grant represented on the map, and it was agreed that they were the owners of the land covered by it.

They were adjoining grants, the northern line of the Smith grant being the southern line of the Brinkley grant. The location of this dividing line is the only question in this case—other exceptions being abandoned.

The John Jordan grant is also represented, as it is referred to in both the preceding grants, and was used by both parties in support of their respective contentions—there are discrepancies and omissions connected with the diagram of these grants, but not sufficient to impair its usefulness for the purpose for which it was put in evidence.

The Jordan grant is dated 21 October, 1782—its survey, 31 July, 1871—its beginning corner is at V.

The Brinkley grant is dated 21 October, 1782—its survey, 9 October, 1781—its beginning corner is in dispute; the plaintiff claims it at H, the defendants say at L.

The Smith grant is dated 6 November, 1784—its survey 1 August, 1781—its beginning corner is at A.

The boundary calls of these three grants are reiterated in the opinions, where they may be seen.

The Brinkley grant, though prior in point of date to the Smith grant, refers to it—explainable by the fact that the survey upon which the Smith grant issued was prior to that of the Brinkley grant.

The Smith grant, beginning at A, runs to B, then to C, then to D, then to E, then to F, which are all agreed corners. The line from F, which is the dividing line between the two grants—the Brinkley and the Smith—is in dispute. The call in the Smith grant from F reads: "Thence west two hundred and ninety poles into John (513) Jordan's line." The plaintiff contended that this call should be run just as it reads, and that being so run, according to the evidence it would strike the Jordan line at 44, which would locate the *locus in quo* north of the Smith, or defendant's grant, and include it inside of the Brinkley, or plaintiff's grant. And the plaintiff insisted that this was a question of law, and that his Honor should so instruct the jury.

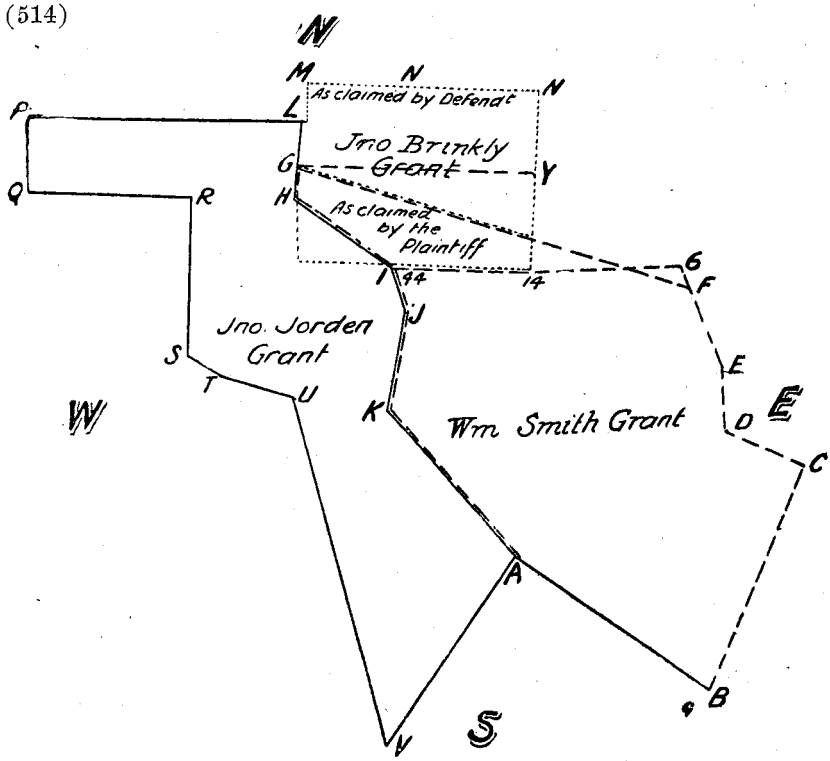
The defendants contended that they had shown facts sufficient upon which the jury might find that there was a mistaken call, or an omitted call in the lines of the Smith grant, and that the point in the Jordan line, where the line from F running west 290 poles struck it was a mixed question of law and fact to be determined by the jury upon the whole evidence, under proper instructions from the court. That point, they insisted, was at G.

It was in evidence that to run the dividing line as claimed by plaintiff would disarrange the remaining calls of the plaintiff's grant, and disturb the boundaries of the Jordan grant, recognized by both plaintiff and defendants—that if the Smith boundary lines were reversed, they would follow along the well settled marked lines of Smith and Jordan to the corner G, claimed by defendants as a corner of the Smith grant—that if the dividing line is run from F to G, every subsequent call of the

Smith grant from G to A could be run along the line of the Jordan grant—that old marked trees were found in running the calls of the Brinkley grant as claimed by defendants.

After full argument on both sides, his Honor stated that he should

(514)



(Map referred to in Tucker v. Satterthwaite.)

(515) hold, that in running the Smith grant that the line would run west from "F," the admitted corner, into the John Jordan line, and that upon all the evidence, it appearing that such a line would strike the John Jordan line at "44," he would instruct the jury that a due west line from F to 44 would be the proper line of the Smith grant.

Defendants excepted.

Verdict finding all issues in favor of plaintiff.

Judgment for plaintiff. Appeal by defendants.

T. J. Jarvis and Bond & Fleming for defendants (appellants).
W. B. Rodman and Jones & Boykin for plaintiff.

FURCHES, J., delivers the opinion of the Court.

DOUGLAS and CLARK, JJ., dissenting.

FURCHES, J. On 6 November, 1784, the State granted to William Smith a certain tract of land in Pitt County, beginning at a gum in Beaverdam pocosin and John Jordan's corner, thence south 59 degrees east 240 poles; thence north 20 degrees east 242 poles; thence north 66 degrees west 80 poles; thence north 60 poles; thence north 25 degrees west 120 poles to a pine; thence west 290 poles to John Jordan's line; thence south with Jordan's line 40 poles; thence south 35 degrees east 130 poles; thence south 20 east 40 poles; thence south 10 degrees east 100 poles; thence to the beginning.

That on 21 October, 1782, the State granted to John Brinkley a tract of land bounded as follows: "Beginning at a pine, John Jordan's corner, in the Bee Gum Island; thence north 40 poles to a pine; thence east 240 poles into Matthew Hodges line; thence with his line south 122 poles to a pine into William Smith's line; thence with (516) his line west 240 poles to a pine his corner in Jordan's line; thence with Jordan's line to the beginning." Bee Gum Island is not located, and cuts no figure in the case.

And on the same day, 21 October, 1782, the State granted to John Jordan a tract of land, the second call of which strikes the William Smith grant at its beginning corner; thence calling for an agreed line with William Smith north 42 degrees west 202 poles; thence north 10 degrees east 100 poles; then north 20 degrees west 40 poles; thence north 50 degrees west 130 poles; thence north 86 poles; which carries the Jordan line further north than the intersection of the northern boundary of the Smith grant, as claimed by either party.

There appears to be some inconsistency in the calls and dates of these grants. The John Brinkley grant is dated 21 October, 1782, calling for the line of the William Smith grant, dated 6 November, 1784. But this is susceptible of explanation, from the fact that the Smith *survey* was made on 1 *August,* 1781, and the Brinkley survey was made on 9 October, 1781.

The plaintiff is admitted to be the owner of the lands included in the Brinkley grant, and the defendant is admitted to be the owner of the lands included in the Smith grant. This being so, the sole question depends upon the location of the northern boundary line of the Smith grant. The Brinkley grant calling for this line of the Smith grant and thence with it west to Smith's corner on the Jordan line, the boundary line of the Smith grant is necessarily the southern boundary of the Brinkley grant.

(517) This was recognized on the argument as the sole question in the case—the defendant's counsel stating this to be so, and abandoned all other exceptions he had in the record of the case on appeal.

To locate the northern boundary of the Smith grant, it is necessary to start at the beginning corner, which is admitted by both parties to be at A on the map, then to B, then to C, then to D, then to E, and then to F. These points are all agreed to by both parties, including A and F. The call from F is west 290 poles to John Jordan's line, which the plaintiff says is at 44 on the map.

The defendant admits that a due west line run from F 299 poles would strike the Jordan line at 44, as claimed by the plaintiff; and that if this is the correct line, that is, the northern boundary of the William Smith grant, then the plaintiff is entitled to recover.

But the defendant claims that this is not the northern boundary line of the Smith grant, and contends that it runs from F to G. And the plaintiff admits that if this line from F to G is the true boundary line, that is, the northern boundary line of the Smith grant, she is not entitled to recover.

The defendant claims to arrive at the conclusion that G is the proper terminus of the line from F west 290 poles to the Jordan line, by reversing the calls and distances, from the beginning corner at A; or rather, by surveying the John Jordan line, north from A according to course and distance; and the defendant claims that this will show G to be the proper terminus of the west end of the line from F. This contention of the defendant violates all rules of construction, as we are taught to understand them.

The first general rule, to which we know of no exception, is that from a known or an agreed point, course and distance must govern, unless
(518) there is some natural object *called for in the deed or grant* that is more certain than the course and distance called for.

F is the last admitted corner in the Smith grant, and the call from this station is "west 290 poles to Jordan's line." There is no natural object called for to change the course, *called* for in the grant, as the only natural object called for in the grant is Jordan's line, and this is reached by running the course called for. The distance called for, to intersect the Jordan line at 44 (this being the course of the call), is only 9 poles more than the distance called for in the grant; while the distance from F to G, the point of intersection claimed by the defendant, is 470 poles—180 poles more than the distance called for in the grant. And when this line of 470 poles reaches G, it strikes the same natural object that it strikes at 44 in running the course called for in the grant. We admit that if the call in the Smith grant had been west 290 poles to Jordan's line, and that line could not have been reached except at G, that the line

in that event should go from F to G. But that is not the case. The natural object called for is reached at 44 by running the course called for in the grant, at a distance of only 9 poles more than called for in the grant. But, as has been said, the defendant claims to arrive at the conclusion that G is the point of intersection by reversing the line from A, the admitted beginning corner of the Smith grant, and by running the John Jordan line north from the beginning corner at A.

This cannot be done for reasons appearing in the grant, nor can it be done for legal reasons established by the rules of interpretation in such cases. The physical or mathematical reason contained in the grant is that neither course nor distance is given in the last call (519) for the Smith grant—"thence to the beginning." This makes it physically or mathematically impossible to reverse this line. And as there are no known or admitted corners in the Smith grant, between the intersection of the line running west to the Jordan line, whether at G or at 44, it cannot be reversed.

It cannot be reversed for the purpose of fixing the intersection of the line west from F for legal reasons. The Smith grant was run from A to B, from B to C, from C to D, from D to E, from E to F, and therefore the line from F, and those following, is what are termed a posterior line, and cannot be located by a reversed survey. To locate a line, the original order of survey must be observed and followed; and a posterior line cannot be controlled by a reversed survey. This rule is too firmly established by numerous decisions of this Court to be disputed now. *Duncan v. Hall,* 117 N. C., 443; *Norwood v. Crawford,* 114 N. C., 513; *Graybeal v. Powers,* 76 N. C., 66; *Harry v. Graham,* 18 N. C., 76.

It is the Smith grant that we are locating, and it is the northern boundary line which is in dispute. This line is not bounded by the Jordan grant, and cannot be located by a survey of that grant. This could not be done if the Smith grant had called for the Jordan line south from the point of intersection, which it does not do. And the call in the Jordan grant for the line of the Smith grant can be no more than a declaration of Jordan that his line runs with Smith's. The Jordan grant calling to run with Smith's grant would be controlled by the Smith grant, and not the Smith grant by the Jordan grant. So it is plain that the Smith grant cannot be located by the Jordan grant.

It is contended (though not by counsel of defendant) that (520) Smith intended to run his line from F somewhere north until he reached a point east of G, and then west to G. This may be so, but if he did we do not know it, and there is nothing in the grant to show that he did. Whatever we may suppose his intentions were, these are but conjectures now. It is certain he did not do it, and we cannot do it for him. *Graybeal v. Powers, supra.*

By every rule of construction known to us, the dividing line between the plaintiff and the defendant must run from F west to the Jordan line, which is admitted to be at 44. The judgment below must be

Affirmed.

DOUGLAS, J., dissenting: I cannot concur in the opinion of the Court. This is an action in the nature of trespass brought to try the title to certain lands, which depends upon the proper location of two grants, one to William Smith and the other to John Brinkley. The real question in dispute seems to be whether the line constituting the northern boundary of the Smith grant and the southern boundary of the Brinkley grant runs from F, an admitted corner, to G or to 44, as shown on the plat filed in the case. The usual issues were submitted, all of which were found for the plaintiff.

The court charged the jury as a matter of law that the line between the Smith and Brinkley grants must be run from F to 44, as contended by the plaintiff. To this instruction the defendant excepted, and it is the only exception necessary for us to consider in our view of the case.

The grants herein referred to are as follows:

1. A grant from the State to William Smith, dated 6 November, 1784, in which the description is as follows, the beginning corner being
(521) at A: "Beginning at a gum in Beaverdam pocosin and John Jordan's corner, then down the pocosin the dividing line between said Smith and Jordan Brinkley, south 59 degrees east 240 poles in said pocosin; then north 20 degrees east 232 poles to a gum in the Pee branch and dividing between said Smith and William Little; then running a dividing between Smith and Howell Hodges north 65 degrees west 80 poles to a gum in said branch; then north 60 poles to a pine; then north 25 degrees west 120 poles to a pine; then west 290 poles into John Jordan's line, then along his line south 40 poles to a pine; then south 50 degrees east 130 poles to a pine; then south 20 degrees east 40 poles to a pine; then south 10 degrees east 100 poles to a pine; and to the beginning."

2. A grant from the State to John Brinkley, dated 21 October, 1872, containing the following description, the beginning corner being at H or L: "Beginning at a pine, John Jordan's corner in the Bee Gum Island; then north 40 poles to a pine; then east 240 poles to a pine into Matthew Hodges' line; then with his line south 132 poles to a pine into William Smith's line; then with his line west 240 poles to a pine, his corner in Jordan's line, then with Jordan's line to the beginning."

3. A grant from the State to John Jordan, dated 21 October, 1782, containing the following description, the beginning corner being at "V": "Beginning at a pine, Jordan's corner; then running the dividing line,

John Brinkley and said Jordan, north 32 degrees east 232 poles to a gum in the Beaverdam swamp; then running agreed line between William Smith and said Jordan north 42 degrees west 200 poles to a pine; then agreed line the second time north 10 degrees east 100 poles to a pine; thence agreed line north 20 degrees west 40 poles (522) to a pine; then agreed line again north 50 degrees west 130 poles to a pine; then agreed line again north 86 poles to a pine in a branch on the side of Bee Gum Island; then west 272 poles to a pine on a branch and crossing one pocosin; then down the branch south 80 poles to a water oak, and in James Barrow's line; then with his line east 186 poles to his corner; then with his other line south 160 poles to Jordan's own line; then with his line South 60 degrees east 40 poles; thence with his other line south 75 degrees east 80 poles; then along his other line to the beginning."

The surveys on which these grants were issued were made as follows: The John Jordan survey on 31 July, 1781; the William Smith survey on 1 August, 1781; and the John Brinkley survey on 9 October, 1781. While the Brinkley grant was issued before the Smith grant, it is based on a later survey, and calling for the Smith line must be treated as the junior grant. Therefore the Smith grant must be located first, and its northern boundary, being called for by the Brinkley grant, will become the southern boundary of the latter survey. There is thus no conflict; but even if there were, the Brinkley grant would be compelled to give way under the act of 1777, which provided that a senior grant issued on a junior entry should be void.

It is worthy of note that the Jordan and Smith surveys were made on consecutive days, and were practically simultaneous. The lines between them were evidently run but once, and were in their origin dividing lines, constituting really one continuous boundary made of several short lines with slightly varying courses. This line seems never to have been disputed, and there is positive testimony that it has been repeatedly run without change of location, once while the Jordan land belonged to the devisor of the plaintiff. Their boundaries in reverse order (523) completely coincide wherever they touch. This line may be regarded as settled, and becomes an important factor in the determination of the issue now before us. Both the Smith and Brinkley grants, under which the defendants and the plaintiffs respectively claim, begin and end by their very terms in the Jordan line. Therefore this Jordan line must be located before the other surveys can even get a starting point. But the Brinkley grant calls for John Jordan's corner as its beginning point, and when it reaches the line now in question it calls for Smith's line, and thence with Smith's line to a pine, Smith's corner in Jordan's line. How can we better locate Smith's corner in Jordan's line than

by fixing it where Smith and Jordan located it in its *genesis?* If we begin the Brinkley survey at "L" as contended by the defendants, we can run every course and distance without material variation and interfere with no one. If, however, we begin at H, as contended by plaintiff, and run thence to Y and south to "14," we cannot possibly form a parallelogram as called for in the grant. Running east 240 poles south 132 poles, and west 240 poles must bring this point directly south of the beginning. And yet "44" is evidently not directly south of "H." It is admitted that if Brinkley's line is run from F to 44, it *must* stop at Jordan's line, which is considered as a natural boundary. But if Jordan's line from H to I is a natural boundary as to Brinkley, why is it not a natural boundary as to Smith, being an agreed line between Smith and Jordan, for such is evidently the meaning of the grants? *Jawett v. Hussey,* 70 Me., 433. If we begin the Brinkley grant at H, as claimed by the plaintiff, we not only cut off a corner of that grant itself, but we utterly destroy the agreed and well-settled line (524) between Smith and Jordan, which is the beginning point and foundation line from which both the plaintiff and the defendants begin their surveys and derive their title. It will be obliterated from G to 44, and south of that it will proceed in the most eccentric fashion, cutting in first on Jordan, then on Smith, and back again on Jordan, and finally ending in somebody's land at least a hundred poles southeast of the beginning corner. Surely an honored age of a hundred years should protect it from such desecration.

There is positive testimony tending to show that there were marked trees at L, M, N, and G, the corners of the Brinkley grant as claimed by the defendants, and that there were no marked corners except the common corner G, if it were located as claimed by the plaintiff. Among others, James Taylor, a surveyor, testified that he "found an old marked pine at Bee Gum Island, corner of John Jordan grant, and beginning corner of John Brinkley grant, as claimed by the defendants at L; pine set upon its stump showed very old marks pointing south, west and north; at M, found a gum marked as a corner; at N, found an old marked pine; at G, found a stake with three old marked trees as pointers, two pines and a gum. These marked trees were found in running the calls of the John Brinkley grant as claimed by the defendants. Found no *marked* trees in running the same grant as claimed by the plaintiff; both sides agreed that A was the beginning corner of the Smith grant and also corner of John Jordan grant; at K, found an old marked pine, at H found an old marked pine, marked as a corner and pointing the direction of the John Jordan grant lines, and this old marked pine is 40 poles south of the point G."

This evidence clearly tended to prove the contention of the (525) defendant. The old marks on the pine at L were especially significant. County surveyors, in the homely phrase of the woods, say "howdye" and "goodbye" whenever they meet a tree, directly in the line; that is, they chop it on the side where the line first strikes and again where the line leaves it. The relative position of these chops distinguishes a line tree from a corner tree. If the chops are on the sides directly opposite to each other, the line passes on without variation; but if the marks are not opposite to each other, it is necessarily a corner tree, the distance around the tree between the marks roughly indicating the angle of the survey. The same tree may be the corner of two tracts in the line of the third, and would thus be marked on three sides. Where, as in the present instance, the survey of a parallelogram begins in the middle of one side, the last line would come up behind the first on the same course, and would therefore be marked as a straight line. This would be so were the Brinkley grant to begin at L. It is true that beginning at A and running the courses and distances of the Smith grant, we come to the admitted corner F. Thence the call is with Smith's line west 240 poles to a pine, Smith's corner in Jordan's line. Ordinarily this line would be run according to the course and distance, that is, directly west to Jordan's line at 44, but we have seen that this would completely disarrange all the remaining calls of this grant, seriously disturb the boundaries of the Jordan grant, and practically obliterate an old and well settled line which is the beginning point of both surveys now under consideration. It is evident that such could not have been the intention of the grantor. The original plat printed in the record does not give us much assistance, as it omits two *admitted* lines of the Smith grant, one for 40 poles, and the other (526) for 200 poles. It seems probable that another line has been omitted from the Smith grant, running perhaps from F to Y, which would reconcile the calls of all the grants. But be that as it may, I am satisfied that G was intended to be the northwest corner of the Smith grant, and as F is the next admitted corner, the line in dispute would run from F to G, as contended by the defendants, and not from F to 44, as contended by the plaintiff.

The next question is, Can we give effect to what appears to us the evident intent of the grantor, and keep within the established rules of construction as laid down by the courts? I think we can.

In the construction of all deeds and grants there is one essential object to be kept in view, and that is to ascertain the true intent of the grantor and to give full effect to that intention when not contrary to law. All rules of construction adopted by the courts are simply *means* to a given end, being those methods of reasoning which experience has taught are

best calculated to lead to that intention. Hence, all authorities unite in saying that no rule can be invoked, no matter how correct in its general application, that tends to defeat the intention of the grantor. This doctrine is of such universal acceptance as to require but few citations, more to illustrate its extent than to prove its existence. It is well expressed by *Chief Justice Shaw* in *Salisbury v. Andrews,* 19 Pick., 250, 252, as follows: "In construing the words of such a grant, where the words are doubtful or ambiguous, several rules are applicable, *all,* however, designed to aid in ascertaining what was the *intent* of the parties, *such intent, when ascertained, being the governing principal of construction.* And first, as the language of the deed is the language of the
(527) grantor, the rule is that all doubtful words shall be construed most strongly against the grantor, and most favorably and beneficially for the grantee. Again, every provision, clause, and word in the same instrument shall be taken into consideration in ascertaining the meaning of the parties, whether words of grant, of covenant, or description, or words of qualification, restrain, exception, or explanation. Again, every word shall be presumed to have been used for some purpose, and shall be deemed to have some force and effect, if it can have. And further, although parol evidence is not admissible to prove that the parties intended something different from that which the written language expresses, or which may be the legal inference and conclusion to be drawn from it, yet it is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, water courses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were probably used by the parties, *especially in matters of description." Salisbury v. Andrews, supra,* a case cited by nearly all text-writers with uniform approval. In *Smith v. Parkhurst,* 3 Atk. Rep., 135, *Lord Chief Justice Wills* says: "Another maxim is that such a construction should be made of the words of a deed as is most agreeable to the intention of the grantor; the words are not the principal thing in a deed, but the intent and design of the grantor. We have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. Those maxims, my Lords, are
(528) founded upon the greatest authority, *Coke, Plowden,* and *Lord Chief Justice Hale,* and the law commends the *astutia*—the cunning of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may show the ingenuity of, but is very ill-becoming a judge." In *Campbell v. McArthur,* 9 N. C., 33, this Court held that

"A mistake in the course and distance of a deed shall not be permitted to disappoint the intent of the parties, if that intent appears, and if the means of correcting the mistake are furnished either by a more certain description in the same deed, or by reference to another deed containing a more certain description." *Ritter v. Barrett,* 20 N. C., 133; *Credle v. Hayes,* 88 N. C., 321. Devlin on Deeds, sec. 835, says: "But it is doubtful how far arbitrary rules can be of service where the only object is to determine the intention of the parties. In fact the truth was well expressed by *Mr. Justice Sanderson* (38 Cal., 481, 487), who said that 'in the construction of written instruments we have never derived much aid from the technical rules of the books. The only rule of much value is to place ourselves as near as possible in the seats which were occupied by the parties at the time the written instrument was executed, then taking it by its four corners, read it.' This is the main object of all construction. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention." Also, *ibid.,* secs. 836, 839, 1013! Sedgwick and Wait on Trial of Title to Land, sec. 856; Tiedeman on R. P., sec. 827; Washburn on R. P., p. 403, par. 21, and p. 408, par. 24. While the deed itself is the evidence of the intent of the parties, there are frequently latent ambiguities which must be explained by parol testimony or other evidence *aliunde,* such as (529) deeds or plats referred to therein. It is well settled by this Court in repeated adjudications that a mistake in course and distance will not be permitted to defeat the intent of the parties, if such intent otherwise appears from the deed, and that any course and distance may be disregarded when it conflicts with a natural or artificial monument, a marked line of the same tract, or a well known line of another called for in the deed. A number of authorities are cited in *Bowen v. Gaylord,* 122 N. C., 816, which it is unnecessary here to repeat. Brief reference to a few will show to what extent this rule has been carried:

In the leading case of *Person v. Rountree,* 2 N. C., 378, repeatedly cited and approved, the course of the first line was "north" from a creek, so as to put the entire tract on the *north* side. The marked line ran south from the creek, so as to put the whole tract on the *south* side of the creek. It was held that the *marked* line controlled. In *Anon. v. Beatty,* 2 N. C., 376, this Court says: "The beginning of the last line is not disputed, the only question is where it terminates. . . . Should we run from the beginning of the last line but one, directly to the hickory at the point of the island, we leave the marked line, proved to be marked as a boundary, and leave out a part of the land intended for the patentee. The Court, therefore, is of opinion that the marked line should be pursued till it strikes the island, and that from thence to the hickory along the edge of the island shall be *deemed another boundary,* and the last

line be drawn from thence to the beginning." The opinion corresponds with the suggestion that an entire line running from F to Y may have been omitted from the grant now in question. In *Cherry v. Slade,*
(530) 7 N. C., 82, these matters are elaborately treated by the first *Chief Justice* of this Court.

In *Hough v. Dumas,* 20 N. C., 328, this Court affirmed the judgment approving the charge of *Chief Justice Pearson,* then on the Superior Court, in which he said: "That if the jury were satisfied that the corner of the Gad tract at A was the corner called for in the Love grant, then they must go to A, and it made no difference whether from I they went to T and then around to A, or whether from I they went to U, W, Q, A or to V, X, Q, A, for in either way after getting to A then the next call, which it was admitted would go to N, an established corner, *and so around,* would take in the land in dispute." So in the case at bar, if the jury believe G to be the true corner of the Smith grant, it makes no difference whether they go from F direct to G or from F to Y, and thence to G, as either way "would take in the land in dispute."

In the case of *Credle v. Hayes,* 88 N. C., 321, 324, this Court held that every line in the deed should be changed, saying: "If the calls of courses in the deed should be held to be the true boundary of the land conveyed, the intent of the parties would be entirely disappointed; for the deed, according to the calls, covers no part of the land evidently intended to be conveyed. In *Long v. Long,* 73 N. C., 370, an additional line was inserted by the Court, citing *Cherry v. Slade, supra,* and *Shultz v. Young,* 25 N. C., 385. In *Clark v. Wagner,* 76 N. C., it was held that a call in a grant reading as follows: "Beginning on a stake, the upper end of the island, thence south 35 degrees east 53 poles to a stake, the lower end of the island," which ordinarily would be a straight line, should be run from the upper end of island number 1 to the upper
(531) end of island number 2, thence around island No. 2 back to the lower end of island No. 1, and thence along the second call to the third corner. Thus to effectuate the intent of the grantor, a call which under the ordinary rules of construction would be a straight line, is cut up into three different lines, two straight and the other meandering, varying in the aggregate nearly 180 degrees from the original course.

It is contended on behalf of the plaintiff that to locate a line, the original order of survey must be observed and followed, and that a posterior line cannot be controlled by a reversed survey, citing us to *Duncan v. Hall,* 117 N. C., 443; *Norwood v. Crawford,* 114 N. C., 513; *Graybeal v. Powers,* 76 N. C., 66, and *Harry v. Graham,* 18 N. C., 76. This is undoubtedly the general rule, but every one of these cases recognizes the principle that the rule does *not* apply where the *posterior line is more certain* than the prior line, and would more clearly indicate the

intent of the grantor. See above cases, 18 N. C., p. 79, line 7; 114 N. C., p. 518, line 1 of opinion, and p. 520, line 2; 117 N. C., p. 446, line 3. *Graybeal v. Powers* does not seem to touch this point. I think the true rule is laid down in *Harry v. Graham, supra,* as cited by *Chief Justice Pearson* in *Safret v. Hartman,* 52 N. C., 199, in which it was held that the survey *could* be reversed, to wit: "It was decided in that case (*Harry v. Graham,* 18 N. C., 76) that a posterior line could not be reversed, in order, by its intersection with a prior line, to show the corner *unless* such posterior line was certain, because to do so would be to extend the *distance* of the prior by the *course* of the posterior line. *The chance of mistake resting on one or the other being equal,* it was deemed proper to follow the order in which the survey was made. But the Court says, 'so if even upon such calls as this deed con- (532) tains, a line of *marked* trees was found, by tracing the line back from the post oak, corresponding with the survey of the 300-acre patent, that might carry the other line to the point of intersection, because it would prove an *actual* survey, and be the evidence of permanent *natural* objects, to show where the black oak once actually stood, which, wherever it stood, would be the terminus, and control the distance mentioned in the deed.'" See, also, *Dobson v. Finley,* 53 N. C., 495, and *Cowles v. Reeves,* 109 N. C., 417.

In the case at bar, if the Smith boundary were reversed it would follow along the well settled and marked line of Smith and Jordan to the corner G, which the testimony tends to show has been *actually* surveyed at least four times, once by the devisor of the plaintiff. The beginning corner is presumed to have been selected by the parties on account of its greater certainty, but any other corner that can be definitely ascertained is of equal dignity, especially as far as its connecting lines are concerned. Am. and Eng. Enc. of Law (2 ed.), p. 763, and note. It is a leading and well-settled rule in the construction of all instruments, laid down by *Gaston, J.,* in *Shultz v. Young, supra,* "that effect should be given to *every part thereof,* and in expounding the descriptions in a deed or grant of the subject-matter thereof, they ought all to be reconciled, if possible, and as far as possible. If they cannot stand together, and one indicate the thing granted with superior certainty, the other may be disregarded as a mistaken reference." Washburn, *supra* (5 ed.), p. 422, par. 37, and cases cited. In *Ferguson v. Bloom,* 144 Pa. St. Rep., 549, 565, the Court holds that "as between two proposed methods of location, where the work on the ground will permit, that should be preferred (533) which fills the largest number of the calls of the return of survey."

In view of these established principles, as applied to the facts in this case, I think the court below erred in instructing the jury that the line in dispute must run from F to 44 as a matter of law. The location of

this line should have been left to the jury as a mixed question of law and fact under proper instructions from the court. As said by *Pearson, C. J.*, in *Clark v. Wagner, supra,* "this is the governing fact in the case, and ought to have been distinctly left to the jury, with instructions to consider *all of the evidence and the surroundings* of the case, including the marked line trees and corners, and the plat annexed to the grant, the tradition of old persons, the land and the nature of the river, . . . and *other like matters.*" This is substantially the instruction approved in *Reed v. Prop. Locks and Canals,* 8 How. (49 U. S.), 274, 288.

For error in the instructions of the court, as above set forth, I think there should be a new trial.

CLARK, J., concurs in the dissenting opinion.

Cited: S. c., 126 N. C., 958.

(534)

COMMISSIONERS OF IREDELL COUNTY v. M. A. WHITE ET AL.

(Decided 6 December, 1898.)

Sheriff's Bond—Plea in Bar—Settlement of Taxes—Order of Reference.

1. The general rule is, that where there is a plea in bar, it must be disposed of, before a reference for an account can be made.
2. In an action upon a sheriff's bond for settlement of public taxes, where previous settlements are referred to and specific errors therein are pointed out in the complaint, which seeks to surcharge and falsify those accounts and settlements—and the answer pleads them in bar of the action—such plea will not avail against an order of reference to ascertain the correctness of the settlements in the particulars pointed out. This is so by virtue of the Revenue Acts of 1895 and 1897, as well as upon legal principles, without special legislation.
3. Previous settlements with the sheriff, when approved by the board of commissioners, are *prima facie* correct, and the burden of proving to the contrary rests upon them.

ACTION upon the official bond of M. A. White, ex-sheriff of IREDELL County, for account and settlement of public taxes for year of 1865, alleging special errors therein, and for a proper settlement for taxes levied in 1896, heard before *Allen, J.*, at August Term, 1898.

The complaint alleged previous settlements of the sheriff, which it seeks to surcharge and falsify. The answer denies the correctness of the allegations of the complaint, and pleads the previous settlements as a bar to the action.

The plaintiff moved for a reference of the cause under sections 421 and 422 of The Code, as amended by acts of 1897, ch. 237, which motion was resisted by defendants upon the ground that the pleas in bar set up in their answer should be first tried.

The court, upon an inspection of the pleadings and record, (535) being of the opinion that plaintiff was entitled to the order of reference asked for, made the following order in the cause.

At this term the plaintiff moves the court for a reference of all matters in controversy, and the defendants, by their attorneys, oppose the said motion.

It is therefore considered and adjudged by the court that R. A. McLauchlin be and he is hereby appointed referee in the cause to state an account and report his findings of law and fact involved in the cause.

Defendants except and appeal.

B. F. Long and W. G. Lewis for defendants (appellants).
Armfield & Turner for plaintiff.

FURCHES, J. The plaintiffs are the commissioners of Iredell County. The defendant, Moses A. White, was elected sheriff of said county in November, 1894, and inducted into said office on the first Monday of December, 1894; that as such officer he gave the bond declared on for the faithful discharge of his duties as tax collector with the other defendants as his sureties; that as such sheriff and tax collector, he received the tax lists of said county for the years 1895 and 1896 for collection, and proceeded to collect said taxes, and from time to time to pay them over to the treasurer of said county. In September, 1896, he had a final settlement with the plaintiffs, at which time he paid them all that he was found to be due on said taxes, and this settlement was accepted by the plaintiffs as a final settlement, and recorded by them in the book of records of settlements of final accounts. And in November, 1897, he had another final settlement with the plaintiffs, through a committee appointed by the plaintiffs, and he then paid the plaintiffs (536) all that was found to be due them on account of all taxes collected or collectible by him. The defendant pleads these settlements in bar of plaintiff's action.

But the plaintiffs in their complaint set forth these settlements (or attempts to settle, as they call them), and then proceed to allege that, by inadvertence and mistake, there were many errors committed in said settlements, which they point out specifically in their complaint, and ask that the whole matter be referred to some good accountant to ascertain the truth of the matter, and report. This prayer of plaintiffs was granted by the court and an order of reference made. To this order the

defendants objected upon the ground that they had pleaded a final settlement with plaintiffs for the taxes of 1895, and also for 1896, and this plea had not been disposed of; that the court could not refer the case where there was a plea in bar until that was disposed of. This is the only point presented by the appeal.

The general rule is that where there is a plea in bar it must be disposed of before a reference for an account can be made. *Royster v. Wright,* 118 N. C., 152; *Grant v. Hughes,* 96 N. C., 177. The reason of this rule is that it would be useless to take an account if the plea in bar would defeat the plaintiff's action, if found for the defendant. But it is otherwise where the matter pleaded in bar would not defeat the plaintiff's action, if found for the defendant. *Humble v. Mebane,* 89 N. C., 410; *Grant v. Hughes, supra.* This is so for the reason that what is pleaded in bar *is not a bar.* The fact that there had been, as the parties thought at the time, a full and final settlement between the plaintiffs and the defendant creates a presumption and makes a *prima facie* case in favor of the defendant. This is so under the Revenue Act of 1895, ch. 119, sec. 110, and the act of 1897, ch. 169, sec. 113.
(537) But it would have been so upon legal principles, without this special legislation.

If plaintiffs had alleged that defendant White, as sheriff and tax collector of Iredell County, had collected the taxes and failed and refused to pay over and account for the same, the defendant's plea of final settlement and payment would have been a bar to plaintiff's action, and must have been disposed of before the court would have been authorized to make the order of reference. But that is not this case. The plaintiffs recognize the settlements, as creating a presumption—a *prima facie* case for defendants—and proceed to allege specific errors in said settlements, and seek to surcharge and falsify the account and settlement. This was the equitable mode of relief. Pomeroy's Eq. Jur., sec. 871. Where fraud is alleged and shown, the whole account may be reopened; but where errors only are alleged and specifically pointed out, the account as stated on the settlement will not be set aside. But the party alleging error will be allowed to show the same; but this burden is on him. Daniel Ch. Pl. & Pr., star p. 668. This was substantially held in *Worth v. Stewart,* 122 N. C., 258, and *Jordan v. Farthing,* 117 N. C., 181, although these cases do not fall directly within the doctrine of surcharging and falsifying a settled account.

This action seems to have been brought under a clear conception of what was the equity practice in cases of this kind. The errors complained of are specifically stated in plaintiff's complaint, which entitles them to an order of reference that they may show the errors complained

of, so as to correct the account and settlement under the directions (538) of the court, but not to have the settlement set aside.

There was no error in the court's making an order of reference, as pointed out in this opinion.

Affirmed.

Cited: Williamson v. Jones, 127 N. C., 180; *Jones v. Sugg,* 136 N. C., 144.

FIRST NATIONAL BANK OF ELIZABETH CITY v. G. M. SCOTT.

(Decided 13 December, 1898.)

Bank Debt—Collaterals—Endorsers.

The proceeds of collateral securities deposited to secure a note at bank must be applied to the payment of the note in exoneration of the indorsers, and not diverted to the payment of other debts of the maker.

CIVIL ACTION against the defendant as endorser of two notes payable to the bank for $1,000 each, dated respectively 14 March, 1895, at 4 months after date, and 27 May, 1895, at 90 days after date, executed by the Jones Manufacturing Company and endorsed by the defendant, and also by G. B. Jones and T. W. Jones, who are not sued.

These notes were renewals—the original notes were dated and endorsed 8 November, 1894, and 26 January, 1895. There were no payments entered upon the said notes at time suit was brought—subsequently under date of 18 September, 1897, a credit on each was endorsed thus: "Received on within note, $513.14, being part of amount received from J. M. Scott, receiver, from the $8,000 note."

These credits the plaintiff contended were all that the notes were entitled to; the defendant contended they were satisfied in full.

The facts as agreed are as follows:

On 20 December, 1894, The Jones Manufacturing Company (539) executed a note payable eight months after date for $8,000 to J. B. Jones and T. W. Jones, and to secure it gave them a mortgage on its property.

On 23 April, 1895, The Jones Manufacturing Company executed its note to the bank for $5,000 at four months after date, which was discounted, with T. W. Jones and G. B. Jones endorsers, and as collateral security to this note, the note and mortgage of $8,000 above stated were lodged with written pledge to furnish additional collaterals at any time on demand. "The net proceeds of this sale of the above securities may be applied either on this note or any other note of our liabilities or

engagements held by said bank, as its president or cashier may elect; and we, the maker or makers, hereby waive the benefit of our homestead exemptions as to this debt and contract."

(Signed) THE JONES MANUFACTURING COMPANY.

Endorsed: T. W. JONES.
G. B. JONES.

The Jones Manufacturing Company failed and went into the hands of a receiver, the defendant Scott, who foreclosed the above $8,000 mortgage, held by the bank as collateral security for the $5,000 note, and he paid the $8,000 into bank, with which they paid off the $5,000, leaving $3,000 over, which the bank apportioned among the two notes in suit, and other notes it held on the Jones Manufacturing Company, upon which were no endorsers and which amounted to $2,295.

His Honor, *Brown, J.*, who tried the case at January Special Term, 1898, of PASQUOTANK County, submitted two issues to the jury.

(540) 1. Was it agreed between G. B. Jones, acting for himself and the Jones Manufacturing Company at the time of the defendant's endorsement of the notes of said company sued on in this action, that said defendant should be secured and indemnified as to his said endorsement to the plaintiff bank, by the security of the said $8,000 note and trust deposited as collateral with plaintiff, subject to the prior lien of the $5,000 loaned thereon by the bank?

The jury say, Yes.

2. Did the plaintiff bank, while holding said $8,000 note and trust, have notice of said agreement prior to 25 April, 1895, after which date the $2,295 notes were purchased?

The jury say, No.

Upon these findings of the jury, both sides claimed the judgment of the court.

His Honor gave judgment that defendant go without day and recover his costs.

Plaintiff excepted and appealed.

E. F. Aydlett for plaintiff (appellant).
Pruden & Pruden and Shepherd & Busbee for defendant.

DOUGLAS, J. This is an action to recover from the defendant the balance due on two notes for $1,000 each, executed on 14 March, 1895, to the plaintiff by the Jones Manufacturing Company, and endorsed by the defendant, together with G. B. and T. W. Jones, who are not parties to this action.

The Jones Manufacturing Company executed to G. B. and T. W. Jones on 20 December, 1894, its note for $8,000 secured by mortgage. On 23 April, 1895, the said company executed and delivered to the plaintiff the following paper: (541)

$5,000. ELIZABETH CITY, N. C., 23 April, 1895.

Four months after date we promise to pay to the First National Bank, Elizabeth City, N. C., or order, negotiable and payable without offset at said bank, five thousand dollars in gold coin, for value received, having deposited with said bank as collateral security for the payment of this note a note of the Jones Manufacturing Company for $8,000, dated 20 December, eight months from date, indorsed by G. B. and T. W. Jones, insurance policies for $5,000, loss if any payable to this bank, with such additional collaterals we hereby promise to give at any time on demand. If these additional collaterals be not so given when so demanded, then this note to be due, and rebate of interest taken shall be allowed on payment prior to maturity. And we hereby give to said bank, its president or cashier, full power and authority to sell and assign and deliver the whole or any part of said collaterals or any substitutes therefor, or any additions hereto, at public or private sale, at the option of said bank, or its president or cashier, or of either of them, on the non-performance of the above promises, or any of them, or at any time thereafter, and without advertising or giving to us any notice or making any demand of payment.

It is also agreed that said collaterals may from time to time, by mutual consent, be exchanged for others which shall also be held by said bank on the terms above set forth; and that if we shall come under any other liability, or enter into any other engagement with said bank while it is the holder of this obligation, the net proceeds of the sale of the above securities may be applied either on this note or any other note of our liabilities or engagements held by said bank, as its (542) president or cashier may elect; and we, the maker or makers, hereby waive the benefit of our homestead exemptions as to this debt and contract.

THE JONES MANUFACTURING COMPANY,
G. B. JONES, *Secretary and Treasurer,*
T. W. JONES, *President.*

And the following endorsements on the back:

"T. W. JONES,
"G. B. JONES.

"March 27, 1897. Received on within note $4,704.50, being balance of $7,000 received from G. M. Scott, receiver of the Jones Manufacturing Company, which was credited upon the $8,000 note.

"September 18, 1897. Received on within note $792.30, balance of principal and interest due to date, being part of amount received from G. M. Scott, receiver, from the $8,000 note."

The said G. B. and T. W. Jones endorsed this note, and also endorsed and deposited with the plaintiff, as security therefor, their note upon the company for $8,000.

The issues and judgment, which recite nearly all the material facts, are as follows:

1. Was it agreed between G. B. Jones, acting for himself and the Jones Manufacturing Company, at the time of the defendant's endorsement of the notes of said company sued on in this action that said defendant should be secured and indemnified as to his said endorsement to the plaintiff bank by the security of the said $8,000 note and
(543) trust deposited as collateral with plaintiff, subject to the prior lien of the $5,000 loaned thereon by the bank?

Answer: Yes.

2. Did the plaintiff bank, while holding said $8,000 note and trust, have notice of said agreement prior to 23 April, 1895, after which date the $2,295 notes were purchased?

Answer: No.

JUDGMENT.

This cause came on to be heard before the court and jury.

The issues hereto annexed were submitted to the jury without objection, no other issues being tendered.

The jury having answered first issue Yes and second issue No, both the plaintiff and defendant move for judgment. It is admitted that the sum unpaid on the notes sued is $1,248.71, and that if the plaintiff is entitled to judgment at all, the defendant admits that the plaintiff is entitled to judgment for only two-thirds of said sum. The plaintiff moves for judgment for the entire sum. The defendant moves for judgment that he go without day and that defendant recover costs. It is admitted that the plaintiff received and collected the whole of the $8,000 note and interest, referred to in the evidence and pleadings, to wit: $8,818; and that plaintiff applied $5,496.80 of the said sum to the $5,600 note and interest referred to in the evidence, and that plaintiff then applied $2,295 to certain notes dated on and after 23 April, 1895, issued by Jones Manufacturing Company for logs, etc., to certain other individuals and purchased and discounted by the plaintiff after 23 April, 1895, and that neither T. W. Jones, G. B. Jones nor George M.
(544) Scott were sureties, or endorsers, or in any way liable for said $2,295 notes.

It is admitted that the plaintiff applied what was left, to wit, $1,026.27 to notes sued on in this action, leaving the balance of $1,248.71, and

that if the bank shall apply said excess after paying the $5,000 note to notes sued on, in preference to the $2,295 notes it is more than sufficient to pay the notes sued on in full.

It is admitted that the notes sued on are renewals and that the originals were dated and executed 9 November, 1894, and 26 January, 1895, and the originals and renewals were executed to plaintiff by Jones Manufacturing Company, a corporation, and endorsed as sureties by T. W. Jones, G. B. Jones, George M. Scott.

It is not denied that the agreement found by jury on first issue was made prior to the purchase by the bank of the $2,295 notes. That is admitted.

It is admitted that on 20 April, 1896, the plaintiff brought an action against Gordon B. Jones, one of the endorsers upon the notes sued on in this action to recover on his said endorsement, in the Circuit Court of Accomack County, Virginia, which court had jurisdiction of the parties and of the cause of action, the defendant Jones being duly before said court, and that the jury therein found for said defendant G. B. Jones, and that the court adjudged that the plaintiff take nothing against said Jones. The record in said action is evidence on this trial and is made a part of this finding.

The court is of opinion that according to the terms, in writing, upon which T. W. and G. B. Jones assigned the $8,000 note to plaintiff, it had no authority to apply the excess after paying the $5,000 note to the $2,295 notes in preference to the notes sued on for which the said T. W. and G. B. Jones and this defendant were liable. Said written contract is hereto attached. It is a renewal of the origi- (545) nal and in same words. Original was dated 20 December, 1894. Both the original and this renewal are signed alike and endorsed on back "T. W. and G. B. Jones."

The court is further of opinion that the evidence does not tend to prove, and is insufficient to show that the $8,000 note and deed in trust were not the property of T. W. and G. B. Jones; on their face they purport to be, and that if this is erroneous no issue was tendered by plaintiff embodying such contention.

Upon the issues as found and the admitted facts and the evidence as a whole, the court is of opinion, and so adjudges, that the excess of the proceeds of the $8,000 note, after paying the $5,000 note, should be applied to payment of notes sued on which cancels and discharges them in full, and that it matters not whether the plaintiff had notice or not of the agreement embodied in first issue.

It is adjudged that plaintiff take nothing by its writ, and that defendant go without day and recover costs to be taxed by clerk.

Upon the foregoing facts we are of the opinion that every principle of law, as well as of good conscience, requires us to affirm the judgment. As held by the court below, the $8,000 note presumably belonged to the Joneses, as it was payable to them, and the manufacturing company could not hold its own paper. As this presumption appears from the face of the note, it is binding upon the plaintiff. The plaintiff is therefore placed in the position of taking the money belonging to the Joneses, and instead of applying it to the notes now in suit upon which they are jointly liable, using it without authority to pay notes with which (546) they had no connection. The pretended authority claimed by it under the collateral note has no existence in law or equity. The plaintiff then sues the defendant upon the notes which it should have paid with the surplus of the $8,000 note. It is true the two Joneses are not sued in this action, and that one of them appears to have successfully defended a suit in the State of Virginia, which might perhaps be pleaded in estoppel; but the plaintiff argues expressly that the defendant would have his redress against his cosureties, the Joneses, at least one of whom would apparently have no defense.

The plaintiff also argues that as neither the principal nor sureties applied the $8,000, it had a right to do so. Undoubtedly, but only to the debts upon which the owners of the money were liable. The plaintiff lays stress upon the fact that the collateral note "commences with *We* and speaks *Our*," and contends that these words refer exclusively to the company and *its* liabilities. If this is true, it does not help the plaintiff, as it excludes the idea that the endorsers are parties to the agreement. If they are not parties to the agreement, then they are liable only as endorsers, and their money is liable only for their obligations under that particular endorsement. If, on the contrary, the endorsers are parties to this complicated agreement, then the word "our" refers only to their joint obligations.

Again, admitting the contention of the plaintiff that the words "we" and "our" in the collateral note refer exclusively to the company, we find the said company specifically *waiving the benefit of its homestead exemptions.* We are not advised as to the nature and extent of a corporate homestead, the existence of which we did not even suspect. (547) In *Boyd v. Redd,* 120 N. C., 335, this Court held that a statute which gives to a bank a lien on the stock of a stockholder indebted to it is in derogation of common right and must be strictly construed, and that "the statutory lien on stock is intended only to secure the direct indebtedness which the stockholder creates with the corporation, either as principal or surety, and not any involuntary indebtedness to it caused by the purchase of his liabilities incurred to third parties." This rule is equally applicable to the case at bar. Under

this view of the law we are not required to pass upon the validity of the many-faced but essentially one-sided contract relied upon by the plaintiff, but we cannot be expected to give a latitudinarian construction to an instrument so inequitable upon its face, and which we are compelled to say has been used as the cover for an unlawful and oppressive diversion of the funds belonging to an endorser. The judgment is

Affirmed.

W. S. COZART v. S. A. FLEMING, J. M. SIKES, CLERK OF THE SUPERIOR COURT, JAMES A. BULLOCK, JOE S. ROYSTER, AND CHARLES F. CREWS.

(Decided 13 December, 1898.)

Sheriff—Tie Vote—Contested Election—Quo Warranto—Mandamus—Injunction.

1. The failure of a new sheriff to qualify, when it is undetermined who is elected and no certificate has been issued to him, does not authorize a declaration by the county commissioners that the office is vacant. The old sheriff holds over until his successor is declared elected and qualified. The Code, sec. 1872.
2. It is not permissible to try the title to an office by injunction nor by mandamus— a civil action in the nature of *quo warranto*, is the appropropriate remedy, to be tried before a judge and jury.
3. A contest cannot be maintained over the certificate, which conveys only a *prima facie* title to the office subject to the declaration of the right in a *quo warranto* proceeding. The officer charged with the duty of issuing the certificate settles that matter conclusively so far as its issuance is concerned, but at his peril, if he act corruptly.
4. The clerk does not have the power in the first instance to count the ballots and declare the result, but merely to add up the various precinct returns legally made and ascertain the result.
5. A tabulation of the result, by the clerk, in the manner required by law is *prima facie* correct, and can only be questioned in a *quo warranto* proceeding.

MONTGOMERY, J., dissenting. A proceeding in the nature of *quo warranto* cannot be maintained, where the defendant is not in possession of the office, and where the action is brought before the term of the office is to begin.

CIVIL ACTION, in a contested election, for the office of sheriff (548) of Granville County, heard before *Timberlake, J.*, at chambers

in Roxboro, 16 November, 1898, on application by plaintiff for orders of restraint. The plaintiff, sheriff of Granville County, alleges in his complaint that he was a candidate for reëlection on 8 November, 1898, and that the defendant S. A. Fleming was his competitor—and from the precinct returns sent to the clerk of the court J. M. Sikes, as added up by him on 10 November, 1898, it appeared that the plaintiff and Fleming had each received 2,216 votes, being a tie, and the clerk so declared at the courthouse door; that a number of errors and mistakes were made by various precinct boards of election in said election, which are specified and enumerated, to plaintiff's prejudice and injury, whereby illegal ballots were cast for his opponent and plaintiff was deprived of votes to which he was legally entitled; that these errors and mis-
(549) takes pointed out show that he was clearly elected to said office of sheriff at the election held on 8 November, 1898, and that he verily believes that a recount of the ballots cast for sheriff at all said precincts would show a gain and a good majority in his favor, and that he should be declared to be duly elected sheriff for the term of two years from and after the first Monday in December, 1898; that the defendant J. M. Sikes, clerk Superior Court, having announced upon the face of the returns the failure of a choice for the office of sheriff, has announced his purpose, upon authority of section 25 of the election law, to call another election, and is now about to issue his writs if not restrained by the order of this Court.

That the defendants James A. Bullock, Joe S. Royster, and Charles F. Crews, county commissioners elect, are by law empowered and will, unless restrained by this Court, on the first Monday in December, 1898, declare said office of sheriff to be vacant, and will proceed to elect some person, other than plaintiff, to said office.

Wherefore, plaintiff prays judgment:

1. That he be declared to have been duly elected sheriff of Granville County at election on 8 November, 1898, for two years from first Monday in December, 1898.

2. That the defendants, commissioners elect, be restrained from declaring said office vacant and from attempting to elect a successor to plaintiff.

3. That plaintiff may continue to hold the office until this action is determined.

4. That the clerk of this court be restrained from issuing his writs for the election of a sheriff until this action is determined.

(550) 5. That the clerk be required forthwith in the presence of the parties, plaintiff and Fleming, and not exceeding three representatives of each of them, to recount the ballots cast for sheriff, as

now in the county boxes, and report the result to this court without delay. The complaint was verified and used as an affidavit.

RESTRAINING ORDER.

His Honor adjudged that J. M. Sikes, clerk Superior Court, be and is hereby restrained and enjoined from making any call for a new election for the office of sheriff of Granville County, or from issuing his writs, etc., until the further order of this court, and that said clerk show cause before me at Oxford on 21 November, 1898, why this order shall not be continued until the hearing also; that the said clerk proceed at 9 o'clock on the morning of 19 November, 1898, in the presence of plaintiff and Samuel A. Fleming, or their representatives, not exceeding three persons for each side to open the ballot boxes of the various precincts of Granville County as returned to him and recount the ballots, containing the names of persons voted for sheriff, and make report to this court at Oxford on 21 November, 1898.

The ballots to be again sealed up and locked, when counted.

The defendants J. A. Bullock, Joseph S. Royster and C. F. Crews are to show cause before me on 21 November, 1898, at Oxford, if any they have, why they should not be restrained from declaring said office of sheriff vacant.

The defendants all file answers.

Samuel F. Fleming admits that the plaintiff and himself, according to the precinct returns added up, each received 2,216 votes for sheriff, but he denies the various errors and mistakes alleged by plaintiff to have been committed in the reception and exclusion of ballots (551) to plaintiff's prejudice, and on the contrary avers and proceeds to specify and enumerate various errors and mistakes, and improper methods to defendant's prejudice, which, if corrected, would show him to have been honestly elected by a clear majority. Though believing he has been fairly and honestly elected to the office of sheriff, he is perfectly willing to again submit the matter to the vote of the people and abide their decision, whatever that may be.

The county commissioners-elect answer that they have not yet been inducted into office and have no existence as a board of commissioners, and cannot exercise any of the functions of the board; that no purpose of theirs of declaring the sheriff's office vacant has been considered by them as a board, nor have they expressed any intention of so doing. They submit that they are not proper parties to this proceeding, and ask to be dismissed.

J. M. Sikes, clerk of Superior Court, answered that he has no cause nor reason why he should not obey the order of the court, nor any cause

why the same should not be continued until the hearing, and that he has obeyed the same by making the recount of the votes as directed, which resulted:

For Wiley S. Cozart	2,216
For Samuel A. Fleming	2,208

In addition to these were 18 ballots, of which 14 of them were noted on detached pieces of paper; 10 contained the name of Samuel A. Fleming for sheriff, 4 contained the name of Wiley S. Cozart for sheriff, and are submitted for the examination and consideration
(552) of the court.

JUDGMENT.

His Honor declared upon the returns and recount of said votes cast for sheriff, the plaintiff hath received a majority of two votes and is declared elected to the office of sheriff of Granville County for two years from first Monday in December, 1898, and the clerk of this court is enjoined from calling any further election for sheriff, and the defendants Crews, Royster and Bullock, upon their induction into office are to induct the plaintiff into the office of sheriff upon tendering the bonds required by law and taking the oath of office. And the clerk is to declare the result of this action at the courthouse door and give the plaintiff a certificate of his election as aforesaid.

This judgment declaring the result of the election for sheriff shall not be held to preclude the defendant from litigating his claim for said office upon the other grounds set forth in the answer and not herein passed upon, either by *quo warranto* after plaintiff's induction into office, or, if he shall prefer, in this same action, which if he so elect may be tried upon the other matters alleged in the complaint and answer or amendments thereof made ten days before the next term.

Defendants excepted.

A motion made by the defendants, other than the clerk, to vacate the restraining order and dismiss the proceedings was denied by the court.

Defendants excepted.

Appeal by defendants S. A. Fleming, James A. Bullock, Joe S. Royster and Charles F. Crews from the ruling and judgment of the court.

(553) *A. W. Graham and J. W. Graham for defendants (appellants).*
T. T. Hicks for plaintiff.

CLARK, J., delivers the opinion of the Court.

MONTGOMERY, J., dissenting in part.

CLARK, J. The clerk of the Superior Court of Granville County upon tabulating the returns of the recent election for sheriff of that county, ascertained that there was an equal number of ballots cast for the relator and for his competitor, the defendant Fleming, and was about to proceed to order a new election to be held for that office as required by the statute; whereupon the relator, who was sheriff of the county and a candidate for reëlection, began this action on 15 November, 1898, against said Fleming, the clerk of the Superior Court, and the three newly elected commissioners who had not then qualified (and could not do so till the first Monday in December) alleging in substance:

1. That the count was incorrect, and that upon a recount of the ballots he would be found to have received a majority, and asking the judge to issue a rule on the clerk to show cause why he should not make such recount and declare the correct result.

2. An itemized statement of illegal votes counted for his competitor, and legal votes for himself rejected, intimidation and like matters proper to be inquired into upon a *quo warranto.*

3. That the clerk had declared his intention to order a new election, averring the needless expense thereof to plaintiff and the county, and asking a restraining order against such proceeding, until the proper result of the election already had was ascertained.

4. That the newly elected county commissioners would, on their (554) qualification proceed to declare the office vacant and elect a successor, and asking a restraining order to prevent such action.

The defendant Fleming answered that he himself had in truth received a majority of the votes cast and on a recount should be declared sheriff, denying all the allegations of the complaint as to the items affecting the result, and also on his part setting out an itemized statement of illegal votes cast for his competitor and legal votes for himself rejected, intimidation, fraud and other particulars proper in a *quo warranto,* but at the same time averring his willingness to submit the issue again to the arbitrament of the ballot box and objecting to the order for a recount.

The clerk answered, expressing his willingness to submit to the orders of the court.

The newly elected commissioners in their answer aver that they had not qualified, had not determined upon any action as to declaring the office vacant, and asking that the action be dismissed as to them as both premature and without warrant in law. It is well to dismiss this branch of the case here by saying that their contention was well founded in both particulars. The proceeding as to them was not only premature, but if it had not been it would have been in effect an attempt to try the title to an office by an injunction, which is not permissible. *Patterson*

v. Hobbs, 65 N. C., 119. Besides, if the commissioners had assumed to declare the office vacant and elect another, there would have been no resultant damage justifying an injunction. The title would still be inquired into by *quo warranto.* The county commissioners should be dismissed with their costs. It is proper, however, to add that the failure of a new sheriff to qualify when it is undetermined who is elected, (555) and no certificate has been issued to him, does not authorize a declaration that the office is vacant. The old sheriff holds over until his successor is declared elected and qualified. Code, sec. 1872.

The court, in view of the provision in section 7 of the Election Law of 1895, chapter 159 (amended by chapter 185, Laws 1897), that any judge of the Superior or Supreme Court may issue a rule upon any election officer "to show cause why he has not performed or shall not perform any specified act or duty required by the election law, or why he or they shall not perform or execute this act in any specified way so as to best give effect to the intent and purposes of the election law," issued the rule as prayed, and on its return ordered the clerk to make the recount in the presence of the parties and others. On such recount of the ballots the clerk reported that the relator had received a majority of eight votes. On review of the disputed items of this report the judge found that the relator had received a majority of two votes, and was entitled to the certificate of election, which he ordered the clerk to issue, and he issued his mandamus to the county commissioners to induct the relator into office upon giving the bonds and taking the oaths required by law, reserving, however, to the defendant Fleming the right to contest either in this proceeding, or, at his election, in an action of *quo warranto*—the correctness of the result as affected by the legality or illegality of ballots rejected and received, and the intimidation and fraud alleged in the pleadings, as to which matters he refused to hear evidence at the hearing in chambers.

His Honor conceived rightly that the title to the office, so far as dependent upon the reception or rejection of ballots, intimidation, fraud, etc., could only be determined before a judge and jury in a *quo* (556) *warranto,* but he erred in thinking that a contest could be maintained over the certificate which conveys only a *prima facie* title to the office, subject to the declaration of the right in a *quo warranto* proceeding.

If the clerk had refused or failed to tabulate the result in the manner required by law, he could have been compelled by a rule to perform that duty (*Moore v. Jones,* 76 N. C., 188). But here the clerk had acted and in the mode pointed out by the statute. His declaration of the result is *prima facie* correct and can only be questioned in an action of *quo warranto.* In *Swain v. McRae,* 80 N. C., 111, decided at a time

when the tabulation was made by a board of canvassers (instead of by the clerk as is now the law), it was held that upon their declaration of the result the board was *functus officio* and could not be ordered by a *mandamus* to reassemble and recount the vote, the remedy being by a *quo warranto*.

In like manner, in *Gatling v. Boone,* 98 N. C., 573, it is held that the declaration of the result of an election by the board of canvassers "conclusively settles *prima facie* the right of the person so ascertained to be elected to be inducted into and exercise the office," leaving the correctness of the result so declared to be investigated upon a *quo warranto*. This seems to be generally well settled. Cooley Const. Lim. (6 Ed.), 784, and cases cited in note 6, among which the following cases hold that not only a recount cannot be ordered by a court, but if the canvassing board voluntarily recount and give a second certificate to another, such action is a mere nullity—*Bowen v. Hixon,* 45 Mo., 300; *People v. Robertson,* 27 Mich., 116; Opinion of Justices, 117 Mass., 599; *State v. Donewirth,* 21 Ohio St., 116; *Moore v. Jones, supra,* does not differ from these. In that case the board of canvassers having without au- (557) thority of law gone behind the returns, were ordered to assemble and perform the duty allotted to them of adding up the returns and declaring the result. In law, the board has not acted at all.

The clerk having declared the result no longer has any duties in regard thereto, which he could exercise either voluntarily or upon the order of a judge. Besides, the clerk did not have the power in the first instance to count the ballots and declare the result, but merely to add up the various precinct returns legally made and ascertain the result. Section 22 of the act; *Moore v. Jones, supra.* In *Broughton v. Young,* 119 N. C., 915, it was held that the preservation of the ballots is required that "they may be kept as evidence to verify or correct the election returns when impeached, and that on a *quo warranto* the ballot boxes might be brought into court and the recount made in the presence of court and jury." But, in that case, being in regard to a contested seat in the General Assembly, inasmuch as the trial was not *viva voce* before that body, but the evidence must be taken before a commission, a recount of the ballots was ordered to be made in the presence of the legislative commission appointed to take evidence, since it could not be contemplated that "the clerks of Cherokee or Dare or other counties should attend with their ballot boxes before the General Assembly in Raleigh, or before the Congressional Committee on Elections at Washington." This was merely to procure evidence to support or impeach the *prima facie* title of the sitting member, and not for the purpose of authorizing or directing a certificate of election to be issued to the contestant should a recount show that he had received a majority of votes. The (558)

object was solely to procure evidence for the body that was to determine the title, not to compel nor to permit the clerk to reverse the declaration of the result already made or recall the certificate founded thereon.

So much of this proceeding as sought to have a recount made by the clerk was without authority of law, and a nullity. If made for the purpose of furnishing evidence, it is not justified by the circumstances, as was the case in *Broughton v. Young, supra,* since here the boxes could be opened and the recount readily made in the presence of the jury. And if for the purpose of changing the result already declared by the clerk, he already having performed that duty in the mode prescribed by law was *functus officio.* The law does not contemplate a legal contest over the *prima facie* certificate. The officer charged with the duty of issuing the certificate settles that matter at his peril, if he act corruptly, but conclusively so far as its issuance is concerned.

The only remaining question is whether so much of this action can be sustained as seeks to restrain the holding of a new election till the issue raised by the pleadings is determined whether in truth there was a tie vote. If, as formerly (The Code, sec. 2699), upon a tie vote, the county commissioners, promptly and without expense, determined the result, there could be no foundation for such proceedings as we have here. Their declaration of the result must be in favor of one party, and the other, if so minded, could by a *quo warranto* have the correctness of the original election determined. But under the present statute we have this anomaly that unless this proceeding lies, neither Cozart nor
(559) Fleming can bring his *quo warranto* until a new election, since Fleming is not in office and Cozart is not in by virtue of this election, but merely holding over till his successor is elected and qualified, and no more liable to a *quo warranto* than if some other person had been the former sheriff and was holding over under no claim to the office, but merely until the title should be determined between two parties, each of whom claimed the election. Suppose the incumbent holding over were not one of the candidates, and the plaintiff brought an action against him claiming to be elected, the defendant could do the same, and each would have to make his competitor a party, thus eliminating the "hold over," who has no interest in the result; we have the very action here presented.

Besides, in such election a third person might be elected, and if the result of the November election can only be contested when one of the two highest candidates at such election is actually inducted into office, there might be no chance to contest at all.

From the averments in the pleadings of both competitors it is almost impossible to believe (especially in view of the recount, though illegally

made) that on a vote of so many thousands there will not be discovered an error of one single ballot in favor of one party or the other, either by inadvertence of the election officers, or the erroneous acceptance or rejection of some ballot, or in some other particular. On the face of the numerous averments to that effect specifically made by both the parties, and the truth of which must be determined notwithstanding a new election shall be held, it seems a clear right both to the parties themselves and to the public as well, that the expense of an election shall not be incurred when the chances are almost infinitesimal that its result will not become a nullity upon the trial of the averments (560) made in these pleadings, averments which would be renewed in a *quo warranto* against the party successful in such new election, since it can have no validity if either party be shown to have been truly elected in the election already held.

It is true that this proceeding is an anomalous one, but it arises upon a condition of things which can very rarely occur. If there is no precedent or statute authorizing it, there is neither precedent nor statute forbidding it. It is one of the occasions when the "reason of the thing" calls upon a court to make a precedent. It is not reasonable that an election should be ordered when both parties make numerous specific averments, the correctness of any one of which on either side (unless exactly balanced by sustaining a similar averment of the other party) will render the new election nugatory.

This proceedings is in its essence a *quo warranto* brought by one contestant against the other, when neither is in actual possession of the office (under the election) by reason of the fact that upon the declaration of a tie vote, which both seek to impeach, neither can be in possession. They have a right to contest the correctness of the result and have it determined, and the clerk is a proper party. The injunction against his ordering a new election will be continued to the hearing, when the trial of the issues will determine which of the two parties claiming the office was elected; or if, by a marvel, it should happen that no majority is ascertained on either side, then the restraining order will be dissolved to the end that an election be held, but the reference to the ballot box should not be ordered till the plea in bar, set up on each side—that the people at the ballot box have already declared their will—is disposed of. This action, notwithstanding its unusual feature of (561) not being against one in possession of office, is in its every essence an "action to try the title or right to an office," since each party asserts his right to the office to which he claims to have been elected and the action will therefore stand for trial at the first term of Granville Superior Court. The Code, sec. 616.

The gist of the action is that the relator was elected and is kept out of office, not by the induction of his competitor, but by an erroneous declaration of a tie vote, which declaration he has a right to contest.

Though for convenience we still speak of an action of *quo warranto,* it must be remembered that action has been specifically abolished (The Code, sec. 603), and we have in fact only a civil action in which the subject-matter is a trial of the title to an office. The Code, sec. 616. Usually in such actions there is an allegation that the defendant has usurped and is illegally exercising the duties of the office, but section 616 does not require such averment, and the facts of this case satisfactorily show why it is not alleged here.

A new election, if there is any truth whatever in the allegations in the pleadings on either side, would damage the parties, not only by the expense thereof (since the expense of the *quo warranto* will still have to be undergone), but the candidate defeated in the new election would be put at a serious disadvantage in satisfying a jury that, at the late election in November, he in truth received a majority, however strong the evidence might be. For these reasons, to give the parties an unprejudiced trial to determine the result of the November election, and to save the public and the parties a serious expense, which will probably
(562) prove to have been unnecessary, the injunction against ordering a new election should be continued to the hearing. The injunction in no wise determines the title, but merely preserves the *status quo* till the title can be determined. *Guillotte v. Poincy,* 5 L. R. A., 403.

In granting such injunction there was no error, but in other particulars as above pointed out there was

Error.

MONTGOMERY, J., dissenting: Before the adoption of The Code of Civil Procedure the writ of *quo warranto* was the only proper remedy provided by our laws to try the title to a public office. Section 362, C. C. P., now section 603 of The Code, abolished the writ of *quo warranto.* But the *form* of the action only has been abolished. The remedies obtainable under the old writ may be obtained by civil actions under the former provisions of Title 15, chapter 2, Code of Civil Procedure, now chapter 1, Title 15, of The Code. *Saunders v. Gatling,* 81 N. C., 298. It is only under the provisions of that chapter of The Code that the title to a public office can be tried in this State. Section 607 of that chapter of The Code declares that "An action may be brought by the Attorney-General in the name of the State upon his own information, or upon the complaint of any private party, against the parties offending in the following cases: (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any

franchise within this State, or any office in a corporation created by the authority or this State; or (2) when any public officer, civil or military, shall have done or suffered an act which by law shall make a forfeiture of his office; or (3) when any association or number of persons shall act within this State as a corporation without being duly (563) incorporated."

There is not, in my opinion, a line written in the laws of North Carolina which authorizes any suit to be brought to try the title to a public office, except the above quoted section. Section 616, as I construe it, only declares that actions brought under section 607, subdivision 1, shall be tried with unusual dispatch at the next term after summons issued.

It is too clear for argument that upon the face of section 607 before an action can be brought for an office the defendant claimant must be in possession of the office.

Fleming, the defendant in this action, not only has not usurped, intruded into, or unlawfully held or exercised the office of sheriff of Granville County before this action was commenced, but he never has been declared by any authority competent or incompetent to be entitled to that office. The clerk had proclaimed, as it was his duty to do under section 26 of chapter 159 of the Laws of 1895, after having tabulated the vote, the result of the vote, to wit, that there was a tie between the plaintiff and the defendant Fleming for the office of sheriff. So we have before us an action brought to test the title to an office by a person, who had been held not entitled to it by that officer, the clerk, whose duty it was to tabulate the vote and announce the result, against that person whom the clerk had announced as having received a tie vote with the plaintiff, and therefore not entitled to the office. Under the announcement of the vote of the clerk, neither one was entitled to the office of sheriff, and yet we have before us a contest for the office commenced by regular action before the day fixed by law for the com- (564) mencement of the term of the office. It is perfectly clear that the proceeding was commenced under the powers which the plaintiff thought that the election laws of 1895 and 1897 conferred upon the judges of the Supreme and the Superior Court over election officers. I concur with the Court in the opinion that the proceeding in the court below by which a recount of the vote was made by the clerk through the order of the judge was without authority of law, for the reason, as I believe, that when the clerk tabulated the vote and announced the result, his duties as one of the election officers for that election ceased. But I go further, and with due deference to the opinion of the Court, I think this action ought to be dismissed, for it has no foundation to rest upon, except the supervisory powers given to the judges under the election laws, and those powers do not support it. It is true that if another election

is ordered, some expense will have to be incurred therefor by the county, but that is a matter that cannot be prevented by judicial determination. Legislation must cure that. In the meantime the county would not be without the services of a person qualified to act as sheriff. The plaintiff was sheriff at the time of the last election, and under the law will serve until his successor is duly elected and qualified. If he was elected at the last election he will succeed himself, whatever the result of the new election, if it is held, may be. If he was not elected, then Fleming, the defendant, may show it, if he can, and succeed him in the office. The new election will settle nothing, unless it should turn out in some proper action for the office, between the plaintiff and defendant, that there was a tie vote; and it is unfortunate that another election has to be held.

(565) But the election laws make no provision to meet a case like this one; and proceedings in the nature of *quo warranto,* if this action can be regarded in that light, cannot be maintained because the defendant is not in possession of the office, and the action was brought before the terms of the office was to begin.

In the opinion of the Court it is stated that unless the present action lies, neither the plaintiff nor the defendant can bring *quo warranto* until the new election is held. I do not take that view of the matter. After the first Monday in December following the election, the date fixed by law for the installation of the person truly elected to the office of sheriff, there was nothing to prevent Fleming, under section 607 of The Code, from instituting proceedings against the plaintiff for the office. It is not necessary, as I see it, that the plaintiff be in possession of the office by the election returns and his installation by the proper authorities, though not truly elected, in order that the defendant may have the right to contest with him the title to the office. If the defendant was in fact elected, the plaintiff is unlawfully holding the office against the defendant, although the law, from motives of public policy that there may be no vacancy in so important an office as that of sheriff, prescribes that the plaintiff shall hold the office until his successor is duly elected and qualified, from the mere fact that he was sheriff at the time of the last election. It is not necessary to enable the defendant to commence his action that he should have his certificate of election or the announcement of the tabulated vote in his favor. He can show, if the fact be so, that he received a majority of the votes for the office, and that he was entitled to be inducted therein, though another had received the certificate of election and had been inducted into the office, or notwithstanding that

(566) the clerk had declared the result to be a tie between him and the incumbent.

E. HOFFMAN & SON v. SAMUEL KRAMER & SON.

(Decided 20 December, 1898.)

Principal—Agent—Creditor—Counterclaim.

A principal who consigns goods to an agent for sale is entitled to proceeds of sale, and if the agent transfers the goods to his creditor in payment of his debt, the principal is still entitled to the goods or their value, and this whether the creditor knew of the real ownership or not.

CIVIL ACTION, before *Adams, J.*, at October Term, 1897, of DURHAM Superior Court upon three promissory notes, dated 14 January, 1896, for $242 each, payable six, seven and eight months after date to the order of M. Lindheim, executed by the defendants, and endorsed by the payee to the plaintiffs, before maturity and for value, and protested for nonpayment.

The answer denies the ownership of the notes by the plaintiff, and also alleged by way of counterclaim that the plaintiff had appropriated to their own use five bales of Havana tobacco well worth $876.84, and also a broken package of domestic tobacco well worth $225, belonging to the defendants.

The reply controverted the allegations regarding the counterclaim.

In respect to the broken package of domestic tobacco and the counterclaim in regard to it, there was evidence that before the maturity of the notes the defendants had consigned to Lindheim at New York a whole package, and also a broken package, of domestic tobacco to (567) be sold by him on their account, that he had sold and accounted for the whole package; that Lindheim being largely indebted to the plaintiffs, over and above the notes in suit, upon which he was endorser, assigned to plaintiffs his accounts and stock in store, No. 191 Pearl Street, New York, as collateral securities, to be converted into cash and applied in liquidation of his indebtedness to plaintiffs, and that among this stock was the broken package of domestic tobacco. In reference to this counterclaim his Honor charged:

"The burden is upon the defendant to prove by a preponderance of the evidence that the broken package of tobacco came into the possession of the plaintiffs and without consideration; and if the jury believe that the plaintiff took the broken package of tobacco without consideration, then the defendants would be entitled to recover its value; but if the jury believe that the defendant put the broken package of tobacco in the possession of the said Lindheim for sale and to account to him for its proceeds, and Lindheim transferred said tobacco to plaintiffs for a valuable consideration, and the plaintiffs had no knowledge or notice that said tobacco was held by Lindheim as agent for the defendant, then

defendant cannot recover of the plaintiff its value, nor set off the same as a counterclaim against its notes, but must look to Lindheim for its value."

Defendants excepted.

The jury rejected the counterclaim, and judgment was rendered in favor of plaintiffs on the notes.

There was much evidence upon other points of the case, and many exceptions to the evidence and to the charge of the court taken by the defendant, which need not be stated, owing to the view taken by this Court of this particular point, presented by the exception and (568) appeal by defendant.

Winston & Fuller for defendants (appellants).
Manning & Foushee for plaintiffs.

MONTGOMERY, J. The defendants executed and delivered to M. Lindheim, a dealer in tobacco in New York City, three promissory notes of $242 each, payable at Durham, N. C., the purchase money for five packages of Havana tobacco, to be delivered to the defendants upon their call. In the complaint it is alleged that Lindheim sold to the plaintiffs the notes before maturity and for value.

This action is for the recovery of the amount due on the notes. The defendants set up, among other defenses, two counterclaims—one for the value of a broken package of tobacco belonging to the defendants and averred to have been wrongfully converted by the plaintiffs, and the other for the value of the tobacco constituting the consideration of the notes sued upon and averred to have been wrongfully converted by the plaintiffs.

We will consider the exceptions to the rulings of his Honor in connection with the first counterclaim. It appeared from the testimony of both Lindheim and the defendants that after the execution of the notes the defendants consigned to Lindheim, at New York, a package and also a broken package of domestic tobacco to be sold by him, the proceeds of which sale to be accounted for to them. Lindheim sold the whole package and accounted therefor to the defendants. Lindheim and the plaintiff testified that Lindheim, before either of the notes (569) fell due, conveyed to the plaintiffs all of his stock and accounts as collateral security for what he might owe them. Under that conveyance, or assignment, Lindheim testified that the plaintiffs took possession of the broken package of tobacco. The plaintiffs denied that statement of Lindheim. Upon that evidence his Honor instructed the jury as follows: "The burden is upon defendant to prove by a preponderance of evidence that the broken package of tobacco came into

the possession of the plaintiffs and without consideration, and if the jury believe that the plaintiffs took the broken package without consideration, then the defendants would be entitled to recover its value; but if the jury believe that the defendants put the broken package in the possession of Lindheim for sale, and to account to them for its proceeds, and Lindheim transferred the said tobacco to plaintiffs for a valuable consideration, and plaintiffs had no knowledge or notice that said tobacco was held by Lindheim as agent of defendants, then the defendants cannot recover of plaintiffs its value or set off the same as a counterclaim against the notes, but must look to Lindheim for its value." There was error in that instruction. His Honor had already told the jury, in defining what is meant by a valuable consideration, that upon the sale by Lindheim of the notes and their purchase by the plaintiffs that an existing indebtedness of Lindheim to the plaintiffs was a valuable consideration, and that the title to the notes passed for that consideration; and the jury of course understood his Honor to mean from his former definition of what a valuable consideration in law was, that the transfer of the broken package of tobacco to the plaintiffs by Lindheim, for a debt which he owed the plaintiffs, was a valuable consideration and supported the transfer of the tobacco for that purpose against the rights of the defendants as consignors. (570)

But a principal who consigns goods to an agent or factor to be sold has a right to expect the proceeds of the sale to be returned to him. Where a factor sells the goods of his principal, he must keep that sale, so far as his principal is concerned, unconnected with his private affairs and not mix it up with his own interests to the injury of his principal. *Guerreiro v. Peile,* 5 E. C. R., 399. The same principle is announced in *Warner v. Martin,* 52 U. S., 209, where it is said: "It has been supposed that the right of a factor to sell the merchandise of his principal to his own creditor, in payment of an antecedent debt, finds its sanction in the fact of the creditor's belief that his debtor is the owner of the merchandise and his ignorance that it belongs to another; and if in the last, he has been deceived, that the person by whom the delinquent factor has been trusted shall be the loser. The principal does not cover the case. Where a contract is proposed between factors or between a factor and any other creditor to pass property for an antecedent debt, it is not a sale in the legal sense of that word, or in any sense in which it is used in reference to the commission which a factor has to sell. . . . When such a transfer of property is made by a factor for his debt, it is a departure from the usage of trade known as well by the creditor as it is by the factor. It is more; it is the violation of all that a factor contracts to do with the property of his principal. . . . It does not matter that the creditor may not know when he takes the property that the

factor's principal owns it; that he believes it to be the factor's in good faith." To the same effect are numerous authorities cited in the American and English Enc. of Law, vol. 1, page 1174. The same principle of law will apply with equal force where the factor conveys the prop-
(571) erty of his principal to his own creditor by way of mortgage or pledge to secure a debt of his own. *Warner v. Martin, supra.*

From what has been said by the Court, it is unnecessary to consider the other exceptions of the defendants. There must be a new trial, and the Court is not disposed in this case to make that new trial a partial one.

New trial.

A. H. SLOCOMB v. JOHN C. RAY AND WIFE, MARY A. RAY.

(Decided 20 December, 1898.)

Mortgage—Husband and Wife—Dower.

To bind the dower interest by mortgage husband and wife must join in the execution of the mortgage deed, separate conveyances will not comply with the requirement of the Constitution, Article X, sec. 6, and of The Code, sec. 1256.

CLARK, J,. dissenting.

CIVIL ACTION for foreclosure, heard before *Allen, J.,* at May Term, 1898, of CUMBERLAND Superior Court, upon demurrer.

John C. Ray, defendant, executed a mortgage to the plaintiff on his land by deed dated 18 January, 1892, which his wife did not sign, but on 3 November, 1892, she executed a separate deed, in which her husband did not join, releasing her dower interest and all other interest she might have in said land by virtue of her marital rights, in favor of the note and mortgage executed by her husband.

All this appeared on the face of the complaint.

The defendants filed no answer, but demurred *ore tenus.* His Honor sustained the demurrer as to the *feme* defendant, Mary A. Ray,
(572) and discharged her, and rendered judgment for the debt and foreclosure against her husband.

The plaintiff excepted and appealed from that part of the judgment sustaining the demurrer as to Mary A. Ray.

H. L. Cook for plaintiff (appellant).
N. W. Ray for defendants.

DOUGLAS, J., delivers the opinion of the Court.
CLARK, J., dissents.

DOUGLAS, J. This is an action for the foreclosure of a mortgage executed 18 January, 1892, to the plaintiff by the defendant J. C. Ray, in which his wife and codefendant Mary A. Ray did not join. Subsequent to its execution, on 3 November, 1892, the said Mary A. Ray executed to the plaintiff a similar mortgage upon her dower interest in the same property to secure the same debt of her husband. In this mortgage the husband did not join.

Upon the trial of the action the defendants demurred to the complaint *ore tenus,* "upon the ground that the complaint showed upon its face that the defendant John C. Ray executed the note and mortgage on 18 January, 1892, and that the defendant Mary A. Ray, wife of John C. Ray, did not sign and execute the same mortgage at the same time with her husband, but on 3 November, 1892, she executed a paper releasing her dower interest and all other interest she might have in said lands by virtue of her marital or other rights, in favor of the note and mortgage executed by her said husband." The defendants filed no answer.

The Court sustained the demurrer as to Mary A. Ray, and gave judgment against the other defendants for the debt and foreclosure of the mortgage on the land, discharging the defendant (573) Mary A. Ray.

The plaintiff appealed from that part of the judgment sustaining the demurrer as to Mary A. Ray only.

This presents the sole question in the case, whether the mortgage of the wife, executed by her alone, is sufficient to convey or release her right of dower. We think not.

Article X, section 6, of the Constitution is as follows: "The real and 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, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and *with the written assent of her husband,* conveyed by her as if she were unmarried."

Section 1256 of The Code provides that "Every conveyance, power of attorney, or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments, *must be executed by such married woman and her husband.*"

This clearly contemplates that the same instrument of writing shall be executed by both. Chapter 136 of the Laws of 1895 in no way alters this requirement, as the act simply refers to the acknowledgment and not to the execution of the instrument.

This Court has well said, in *Ferguson v. Kinsland,* 93 N. C., 337, 339, that: "The requirement that the husband should execute the same deed

with the wife, was to afford her his protection against the wiles and insidious arts of others, while her separate and private examina-
(574) tion was to secure her against coercion and undue influence from him." Approved in *Green v. Bennett,* 120 N. C., 394.

The wife is legally presumed to be always under the protection of the husband, whose stronger character renders him less liable to sinister influences, and whose wider range of experience gives him a better knowledge of business affairs. The particular act by which her property is affected must meet his concurrent assent, expressly given in the instrument itself. Otherwise, the instrument is a nullity, as coming within the express prohibition of the statute and opposed to the letter and spirit of the Constitution. The Constitution includes "all property, real and personal"; while the statute relates to "every instrument affecting her estate, right, or title." Both clearly include her right of dower, which, although inchoate, is none the less vested.

The legal assent of the husband cannot be presumed from any other instrument. It must be expressed in the instrument itself, to which it alone can give validity. Under the statute it is the joinder of the husband and wife that makes the instrument, which without such joinder would be the deed of neither as far as the wife's interest is concerned.

We think that these conclusions, based upon the letter of the law, are in harmony with the uniform current of our decisions. *Harris v. Jenkins,* 72 N. C., 183, 186; *Southerland v. Hunter,* 93 N. C., 310, 311; *Ferguson v. Kinsland, ibid.,* 337, 339; *Lineberger v. Tidwell,* 104 N. C., 506, 510; *Green v. Bennett,* 120 N. C., 397. The opinion in *Barrett v. Barrett,* 120 N. C., 127, does not conflict with these cases, as there the husband and wife executed the same deed, and the opinion says, on page 130, that "The sole defect is that the privy examination was
(575) taken a few minutes or hours before the husband's acknowledgment on the same day of the execution of the deed by him." It was therefore held that this defect was cured by chapter 293 of the Laws of 1893.

For the reasons stated in this opinion the judgment is
Affirmed.

CLARK, J., dissenting: The husband executed his deed with full covenants of warranty. In a subsequent deed the wife executed a release of her contingent right of dower. Her privy examination was duly and regularly taken. The only defect that can be urged is that "the written consent" of her husband was not taken, but the conveyance is not of her own land, and even if it were the previous deed of the husband with warranty was a written consent given with all solemnity. There is no statute anywhere which requires that the husband's assent shall be in

the same deed with the wife's release of her dower. When it is the husband's land and he has conveyed it by deed with full warranty and subsequently the wife releases her dower right by deed with privy examination, the warranty in the husband's deed is not only an assent to the wife's subsequent release of dower, but a solemn contract that she shall make the release, and is a liability of his estate should he die before his wife and without procuring her to execute such release.

There was a line of decisions, all quoted in *Barrett v. Barrett,* 120 N. C., 127, to the effect that where the privy examination of the wife was taken *before* the proof of the execution by the husband, the probate was insufficient, but that was not the case here, and even that was held so exceedingly technical that chapter 293, Laws 1893, was (576) enacted: "That in all cases . . . when the acknowledgment of a husband has been taken before or subsequent to the acknowledgment and privy examination of his wife" it shall be "valid and binding," and chapter 136, acts 1895, recognizing the inconvenience that might arise from the previous technical construction, further provides that the acknowledgment of the husband and wife may be before different officers and even in different states.

As already stated, the release of dower being by deed with privy examination duly taken was not only with written assent of her husband, but in performance of his contract of warranty under seal. If it was a conveyance of her property, held by her independent of any control of her husband, the case is that of two joint owners of an interest in property, which can be conveyed by them in separate deeds and construing the two papers together the Court should hold there was a conveyance of the entire title, each assenting to what the other had done. There is no statute or good reason why both must necessarily join in the same deed, which at times may be inconvenient, as is recognized by chapter 136, acts 1895, and in the absence of any statute requiring joinder in the same deed, even if it were desirable, the courts cannot make one. *Green v. Bennett,* 120 N. C., 394, was decided on a transaction occurring before the above cited acts of 1893 and 1895, and therefore it was governed by the technical ruling in *Ferguson v. Kingsland,* 93 N. C., 337, and such cases, a distinction which was pointed out in *Barrett v. Barrett,* 120 N. C., 127. In the present case, rights of third persons have not intervened, and the curative statutes apply.

Cited: Weathers v. Borders, 124 N. C., 619; *Jennings v. Hinton,* 126 N. C., 57.

(577)

W. D. McMILLAN ET AL. v. H. J. McMILLAN ET AL.

(Decided 20 December, 1898.)

Partition—Questions of Fact—Practice—Appeal.

1. Exceptions to report of commissioners making partition of land, supported by affidavits of inequality in the division, upon which is based a motion before the clerk for a redivision—do not raise *issues* of fact for trial by jury, but *questions* of fact determinable by the court.

2. An order of the clerk, in such case, setting aside the report and directing a redivision, is appealable to the judge, and if no error in law is committed, the decision of the judge cannot be reversed.

SPECIAL PROCEEDING for partition of real estate, before the clerk of Superior Court of PENDER County. Commissioners were appointed to divide the land and allot to the tenants in common their respective shares. To the report of the commissioners the defendants file exceptions, and move, upon affidavits, to have the division set aside for inequality in value of the shares.

Motion allowed by the clerk, and a new division ordered—from which order the plaintiffs, who had also filed affidavits, appealed to the judge at term. By consent, the case was heard by *Robinson, J.*, at chambers in Goldsboro on 23 December, 1897.

The defendants raised the following objections:

1. That the affidavits raised an issue of fact as to whether the division is fair and equal, which should be tried by a jury and not by the judge.

2. That the decree of the clerk setting aside the report did not affect the substantial right, and therefore was not appealable, as the same was a matter of discretion.

3. That the report should be set aside because the commissioners required cotenants to open and keep open a lane.

(578) His Honor overruled the objections and proceeded to hear the cause. Defendants excepted.

After hearing the evidence and arguments of counsel on both sides, his Honor adjudged and decreed that the order of the clerk be set aside and that the report of the said commissioners be in all things confirmed, and that the parties hereto hold the said shares as allotted to them by the said commissioners in severalty; that their report be enrolled in the office of the clerk of the Superior Court of Pender County, and also registered in said county, and that the costs be paid equally by the parties.

To the judgment of his Honor the defendants except and assign as error:

1. The decision of the court that the affidavits did not raise an issue of fact for a jury.

2. That the order of the clerk did not affect a substantial right and was appealable.

3. That the report of commissioners should stand as made.

Appeal by defendants.

J. D. Bellamy for defendants (appellants).

E. K. Bryan and Junius Davis for plaintiffs.

MONTGOMERY, J. The commissioners who were appointed in the special proceeding to make partition of the lands described in the petition made their report in due form of law. That report upon its face is regular in all respects and apparently bears no mark either of irregularity or injustice. Exceptions were filed to it by the defendants Atkinsons — based upon inequality of partition, and nothing more. Affidavits on that matter were introduced before the clerk by (579) both the plaintiffs and the defendants. On the hearing of the affidavits, that officer set aside the report of the commissioners and ordered a redivision of the lands. From that order the plaintiffs appealed to the judge of the district. The matter was heard by his Honor upon consideration of the evidence (affidavits) and argument of counsel, and he set aside the order of the clerk, confirmed the report of the commissioners and ordered the enrollment and registration of his decree. There was an appeal from the order of the judge by the defendants, Atkinsons; and the assignments of error were: "1. The decision of the court that the affidavits did not raise an issue of fact for the jury. 2. That the order of the clerk did not affect a substantial right and was appealable. 3. That the report of the commissioners should stand as made."

The question whether or not a report of commissioners appointed to make partition of lands where the exceptions are in the nature of allegations of inequality of partition, simply without a further charge of omission of some matter of importance in the action of the commissioners, or of fraud or collusion on their part is not before us, and hence that matter need not be considered.

This case is to be treated as if matters had been raised in the affidavits and exceptions which would warrant the clerk and the judge in considering the evidence. The first contention of the defendants, that is that the matters stated in the affidavits raised issues of fact for the jury and that the judge had no power to find the answer to these issues, cannot be sustained. It is true that where an issue of fact is made in the Superior Court before the clerk that issue must be transferred to the

(580) Superior Court, at term time, for trial, and there must be tried by a jury unless that right is waived. But in *Lovinier v. Pierce,* 70 N. C., 167, the Court pointed out that there were *questions* of fact as distinguished from *issues* of fact. The Court there said, "And so in a case like the present, one where a motion is made to vacate an order made in *any* court, the court must of necessity hear the fact upon which the motion is founded, and the parties are not entitled as a matter of right to make an issue of fact and demand a jury trial." But does the motion made before the clerk in this case to set aside the report of the commissioners stand on the same footing as a motion made in a cause to vacate an order of the court already made? It seems to have been so decided in the case of *Simmons v. Foscue,* 81 N. C., 64. That was a case in which the commissioners appointed to divide the lands had made their report and the defendant filed exceptions thereto. The affidavits were considered by the judge and a decree made by him upon their consideration. In that case this Court said, "But of the force and effect of the evidence in inducing the exercise of that reasonable discretion reposed by law in the judge when called on to confirm the action of the commissioners, he alone must determine, and if no error in law is committed we cannot reverse his decision."

The second contention of the defendants is that the order of the clerk setting aside the report of the commissioners did not affect any substantial right of the plaintiffs, and therefore was a matter of discretion with the clerk and is not appealable. It is true that in *Lovinier v. Pierce, supra,* it was held that the matter of the refusal of the probate judge to set aside the report of the commissioner was one of discretion, but the court said, "The discretion is not willful or arbitrary, but (581) legal." The exercise of the discretion of the clerk in the case before us was not purely a matter of law, yet it was one of legal inference and under The Code was appealable. Code, sec. 252.

But the defendants further contend under their second exception, that even if the order of the clerk was appealable, yet the appeal was premature and fragmentary. Fragmentary appeals will not be allowed, as has been often decided by this Court; but it seems to us that in no proper sense can this appeal be called fragmentary. When it was taken, there was but a single question involved, and that was whether or not the lands had been properly divided by the commissioners among the tenants in common. If any other question was ever involved it was out of the way, either by the admissions in the pleadings or by the terms of the decree from which there had been no appeal. The only thing involved in the case is before us on the appeal. The second exception in neither of its aspects can be sustained.

The third exception cannot be sustained for the reasons already given in this opinion. The judge properly had the matter before him; there is no error in law apparent upon his ruling, and the evidence upon which he found his facts we will not review. There is

No error.

(582)

A. F. SOMERS, DEPUTY SHERIFF AND AGENT OF THE BONDSMEN OF T. M. WEBB, SHERIFF; T. M. WEBB, BY H. I. WEBB AND A. F. SOMERS, GUARDIAN, AND JOSEPH A. DALE, CORONER, v. THE BOARD OF COMMISSIONERS OF BURKE COUNTY, AND J. W. GARRISON.

(Decided 20 December, 1898.)

Insanity of Sheriff—Deputy Sheriff—Sureties—Tax Collector—Coroner.

1. The official ascertainment of the insanity of a sheriff suspends him from office, and terminates the agency of his deputies.
2. His sureties, in that event, have merely the same right which they would have in the event of the sheriff's death—that is, to collect the current tax list then in his hands; and the county commissioners on the first Monday in September following are vested with the power of electing a tax collector for the ensuing year, unless and until the sheriff should be restored to reason.
3. The county commissioners, under section 2071 of The Code, may declare the office vacant, upon the insanity of the sheriff, but their failure to do so merely authorizes the coroner to perform the duties of sheriff proper, but does not cast upon him the right to collect taxes.

CIVIL ACTION for the tax books of 1898 and to enjoin their delivery to the tax collector, heard before *Coble, J.*, at Fall Term, 1898, of the Superior Court of BURKE County.

T. M. Webb was duly elected sheriff of Burke County at the fall election of 1896, and on first Monday in December, 1896, was inducted into office for the term of two years—until December, 1898.

In the spring of 1898 T. M. Webb, sheriff, became mentally and physically incapacitated to perform the duties of his office and turned over all his books and business to his deputy, A. F. Somers, and shortly thereafter became imbecile, was taken to the asylum for treatment and was authoritatively ascertained to be a lunatic, and had guardian appointed for him. A. J. Somers, as deputy sheriff, continued (583) to collect the taxes until first Monday in September, 1898, when the county commissioners took the following action, and spread the same on their minutes:

"Whereas, the sheriff of Burke County is now insane and confined in the asylum, and has guardian appointed, and so incapacitated from performing the duties of sheriff, and has so been for some months; and whereas the said sheriff has not made settlement of the taxes for the years 1895, 1896 and 1897, and is behind thereon some $5,000, and demand has been made and payment refused; now, therefore,

"Resolved, by the board of county commissioners that a tax collector be appointed for 1898. In voting on said collector, the same being by ballot, J. W. Garrison gets two votes and S. Huffman one; therefore J. W. Garrison is elected and so declared. It is therefore ordered by the board that J. W. Garrison be notified of his election as tax collector for the year 1898 (Burke County), and that upon his filing justified bond in sum of $25,000 by next meeting of the board (first Monday in October) and approved by board, he be given tax books for said year."

Thereupon this action was instituted 21 September, 1898.

Upon the hearing his Honor, upon motion of defendants, gave judgment as of nonsuit and dismissed the action. Plaintiffs excepted and appealed.

(584) *J. T. Perkins and E. J. Justice for plaintiffs (appellants).*
A. C. Avery, W. S. Pearson and J. M. Mull for defendants.

CLARK, J. Upon the insanity of the sheriff his right to exercise the office ceased, and his committal to the asylum for the insane and the appointment of a guardian for him, upon the certificate of the superintendent of the asylum, as provided by The Code, sec. 1673, was certainly at least *prima facie* evidence of such insanity. There was no evidence offered to contradict such insanity. Upon the declaration of insanity the sureties of the sheriff had no more rights than would have gone to them upon his death, *i. e.,* to collect the tax list then in his hands. Code, sec. 3687; Laws 1897, ch. 169, sec. 117; *Perry v. Campbell,* 63 N. C., 257; *McNeill v. Somers,* 96 N. C., 467. The commissioners on the first Monday in September were vested with the power of electing a tax collector for the ensuing year, unless and until the sheriff should be restored to reason. The failure to exhibit the tax receipts on said first Monday in September would have been an additional ground justifying the county commissioners in refusing to give him the new tax books, even if he had been sane, and the sureties would have no right to collect taxes on such new list after his failure to renew his bond, whether such failure was caused by failure to exhibit the required receipts or by his insanity. *Colvord v. Comrs.,* 95 N. C., 515; Code, sec. 2070. The time (December) being changed to September, Laws 1897, ch. 169, sec. 35.

In North Carolina a sheriff's deputy is merely his agent (*R. R. v.*

Fisher, 109 N. C., 1), and such agency terminated upon the official ascertainment of the insanity. Neither Somers, therefore, nor the sureties on the sheriff's bond have a right of action to compel the commissioners to give them the tax list. The agency could not have (585) been one coupled with an interest, as that is prohibited. Code, sec. 2084; *Basket v. Morse,* 115 N. C., 448. Upon the *prima facie* ascertainment of the insanity of the sheriff under section 1673 or by inquisition of lunacy, the commissioners might have declared the office vacant under section 2071 of The Code, but their failure to do so merely authorized the coroner to perform the duties of sheriff proper, till such declaration (*Greer v. Asheville,* 114 N. C., 678) and did not cast upon him the right to collect the taxes, which went to the sheriff's bondsmen for the current list and after that the duty devolved upon a tax collector chosen by the county commissioners. Indeed, the election of a tax collector at the meeting of the county commissioners, supervening upon the appointment of a guardian for the sheriff, under section 1673 of The Code, was *pro tanto* a declaration of a vacancy in the sheriff's office under section 2071 to the extent of his duties as tax collector, and their failure to elect a sheriff to serve process merely left that matter open for future action. *Greer v. Asheville, supra.*

No error.

(586)

RICHARD WILLIAMS AND WIFE v. W. C. MAXWELL, TRUSTEE.

(Decided 20 December, 1898.)

Building and Loan Association—Stockholder—Mortgage.

1. Upon the failure of such association, each stockholder is to be regarded as an incorporator liable for his *pro rata* part of the defalcation and expenses of closing out the concern; until this is ascertained and accounted for, he is not entitled to have the excess paid to him, nor can the amount paid into the association be allowed as a discharge of his indebtedness until this deficiency is paid. *Meares v. Butler,* at this term.

2. In foreclosing the mortgage of a borrowing member, all payments made under whatever form should be deducted from the amount borrowed with the addition of 6 per cent interest and his *pro rata* part of the expense account of the association.

MOTION made in a civil action commenced in Superior Court of BURKE County on 17 February, 1898, to enjoin the sale of certain lots, under mortgage, in the town of Morganton, the defendant being the trustee in the mortgage, heard before *Starbuck, J.,* upon notice, at chambers in Marion on 9 March, 1898.

At the hearing of a motion for injunction his Honor, *Judge Starbuck*, after argument by counsel and a consideration of the case upon the evidence introduced, found the following facts and entered the order of judgment hereinafter set forth, to wit:

First. That on or about 26 March, 1890, the plaintiff, R. Williams, became the holder and owner of ten shares of stock in the North Carolina Building and Loan Association of Charlotte, N. C., a corporation duly organized under the laws of North Carolina for the purpose of conducting a general Building and Loan Association in the State of North Carolina, and they hereby became shareholders in said
(587) corporation, and entitled to share in its benefits and bear their proportion of the losses according to its by-laws and charter.

Second. That on 26 March, 1890, the plaintiffs borrowed from the said association the sum of $1,000, executed in a deed of trust on certain realty located in Burke County, to the defendant, W. C. Maxwell, trustee, for the benefit of the association, as fully appears in said trust deeds, and hypothecated and pledged their said shares of stock as security.

Third. That on 1 February, 1894, the said plaintiff executed to W. C. Maxwell, trustee, for the benefit of the association, another mortgage on the said realty, and hypothecated and pledged said shares of stock. This was done for the purpose of securing an additional loan of $250, to be made by association to plaintiffs, and the balance due upon the first loan, it being further agreed that plaintiff should receive credit upon the $1,000 for the difference between $750 and the balance due upon the first loan. On 2 October, 1894, plaintiffs received the additional $250 loan in cash, and was credited with the difference between the $750 and the balance due upon the first loan, as figured according to the by-laws of the association, not allowing credits for fines.

Fifth. That the said association, while running, charged the plaintiffs 8 per cent interest on the sum borrowed, notwithstanding that they had paid certain amounts from time to time to the reduction of their loan, and also received and applied certain amounts as fines for the nonpayment of their dues, according to the by-laws of the association, to which the plaintiffs had subscribed as shareholders; that while 8 per cent interest was charged the plaintiff on the full amount borrowed,
(588) as aforesaid, notwithstanding the reduction of the loan by the payment of dues, it was a rule of the association that upon settlement the plaintiffs would be allowed interest on their payments, excepting payments made on fines. It is therefore found that certain amounts, aggregating about $50, paid by plaintiffs, were usuriously received and applied by the association.

Sixth. That on 27 March, 1897, J. W. Keerans and E. T. Cansler were appointed receivers of said association by the Superior Court of

Mecklenburg County in the case of *J. S. Thompson et al. v. The North Carolina Building and Loan Association,* for the benefit of all the shareholders and creditors, and are now duly acting as receivers and winding up the affairs of the association and collecting its assets; that W. C. Maxwell, the defendant, was made a party to said action by the said court to act in connection with the said receivers in collecting the assets of the association, and is acting in accordance with the orders of the court and upon the directions of said receivers in accordance with the said orders of the court in collecting the assets of the association; and the plaintiffs were shareholders in the association at the time the receivers took charge, 27 March, 1897, were the owners of ten shares of stock and indebted to the association on their loan.

Seventh. That the said receivers and trustee have figured their account by charging them with the actual sums borrowed, and received from the association, to wit, $1,000 on 26 March, 1890, and $250 on 2 October, 1894, and legal interest thereon according to contract from the dates of same to 27 March, 1897; that they have allowed them credit on said loan for all payments that they have made to the association for any purpose, whether the same had been usuriously or properly applied by the association before the appointment of the said receivers, and have allowed them full interest thereon from the dates paid at the (589) same rate charged on their loan, and by the calculations ascertained the indebtedness of the plaintiffs to be on 27 March, 1897, the date they took charge as receivers, $676.70, and this the court finds was the true indebtedness of the plaintiffs to the association on said date, and on which nothing has since been paid; that the said receivers, in the calculation aforesaid, paid no attention to the method of settlement between the plaintiff and the association on 2 October, 1894, as aforesaid, but have simply charged the plaintiffs with the exact amount of money received from the association, as aforesaid.

Eighth. That the said receivers sent the plaintiffs a statement of their account, dated 15 September, 1897, and included therein the sum of $125, an assessment ordered by the court on 23 September, 1897, for their proportionate share of the losses and expenses for winding up said association; that the said plaintiffs promised to make settlement from time to time, and at no time contended that the statement sent them was wrong, until 25 January, 1898, when they advised the said receivers that they differed from same, but without mentioning in what particular, and threatened to bring them into court if they attempted to foreclose the trust deed.

Ninth. That on account of plaintiffs' refusal to settle their loan as aforesaid, the defendant, trustee, at the directions of the said receivers,

and by the orders of the court in the cause, advertised the property described in the complaint to be sold on 5 March, 1898, in order to pay the amount due the association.

Tenth. That on 23 September, 1897, the Superior Court of Mecklenburg County directed the said receivers to figure the accounts
(590) between the association and its shareholders in the manner calculated with plaintiffs, and to deduct from the payments the sum of $12.50 per share for the losses and expenses of winding up the said association, as will appear by certified copies of the orders and decrees in the exhibits herewith filed.

Eleventh. That the plaintiffs, before the hearing of this cause, tendered the defendant's attorney the sum of $360 in full settlement, which was refused; that the plaintiffs have not paid this sum into court, nor does he now offer to pay it, or any other sum upon their loan, and that they have never offered to pay any other sum than the $360, as aforesaid.

Twelfth. It is agreed that the amount loaned by the association to the plaintiffs, for which the mortgage security was given, was $1,000 on 26 March, 1890, and $250 on 2 October, 1894, and that the aggregate of all sums paid by the plaintiff to the association is $931.46, leaving a balance due the association, without taking into account interest on either side of $318.54; that if plaintiffs be charged with interest on all sums loaned them by the association and credited with interest at the same rate on all sums paid by them, there is left a balance due the association of $676.70; and if plaintiffs be credited with interest on all sums paid in at eight per cent from the dates of same, and be not charged with interest on the loans, there is left a balance of $22.82 in their favor; that if interest be charged on both sides at the same rate, and if there should be deducted from the credits allowed the plaintiffs the sum of $125 as their proportionate share of the losses and expenses for winding up the association in accordance with the orders of the court, dated 23 September, 1897, the balance in favor of the association
(591) would be the sum of $801.70, due 27 March, 1897, with interest thereon from that date to time of settlement.

Thirteenth. That the receivers of said association, in accordance with the orders of the court of Mecklenburg County, have declared and paid two dividends to the nonborrowing shareholders from funds devised on the loan due by other borrowing members figured in the same way as the plaintiffs, and with the same proportionate sum deducted for losses and expenses.

Fourteenth. That on 17 February, 1898, the plaintiffs had a summons issued by the clerk of the Superior Court of Burke County, returnable to the March Term for said county, and the same was shortly thereafter served on the defendant; that on 19 February, 1898, a restraining order

was issued by J. D. McIver, Judge of the Seventh Judicial District, and made returnable before H. R. Starbuck, Judge, at Marion, N. C., on Wednesday, 9 March, 1898, which said order was also duly served on the said defendant; that before commencing the said action in Burke County, as aforesaid, the plaintiffs did not apply for or obtain any permission from the Superior Court of Mecklenburg County, or to the judge presiding in said district to sue the defendant in Burke County, nor has he petitioned the court in the cause in Mecklenburg County.

Fifteenth. That at the October Term, 1897, of the Superior Court of Mecklenburg County, an order was made directing the said receivers of The North Carolina Building and Loan Association to cause an advertisement to be made in the Charlotte Observer, a newspaper published in Mecklenburg County, for six successive weeks, and mail a notice of same to all shareholders and creditors of the association to the effect that they must present their claims to the said receivers on or before the first day of the January Term of the Superior Court (592) for said county, which convened in Charlotte on 24 January, 1898; that at the January Term of said court for Mecklenburg County an order was made declaring that the said advertisement had been made and notice mailed to all the shareholders and creditors of the association, in accordance with the orders made at the October Term, 1897, and that all shareholders and creditors who had failed to send in their claims by the first day of said January Term were excluded and debarred from participating in the assets of the said corporation, as will appear by reference to the said orders included in the exhibits in this cause; that a notice of said order was duly mailed to the plaintiffs by the said receivers.

Sixteenth. That the said plaintiffs did not send in their claim to the said receivers in accordance with the said orders, nor have they in any way petitioned the court in Mecklenburg County in said cause.

It is now, upon consideration of the foregoing facts, adjudged that the motion for an injunction to the final hearing be denied; that the restraining order hertofore issued be dissolved, and that the defendant recover his cost expended in this motion.

H. R. STARBUCK,
Judge Presiding Tenth Judicial District.

To the foregoing judgment plaintiffs except and appeal.

I. T. Avery and A. C. Avery for appellants.

Burwell, Walker & Cansler, and Osborne, Maxwell & Keerans for appellee.

(593) FURCHES, J. The "North Carolina Building and Loan Association" is a corporation and its place of business is Charlotte, N. C. The plaintiff, Richard Williams, became the owner of ten shares of capital stock in said association of the par value of $100 each, aggregating the sum of $1,000. This made him a stockholder in the association (*Strauss v. B. & L. Asso.*, 117 N. C., 314) and enabled him to borrow $1,000 from the association, which he did, and he and his wife executed one of the mortgages mentioned in the complaint as security therefor. The plaintiff having reduced the amount of this indebtedness to the association, was allowed to borrow $250 more, for which he and his wife executed a second mortgage on the same property. Plaintiff from time to time made payments to the association until this indebtedness was reduced to $676.70 on 27 March, 1897, if these amounts should all be applied to said indebtedness, calculating the indebtedness at six per cent interest and allowing plaintiff credit for all amounts paid by them, and interest thereon at the same rate of per cent, whether the same was called fines, assessments, or what not.

The defendant corporation became insolvent, suit was commenced in the Superior Court of Mecklenburg County to wind up the concern, and on 27 March, 1897, J. W. Keerans and E. T. Cansler were appointed receivers. The mortgages mentioned above were made to W. C. Maxwell with power to sell upon default. Maxwell was also a stockholder and member of said corporation, and a party to the action to wind up and settle the concern; and upon the plaintiff's failing to pay said indebtedness, the court made an order directing said Maxwell, trustee, to sell and to foreclose said mortgages.

(594) To prevent Maxwell's selling under said mortgages, the plaintiff on 17 February, 1898, commenced this action in the Superior Court of Burke County, and obtained a temporary restraining order against said sale. The plaintiff's motion for injunction was afterwards heard, when the following facts were found and agreed to by the parties:

The plaintiff on 26 March, 1890, borrowed $1,000, and on 2 October, 1894, borrowed $250; that after allowing plaintiff credit for every dollar paid the defendant association, whether by way of fines or otherwise, and interest thereon at the rate of six per cent (the same rate defendant had charged plaintiff), the balance remaining due from plaintiff, if the whole amount of these payments should be credited on the indebtedness, left a balance of $676.70. But the court allowed the receivers to apply $12.50 per share of stock to the loss account, amounting to $125, and if this be deducted from the amount paid into the concern, the amount still due will be $801.70. The injunction being refused, plaintiff appealed.

These are the facts found by the court and not disputed on the argument here.

Upon this state of facts there is nothing but questions of law presented, and they have been so frequently and so recently decided by this Court that we do not feel disposed to discuss them in this opinion.

It was decided in *Strauss' case, supra,* 117 N. C., 314 and 118 N. C., 556, that each holder of stock on 27 March, 1897, the day the receivers were appointed, is an incorporator, and liable for his *pro rata* part of the defalcation and expenses of closing out the concern.

It is held in *Meares v. Davis,* 121 N. C., 192, that a corporator (595) is not entitled to have the excess paid to him until his part of the deficiency is ascertained and accounted for.

And it is held in *Meares v. Duncan,* and in *Meares v. Butler,* at this term, that as incorporators are bound for the defalcation and expenses of winding up the concern, the amounts paid into the association cannot be allowed as a discharge of their indebtedness until this deficiency is paid. This is held in these cases to be so, even where the rights of married women are involved.

It is held in *Strauss' case, supra,* that the incorporators were liable for their *pro rata* part of this deficiency, according to their *pro rata per cent* upon the amount of capital they had in the association on the day it went into the hands of the receiver. And the capital of the borrowing members was the amount they owed the association at that time.

In this case it seems that the shares held by each incorporator were assessed $12.50. We do not think this was a compliance with the rule in *Strauss' case,* and may make some difference in the amount due by the plaintiff. But this is a matter that may be corrected by a mathematical calculation, by taking what the assessments amount to, at $12.50 a share, and get the per cent this would make upon the whole collectible assets of the concern, and apply this per cent to the plaintiff's indebtedness.

We are of the opinion that the remaining amount of plaintiff's indebtedness is the amount he borrowed, with six per cent interest, the whole amount the plaintiff has paid the association, after first deducting the proper per cent therefrom for defalcations and expenses of closing out the concern.

In the consideration of this case, in order to put it upon its (596) merits, we have left out of consideration the question of *venue.*

We see no good reason why an injunction should issue, and therefore affirm the judgment of the court below.

Affirmed.

C. M. McDOWELL, APPELLANT, v. W. C. MAXWELL, TRUSTEE.

FURCHES, J. This case presents substantially the same facts as *Williams v. Maxwell,* and is governed by the opinion in that case.

The judgment of the court refusing an injunction is

Affirmed.

P. H. PELLETIER v. GREENVILLE LUMBER COMPANY; FARMERS AND MERCHANTS BANK OF NEW BERN; CHARLES S. RILEY & CO.; HENRY WALKER, W. A. LEARY, CHARLES S. HAMILTON, P. B. TALLAFERRO, TYSON & RAWLS, AND J. T. LITTLE.

(Decided 23 December, 1898.)

Insolvent Corporation—Receiver—Judgments—Creditor—Paramount Lien—Execution.

1. Property of an insolvent corporation in the hands of a receiver is in *custodia legis* and cannot be sold under execution without leave of the court, which will always be granted in proper cases.

2. The exclusive possession of the receiver does not interfere with or disturb any preëxisting liens or priorities, but holds the property intact until relative rights of all parties can be determined, and prevents the sacrifice of assets by a multiplicity of suits and executions.

3. Where a judgment is a lien upon the property, prior to the title of the corporation, it is of course paramount to all claims of its creditors, who must discharge the lien before they can subject the property. The remedy of such judgment creditor, under present system, is by petition and motion in the cause.

CLARK, J., concurring in the result. Where the lien of a judgment creditor on land exists before the appointment of a receiver, the creditor may sell under execution without incurring a contempt, and the purchaser acquires a valid title. It is otherwise as to personal property, because that is in the actual possession of the receiver, and there is no lien acquired without a levy.

(597) MOTION to continue a restraining order until the hearing, made before *Bryan, J.,* at chambers in New Bern, 25 September, 1897, in the above-entitled cause.

The plaintiff was a stockholder in the Greenville Lumber Company, which had become insolvent—the other defendants are creditors.

The action was instituted in the Superior Court of Craven County for the appointment of a receiver and for such restraining orders and other and further relief as would conduce to the furtherance of the rights and interests of the creditors and stockholders. Lovit Hines was

appointed receiver, and at his instance and upon his affidavit; that since his appointment an execution has been caused to be issued from the Superior Court of Pitt County by one Callie Langston (now Callie Joyner) upon a judgment obtained in said court in an action wherein she as administratrix of B. G. Langston is plaintiff and the Greenville Land and Improvement Company is defendant, and has caused the sheriff of Pitt County to levy said execution upon property in possession of affiant, as receiver aforesaid; that said property so levied upon is advertised for sale at the courthouse door in Greenville on 20 September, 1897, by the said sheriff; an order, at chambers, was made in Windsor by his Honor, directed to said Callie for her to show cause at New Bern on 25 September, 1897, why an injunction should not (598) be issued restraining said sale with order of restraint meanwhile.

The said Callie answered the rule and says: That as administratrix of B. J. Langston, at March Term, 1896, of Pitt Superior Court she recovered judgment against the Greenville Land and Improvement Company for $649.30, duly docketed in March, 1896, and which is still unpaid, and that said judgment was rendered for services rendered by her intestate prior to the execution of certain mortgages executed by said Greenville Land and Improvement Company, under which mortgages the said Greenville Lumber Company now claim to own certain real estate in Pitt County, which land was owned by the said mortgagor at the time said services were rendered, and that B. J. Langston, her intestate, had commenced his said action before sixty days had elapsed after the registration of said mortgages, and that the Greenville Lumber Company has no source of title to said land, except under said mortgages; that in said action it was expressly decided by the Supreme Court at February Term, 1897 (120 N. C., 132) that said judgment took precedence over said mortgages as to right of satisfaction by sale of said land.

His Honor, *Judge Bryan,* at the hearing on 25 September, 1897, adjudged that the said injunction to the hearing is hereby refused; that the restraining order heretofore granted is vacated, set aside and annulled, and that said Callie Joyner recover her costs.

The plaintiff and the receiver excepted and appealed.

Clark & Guion for appellants.
Jones & Boykin for defendant Joyner.

DOUGLAS, J. This case comes before us on an appeal from the (599) refusal of the court below to continue an injunction against the sale of real estate of the defendant corporation under a judgment in favor of Mrs. Callie Langston, now Callie Joyner. There is no question that this land is subject to execution under this judgment as held

in *Langston v. Imp. Co.*, 120 N. C., 132. That judgment is superior not only to the claims of all the other judgment creditors in this case, but even to the original title of the insolvent corporation itself. The only question is whether the land can be levied upon and sold under that judgment while in the hands of a receiver.

In other words, can land belonging to an insolvent corporation be sold after the appointment and possession of a receiver upon a valid judgment obtained before such appointment. We think that as a matter of right the land cannot be sold without leave of the court. Property in the actual or constructive possession of the receiver is *in custodia legis*, as the possession of the receiver is that of the court, he being merely the hand of the court. This exclusive possession of the receiver does not interfere with or disturb any preëxisting liens, preferences or priorities, but simply prevents their execution by holding the property intact until the relative rights of all parties can be determined. Another essential object sought to be obtained by the appointment of a receiver for an insolvent corporation is to prevent the sacrifice of its assets by a multiplicity of suits and petty executions. Both these objects would be destroyed by permitting any one, no matter what may be his title or claim, to interfere with property *in custodia legis* without leave of the court by which such custody is held. 1 Freeman on Ex. Sec., 129; Beach on Receivers, secs. 207, 213, 738; High on Receivers, sec. 163; 20 Am. & Eng. Enc., 138.

(600) Under the old equity practice when a person holding a prior or paramount claim or title was prejudiced by having a receiver put in his way, the course was either to give him leave to bring an ejectment or to permit him to be examined *pro interesse suo*. The same result can now be accomplished by a petition and motion in the cause. In the case of *Wiswall v. Sampson*, 14 How. (55 U. S.), 52, 66, where this question is fully and ably treated, the Court says: "A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgagee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court, to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose."

We cannot assent to the doctrine laid down by Chancellor Walworth in *Albank City Bank v. Schermerhorn*, 9 Paige, 372, 378, that real estate in the custody of a receiver can be levied upon and sold under execution, provided only that the actual possession of the receiver is not interfered with. Its practical effect would be either to permit outside parties to stop all further proceedings of a court of equity by disposing of the subject matter in controversy, or else to put that court in the position of holding simply the naked possession of property, and gravely

proceeding to determine who would have been entitled to the property if it had not been sold. This doctrine is distinctly denied in *Wiswall v. Sampson, supra,* where it is said that the court must administer the property "independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless."

The case of *Skinner v. Maxwell,* 68 N. C., 400, although deal- (601) ing with personal property, lays down the same general rule.

As it is well settled that the property cannot be sold under execution without leave of the court, it is equally clear that in proper cases such leave can be given. A court of equity is not required to retain possession of property when it would be inequitable to do so.

It simply remains to be seen whether the judgment creditor has leave of the court, express or implied, to proceed with his execution. Upon the hearing of the matter the court decreed, "That the said injunction to the hearing is hereby refused; that the restraining order heretofore granted is vacated . . . and the said Callie Joyner recover her costs incurred herein." We think that this unqualified refusal of the court to continue the injunction is implied leave to proceed. As his Honor does not base his action upon want of power, we must assume that he acted in his equitable discretion, and we think this discretion was properly exercised under all the circumstances of the case. The judgment of Mrs. Joyner is paramount to the original title of the defendant corporation, and is of course paramount to all claims of its creditors. They are asking to have the land divided up into building lots, and sold by the lot, *at the cost of the fund* and consequently at the risk of Mrs. Joyner. If they wish the land so sold, they have the privilege of paying off Mrs. Joyner, and then speculating in the land at their own risk and in their own way. The judgment is

Affirmed.

CLARK, J., concurring in result: If it was the judgment debtor (602) who had been placed in the hands of a receiver, the latter might have applied for an order of the court restraining, in the interest of the fund he represents, the judgment creditor from enforcing his lien by sale, but even in such case the order is not a matter of right, but rests in the discretion of the court. There are many authorities that the sale of real estate in such case under the lien of a prior judgment is lawful and is not a contempt of court (High on Receivers, sec. 171; *Bank v. Schermerhorn,* 9 Paige, 372) and the purchaser acquires a valid title when the lien of the judgment is prior to the date of the appointment of the receiver (Beach on Receivers, sec. 200; *Chatauqua Bank v. Risley,* 19 N. Y., 369), because the receiver takes subject to all valid liens.

Chicago, etc., v. Smith, 158 Ill., 417. The rule is different as to personal property, because that is in the actual possession of the receiver and there is no lien acquired without a levy. *Skinner v. Maxwell,* 68 N. C., 400.

But this case is far stronger in support of his Honor's action in refusing the restraining order. Here, the judgment debtor had executed a mortgage which this Court held at a late term (*Langston v. Land Co.,* 120 N. C., 132) was subject to the prior lien of the judgment creditor. At the sale under that mortgage the Greenville Lumber Company bought, subject of course to Langston's judgment lien. The plaintiff herein instituted this proceeding to place such purchaser, the defendant herein, the said Greenville Lumber Company, in the hands of a receiver as insolvent, and in that proceeding to wind up the affairs and to distribute the assets of that company, in which Langston, the judgment creditor of the mortgagor has no interest or right to participate, and to which proceeding he is not a party, but in every sense a stranger, being neither
(603) a stockholder in, nor creditor of such company; the notice is issued to him to show cause why he should not be restrained from proceeding to enforce the lien against the land. The purchaser at the mortgage sale has no equity to stay him from collecting his judgment, having bought with notice thereof, and the receiver of such purchaser is in no better or stronger case. A case very much in point is *Carlin v. Hudson,* 12 Texas, 202, in which it was held that a restraining order would not be granted to the purchaser from a judgment debtor to restrain a sale under the prior judgment lien.

It would be a great hardship upon judgment creditors if they could be restrained from enforcing collection of a judgment and lien given them by the court, indefinitely, till the receivers of insolvent purchasers, who buy subsequent to and with notice of the judgment, shall at their leisure wind up and distribute the assets of such insolvents, in which assets a judgment creditor of the vendor has no interest. His lien is prior to that of the purchaser from the judgment debtor, and he should not be hindered and delayed by such purchaser going into liquidation. *Bostic v. Young,* 116 N. C., 766.

Cited: Bank v. Bank, 127 N. C., 434.

(604)

J. S. COX, ADMINISTRATOR OF N. L. COX, v. NORFOLK AND CAROLINA RAILROAD.

(Decided 23 December, 1898.)

Negligence—Contributory Negligence—Burden of Proof—Nonsuit—Act of 1897, Chapter 109.

1. In a motion to nonsuit under Act of 1897, ch. 109, plaintiff's evidence must be accepted as true and construed in the most favorable light to him. If there is more than a mere scintilla of evidence, it must be submitted to the jury.

2. The burden of proving negligence rests upon the plaintiff; that of proving contributory negligence rests upon the defendant, and then for the plaintiff to show the last clear chance of the defendant—each issue depending upon the preceding.

3. The judge may say to the jury that there is no evidence tending to prove a fact; but he can never say a fact is proved.

4. It is the settled rule, that a verdict can never be directed in favor of the party upon whom rests the burden of proof, and who, in all cases, is considered to have the affirmation of the issue, whatever may be its form.

5. The Act of 1887, ch. 33, imposes the burden of proving contributory negligence upon the defendant. It therefore follows, that on a motion to nonsuit the court can only consider the evidence relating to the negligence of the defendant, and if there is more than a scintilla tending to prove such negligence, the motion must be denied and the case submitted to the jury.

6. Where the evidence, considered in the light most favorable to the plaintiff, tends to show that the deceased was killed by a train running backwards in a town at night, and neither sounding the whistle nor ringing the bell, although passing over a track on the old county road, habitually used as a foot path. This amounts to more than a scintilla of evidence tending to prove negligence on the part of the railroad, and should be submitted to a jury.

CIVIL ACTION to recover damages for the negligent killing of the intestate of plaintiff by defendant's train, tried before *Norwood, J.*, at HALIFAX Superior Court.

ISSUES. (605)

1. Did the defendant negligently kill the plaintiff's intestate?

2. Was said intestate guilty of contributory negligence?

3. Notwithstanding such negligence on the part of said intestate, could the defendant by the exercise of due care and prudence have prevented the killing?

There were a number of witnesses examined on the part of the plaintiff, whose evidence is stated in full in the opinion.

It tended to show that the dead body of intestate was in a crushed condition, with one hand and one foot cut off, was found lying across the track of defendant between 12 and 1 o'clock of a bright moonlight night on 7 July, 1897, where the track, on a level grade crossed the old county road, now used habitually as a footpath, along which deceased usually walked to and from his house and the village of Hobgood, where the occurrence took place. That about two hours before the body of deceased was found, that a train of the defendant had backed along the track and past the spot, without sounding the whistle or ringing the bell. That the intestate was in a drinking condition that day.

At the conclusion of plaintiff's evidence, the defendant moved to nonsuit the plaintiff.

His Honor adjudged that the action be dismissed, at costs of plaintiff.

Plaintiff excepted and appealed.

W. A. Dunn and Claude Kitchen for plaintiff (appellant).
Thomas N. Hill, McRae & Day, and David Bell for defendant.

(606) DOUGLAS, J., delivers the opinion.
FAIRCLOTH, C. J., dissents.

DOUGLAS, J. This is an action brought by the plaintiff as administrator of N. L. Cox to recover damages for the negligent killing of his intestate by the defendant's engine. At the close of plaintiff's testimony the defendant moved to nonsuit the plaintiff under chapter 109 of the Laws of 1897. This is the act that has already given us so much trouble. It was doubtless intended by the Legislature to save time and expense by cutting short an action devoid of merit, but its practical result is the very opposite. It gives the defendant two chances to one for the plaintiff, prolongs litigation, and may cause a palpable miscarriage of justice. As stated in *Purnell v. R. R.*, 122 N. C., 832, 835: "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 motion. The motion could be renewed at the close of the evidence in the case, but would then depend upon the whole evidence," citing *Sugg v. Watson,* 101 N. C., 188. Now, however, the defendant, if his motion is overruled, can file his exception and proceed with the case. In passing upon that exception, we would be compelled to ignore all the subsequent proceedings, including the additional evidence, the verdict and judgment. If we sustained the exception the plaintiff must be nonsuited even if the subsequent evidence of the defendant himself should show the plaintiff clearly entitled to recovery. If we overruled the exception we must then proceed to review the case upon its merits.

Thus, there would be practically two appeals, in one of which we might be compelled to nonsuit a plaintiff who had obtained a just judgment.

We do not intend to criticise the Legislature, but simply to call attention to the fact that the law in practical operation does not meet the public purposes of its enactment. While doing so, we still (607) deem it our duty to enforce it.

The case as now before us presents the single question whether there was sufficient evidence to go to the jury as to the negligence of the defendant. The plaintiff's evidence must for the present purpose be accepted as true, and construed in the light most favorable for him. *Avera v. Sexton,* 35 N. C., 247; *Hathaway v. Hinton,* 46 N. C., 243; *S. v. Allen,* 48 N. C., 257; *Abernathy v. Stowe,* 92 N. C., 213; *Gibbs v. Lyon,* 95 N. C., 146; *Springs v. Schenck,* 99 N. C., 551; *Hodges v. R. R.,* 120 N. C., 555; *Collins v. Swanson,* 121 N. C., 67; *Cable v. R. R.,* 122 N. C., 892; *Whitley v. R. R., ibid.,* 987; *Chicago N. & S. Ry. Co. v. Lowell,* 151 U. S., 209.

It is well settled that if there is more than a mere scintilla of evidence tending to prove the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence. *S. v. Shule,* 32 N. C., 153; *S. v. Allen,* 48 N. C., 257; *Wittkowski v. Wasson,* 71 N. C., 451; *Spruill v. Ins. Co.,* 120 N. C., 141; *Hardison v. R. R.,* 120 N. C., 492; *Bank v. School Comrs.,* 121 N. C., 107; *White v. R. R.,* 121 N. C., 484; *Collins v. Swanson, supra; Eller v. Church,* 121 N. C., 269; *Cable v. R. R., supra.*

Applying these principles, we find the following evidence, which we think is certainly more than a scintilla, and which should have been submitted to the jury as tending to prove the negligence of the defendant. No one saw the killing, nor does it appear how long (608) the deceased had been killed when found.

Thomas Griffin testified: "That between 12 and 1 o'clock he found some one dead on the railroad (proved to be deceased). He was lying across the track with one hand cut off on one side and one foot on the other. . . . Saw a train pass that night about two hours before I saw Cox. I was about 200 yards from it, I guess. The train was running backwards when I saw it; it made no stop. At the time when I saw the train it was on the Norfolk and Carolina Railroad; it was on the Y the last time; *heard no bell or whistle.* The moon was shining bright."

James Sills testified that: "Tom reported to Massey, the night operator, that he had found a dead body on the road. We went and examined and found it was Cox. He was lying catacornered across the railroad, one side of his face torn, his skull crushed, one of his hands cut off. His hat was lying on the right-hand side of the switch, and

his foot was lying crushed off, and one of his legs was broken. The roads run pretty near together up there. The switch goes from the Norfolk and Carolina to the Wilmington and Weldon. There is a public footpath there. It was the old county road. It goes right by my store from the main road across the W. and W. R. R. It goes out into the main road. Most people traveling afoot go on that road. Cox could not go out of town any way without crossing a railroad. This was the usual path to his house—the path he always walked. No obstructions nor anything from the railroad in the way of the path. A person could easily be seen that night on the railroad near the path from the depot. It was a moonlight night—a bright moonlight night.
(609) Heard no noise, signals, nor anything of that kind. Heard no bell or whistle.

P. E. Smith, admitted to be an expert engineer, testified: "It was two hundred and fifty feet from the depot to where he was found; this was about ten feet from the path. That there was no obstruction between depot and point opposite depot to this road and path. There is a small cut in road right opposite depot, but after that it is level all the way. Small tree between house and railroad, twenty-four feet from center of road to center of tree. House and tree would not interfere with view from train if any one was moving along the track by this switch. If I were looking out for a man I could see him one hundred yards ahead of me on a bright moonlight night. If a man was keeping a lookout, he could see a man on the track for one hundred yards." The witness was asked, "Would the manner in which this road was curved around prevent you from seeing him?" The witness answered, "There is no obstruction in the view, because the man is on a level; you can look across the track; you cannot look straight down, but you can look across."

On the redirect examination he stated that "if the train were moving at a speed of three or four miles an hour, it could have been stopped in *fifteen* feet; if eight miles an hour, in double that distance."

The plaintiff testified that: "The deceased was his brother, . . . and he got some gentlemen on Monday night and went out there, and took a hand off my farm, about the size of my brother, made him lie on the track, went to about even with course of warehouse and could see him while standing up; he lay down and I could see him. The night was moonlight and a little cloudy. . . . The path was the old
(610) road at one time before the town was laid off into streets, and had been used by *foot passengers ever since.*"

R. M. Quidly testified that: "He was in Hobgood that night; it was a clear moonlight night. I saw train about ten o'clock pass; *heard*

neither signal nor bell; I was about 100 yards from the track." There was also testimony tending to show the deceased had been drinking.

Taking this evidence in the light most favorable to the plaintiff, we find a train running backwards in a town at night, and neither sounding the whistle nor ringing the bell, although passing over a track on the old country road which has ever since been habitually used as a footpath. It is admitted that the deceased was killed by the train, which would be the natural inference from the evidence. This is certainly more than a scintilla of evidence tending to prove the negligence of the defendant, which should have been submitted to the jury. There was error in directing a nonsuit.

Had the question not been again presented by counsel, it would almost seem needless to repeat what we have so often said, that the burden of proving negligence rests upon the plaintiff, while the *onus* of showing contributory negligence rests upon the defendant. In both cases this must be shown by a greater weight of the evidence, and of this relative weight the jury alone can determine. A negative presumption necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. Each issue bears its own burden, and it rarely happens that the burden of all the issues rests upon the same party. In cases of negligence like the present, it changes with each successive step, it being necessary for the plaintiff to prove the negligence of the defendant, the defendant the contributory negligence of the plaintiff, and again for the plaintiff to show the last clear chance of the defendant if that issue be- (611) comes material.

Each of these issues depend upon the one preceding. The plaintiff must first prove that he was injured by the negligence of the defendant. If he fails to prove it that is an end of the case, and the defendant is not then required to prove contributory negligence. Properly speaking, there can be no contributory negligence unless there is negligence on the part of the defendant. 7 Am. & Eng. Enc., 373 (2 ed.). This distinction is important as affecting the burden of proof and the consequent direction of a verdict. If the negligence by which the plaintiff is injured is entirely his own, as in *Mesic's case,* where instead of the train running into the horse, the horse ran into the train, then there is no evidence to go to the jury on the first issue, and the question of contributory negligence becomes immaterial. Where there is evidence tending to prove negligence on the part of both parties, the case must always be submitted to the jury, and it makes no difference if this evidence appears in the testimony of the plaintiff. The court may say to the jury that there is no evidence tending to prove a fact, but it can never say that a fact is proved. Under exceptional circumstances, not now before us, it

may say that if the jury believe the evidence they will answer the issue "Yes," for that is equivalent to charging the law upon a given state of facts, leaving entirely to the jury the credibility of the witnesses. Even then, if there is any conflict of testimony, the verdict is vitiated.

It is the settled rule of this Court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who (612) in all cases is considered to have the affirmative of the issue, whatever may be its form. Though this rule was discussed and reaffirmed in *Spruill v. Ins. Co.*, 120 N. C., 141, it did not have its origin in that case, but in *Wittkowski v. Wasson*, 71 N. C., 451, where the doctrine was distinctly laid down in the following words quoted from the opinion of *Welles, J.*, in the Court of Exchequer Chamber: "There is in every case a preliminary question which is one of law, viz.: whether there is any evidence on which the jury could properly find the question *for* the party on whom the *burden of proof* lies. If there is not, the judge ought to withdraw the question from the jury and direct a *nonsuit* if the *onus* is on the *plaintiff*, or direct a *verdict* for the plaintiff if the *onus* is on the *defendant*." In other words, the verdict must in either event be directed *against* the party on whom lies the *onus*, and by necessary implication can never be directed in his favor.

In *Spruill v. Ins. Co., supra*, on page 147, this Court has said: "That where there is no evidence, or a mere scintilla of evidence (or the evidence is not sufficient in a just and reasonable view of it to warrant an inference of any fact in issue), the court should not leave the issue to be passed upon by the jury, but should direct a verdict *against the party upon whom the burden of proof rests.*" The words in parentheses have been cited as authorizing the court below to pass upon the entire evidence, and direct a general verdict in favor of the defendant upon the contributory negligence of the plaintiff. That opinion will bear no such construction, as the burden of proving contributory negligence is always upon the defendant. Therefore, a direction in his favor, based in (613) any degree upon the contributory negligence of the plaintiff, would be a direction *in favor* of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. *Hardison v. R. R.*, 120 N. C., 492; *Collins v. Swanson, supra; Bank v. School Comrs.*, 121 N. C., 107; *Eller v. Church, supra; Caldwell v. Wilson*, 121 N. C., 425; *White v. R. R., ibid.*, 484; *Everett v. Receivers, ibid.*, 519; *Cable v. R. R.*, 122 N. C., 892; *Johnson v. R. R., ibid.*, 955; *Whitley v. R. R., ibid.*, 987.

If there had been any reasonable doubt that the burden of proving contributory negligence rested upon the defendant, it has been set at rest by chapter 33 of the Laws 1887. The same rule prevails in the

Federal Courts. *Washington, etc., R. R. Co. v. Gladmon,* 82 U. S., 401; *Inland, etc., Co. v. Talson,* 139 U. S., 551.

It therefore follows that on a motion for a nonsuit the court can consider only the evidence relating to the negligence of the defendant, and if there is more than a scintilla tending to prove such negligence, the motion must be denied and the case submitted to the jury.

We have discussed this question fully because the learned counsel for the defendant contended that the judgment of nonsuit should be affirmed on the ground of the contributory negligence of the plaintiff. To this doctrine, so ably presented and elaborately discussed, we are permitted to assent neither by the current of our decisions nor the policy of our laws.

The judgment of nonsuit is reversed, and a new trial ordered.

New trial.

FAIRCLOTH, C. J., dissents.

Cited: Bolden v. R. R., post, 617; *Dunn v. R. R.,* 124 N. C., 255; *Cogdell v. R. R., ibid.,* 304; *Bank v. Nimocks, ibid.,* 360; *Bank v. Wilson, ibid.,* 567; *Gates v. Max,* 125 N. C., 140, 144; *Powell v. R. R., ibid.,* 372; *Cowles v. McNeill, ibid.,* 388; *Brendle v. R. R., ibid.,* 479; *Brinkley v. R. R.,* 126 N. C., 91; *Lloyd v. Hanes, ibid.,* 363; *Neal v. R. R., ibid.,* 651; *Meekins v. R. R.,* 127 N. C., 36; *Whitesides v. R. R.,* 128 N. C., 235; *Mfg. Co. v. R. R., ibid.,* 285; *Moore v. R. R., ibid.,* 457; *McCall v. R. R.,* 129 N. C., 300; *Hord v. R. R., ibid.,* 307; *Thomas v. R. R., ibid.,* 394; *Coley v. R. R., ibid.,* 413; *Smith v. R. R.,* 130 N. C., 310; *Cogdell v. R. R., ibid.,* 328; *Curtis v. R. R., ibid.,* 438; *Harper v. Anderson, ibid.,* 540; *House v. R. R.,* 131 N. C., 105; *Dorsett v. Mfg. Co.,* 131 N. C., 259; *Clegg v. R. R.,* 132 N. C., 295; *Gordon v. R. R., ibid.,* 569; *Lewis v. Steamship Co., ibid.,* 920; *Bessent v. R. R., ibid.,* 945; *Trust Co. v. Benbow,* 135 N. C., 305; *Craft v. R. R.,* 136 N. C., 50; *Kearns v. R. R.,* 139 N. C., 481.

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(614)

S. M. BOLDEN v. SOUTHERN RAILWAY COMPANY.

(Decided 23 December, 1898.)

Negligence—Contributory Negligence—Nonsuit.

1. Where there is evidence, more than a mere scintilla, tending to prove negligence—it must be submitted to a jury to be passed on.

2. Contributory negligence is an affirmative defense set up to excuse the negligence of the defendant, and is not to be considered upon a motion to nonsuit. ***Cox v. R. R., ante,* 604.**

BOLDEN *v.* R. R.

CIVIL ACTION for damages for personal injury received through the alleged negligence of the defendant, tried before *Robinson, J.*, at February Term, 1898, of the Superior Court of GUILFORD County.

The plaintiff was a bridge watchman in the service of the defendant company, and was seriously injured by a fall through the bridge while spacing up a crosstie, apparently sound, but was defective, and broke in two with his weight and the blows from a hammer he was using for the purpose.

The plaintiff was the only witness who testified—his evidence is substantially stated in the opinion.

At the close of plaintiff's evidence, the defendant moved for judgment of dismissal. Whereupon his Honor intimated that he would charge the jury that upon the plaintiff's own evidence he was not entitled to recover—and the plaintiff, in deference to this intimation of his Honor, submitted to a judgment of nonsuit, and appealed to the Supreme Court.

Schenck & Schenck and C. M. Stedman for plaintiff (appellant).
F. H. Busbee for defendant.

(615) DOUGLAS, J., delivers the opinion.

FAIRCLOTH, C. J., dissents.

DOUGLAS, J. This is an action for damages for personal injuries received by the plaintiff through the alleged negligence of the defendant.

The only evidence in this case was that of the plaintiff, who testified substantially as follows:

That he was a watchman for the Southern Railway Company at a bridge over Reedy Fork, in August or December, 1895, that one Reister was the bridge builder of the defendant, under the "supervision" of the bridge department of the Southern Railway Company; that Bolden was under the control of the said Reister as a watchman. That Reister began to repair the bridge; that before Reister began on the bridge that there were two planks nailed down between the rails as a footway over which he could easily walk, and that there was a guard-rail of wood outside of the iron rails on either side, which had daps or square notches in them that fitted down on the crossties and were confined to the crossties and kept them from slipping. That Reister took up this footway plank and the guard rails which made it much more difficult if not dangerous for plaintiff to walk over the bridge in the discharge of his duty. That the plaintiff then remonstrated with Reister about the matter, but Reister promised him (Bolden) that he would fix the bridge in a day or two, and ordered the plaintiff to continue his work. That under the *orders of the said Reister, and relying on his promise to fix the*

bridge, and in *order to keep his job,* he continued in the discharge of his duty, which consisted in going over the bridge, after every train crossed, to see that it was all right; and if the crossties had been moved out of place, to space them up again in proper shape; that the company furnished him a large hammer for this purpose, called (616) a spiking hammer; that about the fourth day after Reister promised him, he was obeying orders, and at the farther end of the bridge he found a crosstie out of place, about daylight. He undertook to knock it back into place as usual, when it broke at the end, where it was resting upon a piece of timber, and it gave way with him, causing the said Bolden to fall some distance, onto the trestle of the bridge, by which he was severely and painfully injured. Bolden knew nothing of the defect in this crosstie. It looked "perfectly sound" outside; it was not his duty to inspect the crosstie inside, but only to observe it on the outside as he passed over it; that it was the inspector's duty to examine the crosstie inside. Witness did not suppose that there was "immediate danger" in discharging the duty, when he obeyed the order of Reister to continue in the usual discharge of his duty. That Reister, the bridge builder, knew of the defective condition of the bridge, and that it needed repairs. That one Welker was the bridge inspector of the defendant company.

Upon the foregoing evidence his Honor intimated the opinion that the plaintiff was not entitled to recover. The plaintiff took a nonsuit.

This presents to us the single question whether, taking the evidence of the plaintiff to be true and construing it in the light most favorable to him, there was anything more than a mere scintilla tending to prove negligence on the part of the defendant. If there was such evidence, then the case should have been submitted to the jury under proper instructions. We think there was such evidence strongly *tending* to prove negligence on the part of the defendant; but whether it was sufficient to prove such negligence is a question for the jury, and (617) neither for us nor for the court below.

This Court has said, in *Chesson v. Lumber Co.,* 118 N. C., 59, 67, that: "The plaintiff was injured while loading trucks with lumber, because the stringers that supported the floor of the platform, which he was required to use, were rotten, when an ordinary examination would (as a witness testified) have disclosed its defect. The defendant was therefore negligent in that aspect of the evidence if it failed to have such inspection made, or if it failed to repair the stringers within a reasonable time after discovering their condition. The two carpenters employed to inspect the platform and make needed repairs were, in so far as that duty was concerned, not fellow-servants of the plaintiff, but

representatives of the company," citing *R. R. v. Herbert,* 116 U. S., 642. To this may be added *Hough v. R. R.,* 100 U. S., 225.

The counsel for the defendant contended that the judgment of nonsuit should be sustained on account of the evidence of contributory negligence on the part of the plaintiff. This question has been so fully discussed in *Cox v. R. R.,* at this term, that it is useless to repeat what we have there said. By force of statute as well as a settled rule of decision, the plea of contributory negligence is an affirmative defense, in which the burden both of allegation and proof rests upon the defendant. It is true that contributory negligence may be shown by the evidence of the plaintiff, but whether the *weight* of that evidence is sufficient to overcome the presumption in his favor arising from the burden of proof is a question for the jury.

The action of the plaintiff in going upon the bridge was argued as contributory negligence, but if it be viewed as an implied assump-
(618) tion of risk, the same rule will apply. Both doctrines are alike as being in the nature of a plea of confession and avoidance, inasmuch as they are affirmative defenses set up to excuse the negligence of the defendant. As such, the burden of proof is in both cases upon the defendant, and an issue can be found in its favor only by a jury. The doctrine is fully discussed in an elaborate note in 40 L. R. A., 781, and also in American and Eng. Enc. But it is useless for us to consider it at greater length, as the only question before us is, not what instructions should have been given to the jury, but whether the case should have been submitted to the jury.

For error in the intimation of his Honor, the judgment of nonsuit must be set aside and a new trial ordered.

New trial.

FAIRCLOTH, C. J., dissents.

Cited: Cogdell v. R. R., 124 N. C., 304; *Marcom v. R. R.,* 126 N. C., 204; *Neal v. R. R., ibid.,* 652; *Thomas v. R. R.,* 129 N. C., 394; *Dorsett v. Mfg. Co.,* 131 N. C., 261; *Orr v. Tel. Co.,* 132 N. C., 692; *Bessent v. R. R., ibid.,* 946.

R. L. WRIGHT v. W. N. KINNEY, COUNTY TREASURER OF DAVIDSON COUNTY; ED. L. GREEN ET AL.

(Decided 23 December, 1898.)

County Treasurer—County Warrants—Misjoinder of Parties—Jurisdiction.

1. The holder of a valid county warrant, who is refused payment, has two remedies against the county treasurer—either to sue him on his bond, or to apply for a *mandamus*—of neither of which has a justice of the peace jurisdiction.

2. Such warrants, or orders, are not negotiable in the sense of the Law Merchant; while transferable, so as to authorize the holder to demand payment, with or without action in his own name, yet he takes them subject to all legal and equitable defenses which existed as to them in the hands of the payee. They are mere *prima facie*, and not conclusive evidence of the validity of allowed claims against the county.

3. The unauthorized indorsement of "approved" signed by the chairman of the county commissioners of a county order invalid upon its face, will not render him personally liable, in the absence of fraud and misrepresentation.

4. Exceptions, on the ground of misjoinder of causes of action or misjoinder of parties, must be taken in the court below, or they cannot be considered here. Rule 27 of this Court.

5. The county board of education has nothing to do with orders on the treasurer issued by the districts. Acts 1897, ch. 109.

CIVIL ACTION, begun in the justice's court, and tried on appeal (619) before *Allen, J.*, at Fall Term, 1898, of the Superior Court of DAVIDSON County.

The plaintiff was the holder of an order for $22.50 issued by Amos Smith and Joe Miller, who signed as committee of District No. 32, colored, Davidson County, dated 28 May, 1897, in favor of W. W. Tutwiler, for purchase of school charts. Tutwiler sold the order to plaintiff and endorsed it. Before the order was transferred to plaintiff, Ed. L. Green, chairman of board of county commissioners, placed his signature thereon under these words: "Approved and countersigned."

The board of county commissioners never approved the order, and never authorized Green to sign the same.

On 3 January, 1898, board of education made an order instructing treasurer to pay this order and a number of orders like it.

The order was presented to the county treasurer for payment, but he refused to pay it; and this action was brought against Kinney, the county treasurer, and Green, the chairman of the county commissioners, and taken by appeal to the Superior Court.

His Honor, upon motion of defendants' counsel, dismissed the case as upon judgment of nonsuit, under chapter 109, acts 1897, and
(620) plaintiff appealed.

Walser & Walser and R. L. Wright for plaintiff (appellant).
E. E. Raper for defendants.

CLARK, J. This action was begun by a justice of the peace against Kinney, as treasurer of Davidson County, and Ed. L. Green, upon an order for $22.50, dated 28 May, 1897, and signed by Amos Smith and Joe Miller, as committee of District No. 23 (colored) of that county, reciting therein that it was for the purchase of school charts. It was payable to W. W. Tutwiler, or bearer, who sold it to plaintiff and endorsed it. Before the order was endorsed to plaintiff the following was written thereon: "Approved and countersigned. Ed. L. Green, chairman of board of county commissioners," but the board of county commissioners never approved the order, nor did it authorize Green to do so.

On 3 January, 1898, the board of education ordered the county treasurer to pay out of the funds apportioned to the several districts the orders held by the Lexington and Salisbury banks, of which number this check was one, with a proviso that no district pay for more than one chart. This order was presented to defendant Kinney, as treasurer, and he refused to pay it or recognize it in any way as valid.

No exception on the ground of misjoinder of causes of action or misjoinder of parties was made below, and of course cannot be considered here. Rule 27 of this Court. As to the defendant Kinney, treasurer, the plaintiff had two remedies, either to sue him on his bond or to apply for a *mandamus,* and of neither of these actions did the justice of
(621) the peace have jurisdiction. *Robinson v. Howard,* 84 N. C., 151; *Taylor v. School Committee,* 50 N. C., 98.

Orders or warrants issued by a municipal corporation are not negotiable, and carry with them none of the privileges of negotiable paper except to pass by delivery upon endorsement. Daniel Neg. Inst., sec. 427; 1 Dillon Mun. Corp., sec. 487. In *Wall v. Monroe,* 103 U. S., 74, *Field, J.,* says: "The warrants, being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain in his own name an action upon them. But they are not negotiable instruments in the sense of the Law Merchant, so that where held by a *bona fide* purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed as to them in the hands of such payee. There has been a great

number of decisions in the courts of the several states upon instruments of this kind, and there is little diversity of opinion respecting their character. All the courts agree that the instruments are mere *prima facie,* and not conclusive, evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the legality of the claims." This has been followed in *Ouashita v. Wolcott,* 103 U. S., 559, and *Merritt v. Monticello,* 138 U. S., 673, and cases therein cited. So that if this action had been brought in the proper form and against the proper parties, it would be open to set up any defense, as fraud, misrepresentation, and the like, which would have been good against the original holder, and if the claim was improperly allowed, the order may be canceled. *Abernathy v. Phifer,* 84 N. C., 711. *Indiana v. Glover,* 155 U. S., 513, is a (622) very recent decision (1894) of the Supreme Court of the United States affirming the invalidity of a township warrant for school supplies, even in the hands of subsequent holders, when the "supplies are not suitable and reasonably necessary."

The plaintiff further seeks to hold Ed. L. Green liable individually because he alleges he bought the paper relying on its validity as being guaranteed by Green's endorsement, as chairman, of the claim, "approved," which endorsement, it has since appeared, he had no authority to make, not having been authorized by the board of commissioners. There are circumstances under which an officer would make himself personally liable to one misled by his unauthorized action (Throop on Pub. Officers, sec. 774; Mecham on Officers, secs. 811, 812, 816), but whatever force there would have been in this proposition, if the order had been valid by the authorized attachment of the approval of Green as chairman, we need not consider, because by section 15, chapter 108, Laws 1897, ratified 6 March, 1897 (and therefore in force at the date of this order, given 28 May, 1897), all such orders are required to be "signed first by at least three members of the committees and then by the county supervisor, who shall place his seal upon it," and without this, no order "shall be a valid voucher in the hands of the county treasurer." Therefore, on its face the order was invalid, and the approval of "Green, chairman," could not have made it good. In the absence of evidence of fraud and misrepresentation, Green cannot therefore be held liable for his unauthorized signature, which could not have misled the plaintiff to his hurt. The order would have been invalid even if the signature had been duly authorized by the county commissioners, and (623) the plaintiff is no worse off because it was unauthorized.

The action of the county board of education, 3 January, 1898, was a nullity, as that board had nothing to do with orders on the treasurer issued by the districts. Acts 1897, ch. 108, sec. 15.

Upon the facts found by the court by consent of parties, the plaintiff could not recover, and the court properly so held, but we see no ground for the nonsuit ordered under chapter 109, Laws 1897. The judgment against the plaintiff is

Affirmed.

Cited: McPeeters v. Blankenship, post, 655; *Bank v. Warlick,* 125 N. C., 594.

CLARA FEATHERSTON v. SAMANTHA WILSON, G. W. NEELY ET AL.

(Decided 23 December, 1898.)

Motion to Nonsuit Under Act 1897, Chapter 109—Demurrer to Evidence—Practice.

1. A motion to nonsuit under Act 1897, ch. 109, is a demurrer to the evidence of plaintiff; should it be overruled the defendant may except, and proceed with the trial, preserving his right to have his exception passed on by appeal.

2. Where such motion is made, it is discretionary with the judge, before passing on it, to allow the plaintiff to introduce additional evidence.

CIVIL ACTION, tried before *Hoke, J.,* and a jury, at Spring Term, 1898, of the Superior Court of BUNCOMBE County.

This action involved the construction of a deed of trust executed by J. W. Wilson to a trustee for the benefit of his wife, the defendant, (624) now a widow, and his two daughters, Delia, since dead, and the plaintiff, who succeeded to her sister's interest. The trustee, G. W. Neely, is a nonresident and paid no attention to the management of the property, which has been controlled by the defendant. The plaintiff claimed that under that deed she, Delia, and the defendant were tenants in common during the life of the defendant, with remainder to herself—she having now two interests, one in her own right and the other by inheritance from her sister.

The defendant claimed that under the deed of trust she was entitled to the whole interest in the property during her life, with remainder to the plaintiff in fee.

The Supreme Court held, on appeal from a former trial, that under the trust deed of J. W. Wilson, the wife and children were tenants in common—the plaintiff as surviving child owning two-thirds and the wife one-third of the trust estate, during the life of the wife, now widow of said Wilson, and granted a new trial. 119 N. C., 588.

On the present trial the plaintiff submitted to the court the deed of trust of J. W. Wilson and others to G. W. Neely, dated 16 April, 1861, and the opinion of the Supreme Court construing it, and rested.

Whereupon defendant moved to nonsuit the plaintiff under act of 1897, ch. 109.

His Honor held that the evidence offered was not sufficient to justify a verdict on the issues for plaintiff, and plaintiff moved for permission to offer other and further evidence, which the court allowed.

Defendant excepted. (625)

The plaintiff then introduced further evidence, and rested.

The defendant renewed her motion to nonsuit the plaintiff, which his Honor overruled. The defendant again excepted, and proceeded to introduce evidence.

There was a verdict and judgment for the plaintiff. Defendant appealed.

Merrimon & Merrimon for appellants.
A. S. Barnard for appellee.

FAIRCLOTH, C. J. This is the fifth time this case has come before this Court. See 118 N. C., 840; 119 N. C., 588; 120 N. C., 446; 122 N. C., 747, where the facts and history of the whole matter will be found. It was held by this Court (119 N. C., 588) that under the trust deed of John Wilson, husband of defendant and father of plaintiff, the wife and children are tenants in common in the trust estate. The plaintiff is the only surviving child and owns two-thirds, and the defendant one-third of said estate. At the last trial, now here for review, the plaintiff, demanding her two-thirds of the net profits, rents, etc., in the hands of the trustee, introduced her evidence and rested her case. The defendant moved to nonsuit the plaintiff under the act of 1897, ch. 109. The plaintiff asked permission to introduce other and further evidence, which was allowed by the court, and the defendant excepted. Plaintiff introduced further evidence, and rested again. Defendant renewed the motion for nonsuit under the act of 1897, which was refused, and the defendant again excepted.

Defendant then introduced evidence, and the case was tried by the court and jury. The issues were found in favor of the plaintiff, and judgment was entered declaring that the plaintiff was entitled (626) to two-thirds of the rents and profits in fee, and defendant to one-third during her life, and remainder to the plaintiff. Appeal by defendant. This recital presents all the facts necessary to the consideration of the real question before us.

The question is, When the defendant first moved for nonsuit, was it the imperative duty of the court to pass upon the legal question presented by the motion under said act of Assembly, or had he the discretionary power to hear further evidence from the plaintiff against defendant's objection? The Court has held in *Purnell v. R. R.*, 122 N. C., 832, and other cases, that the motion for nonsuit under the act of 1897, ch. 109, is a demurrer to the evidence, and the defendant by noting his exception preserves his right to have the motion passed on on appeal, although he proceeds to trial with his evidence, contrary to the former practice. Said act of 1897 seems to give the defendant two chances (1) with the court, (2) with the jury, but it gives no direction on the practice or procedure under its provisions. We have discovered nothing in The Code, or in any other statute, changing the long established rules of practice in our courts, and unless some statute is found inconsistent with the former practice and procedure, that system is still the rule. *Ins. Co. v. Davis,* 74 N. C., 78.

Whilst The Code dispenses with the formal mode of commencing actions and of pleading, it does not dispense with the rules for conducting trials heretofore established, as essential to the administration of law. By a demurrer to the evidence, the case is put upon the sufficiency of the evidence which means the *exitus* issue, or end of the case, (627) and strictly speaking, no issue of law is raised until the opposing party joins therein. Co. Litt., 71 b. In the case we have, there was no joinder in demurrer, but the plaintiff moved for and obtained leave to give further evidence. We do not care, however, to put the case on this strict technical point of pleading.

Under the former rules of practice and procedure, had the court the power to receive other evidence on motion of the plaintiff after the defendant's motion for nonsuit as by demurrer, under the act of 1897, ch. 109? We find by former decisions that he had the power in the exercise of his discretion. In *Kelly v. Goodbreed's Executors,* 4 N. C., 28 (468), it is held: "After the testimony in a cause is closed, the introduction of other witnesses is a matter within the sound discretion of the Court." *Parrish v. Fite,* 6 N. C., 258, says: "The court may in its discretion permit new witnesses to be introduced and examined before the jury after the argument of counsel is closed," but it ought not to be done except for good reasons shown to the court. In *Barton v. Morphis,* 15 N. C., 240, the ruling is that the refusal of the court to permit a witness to be reëxamined is no ground for a new trial, it being discretionary with the court to permit it or not. *S. v. Rash,* 34 N. C., 382: "In criminal as well as civil cases all the testimony on both sides should be introduced before the argument commences. After that, the parties

have no *right* to introduce additional testimony, though the court in its discretion may permit it to be done." This rule will be found in later cases.

The argument made is that if the above rule of practice prevails, it destroys the act of 1897, ch. 109. Not necessarily so, for if the judge refuses to hear other evidence, the defendant puts to the (628) test the strength of the plaintiff's case on which he rested.

The charge of the court is very full, and seems to cover the material parts of the defendant's prayers for special instructions. The hardship of the result to the defendant was referred to in the argument, but, whatever we might think of that, we are not authorized to express any opinion about it.

Affirmed.

ALBERT ERWIN AND WIFE, CAROLINE, v. L. A. BAILEY AND WIFE, ELSIE, ET AL.

(Decided 23 December, 1898.)

Depositions—Legitimacy—Marriage of Slaves.

1. Where the notice to take depositions is wrongly entitled, the objection is waived by attendance, and cross-examination of the witnesses.
2. Upon the question of the legitimacy of a child, evidence of the husband's non-access at the time the child was begotten and of his frequent quarrels with his wife in reference to the child's illegitimacy is admissible. General reputation of illegitimacy is inadmissible.
3. Former slaves continuing their relations of man and wife until the death of one of the parties, were made man and wife under our statute of 1866. Whether they ever went before the clerk and had a record made of this relation or not, children born during such cohabitation are presumed to be legitimate and entitled to the benefit of the laws of inheritance. The presumption may be rebutted.

CIVIL ACTION for one-third interest in land, tried before *Hoke, J.*, at March Term, 1898, of the Superior Court of BUNCOMBE County.

STATEMENT OF THE CASE.

The land sued for was admitted to have belonged to Cæsar Swinton, colored, who died before suit was brought. Caroline Erwin, the *feme* plaintiff, claimed one-third of the land as heir at law of Cæsar Swinton, and defendants, Hester Bailey and one other, two chil- (629) dren and heirs at law of Cæsar Swinton, answered, claiming the entire interest in the land—alleging that Caroline was not the child of

Swinton. Plaintiff offered depositions of Susan Cochran and Henry Vanderhost—these depositions had been opened by consent under an agreement that any objection thereto might be made and passed upon at the trial. Defendant objected to reading such depositions on the ground that the notices were entitled "Alfred Erwin and Wife v. Ella Bailey et al.," whereas the true title of the cause was "Erwin and Wife v. L. A. Bailey and Hester Bailey et al." It appeared that defendant had been duly served with a notice entitled "Alfred Erwin and Wife v. Ella Bailey et al.," giving correct time and place where the depositions were taken, and defendant had filed cross interrogatories at the taking of the same, which were answered, and that no objection to taking them had been made at the time they were taken. The court overruled the objection and allowed the plaintiff to amend the notice, so as to properly entitle the notice, and allowed the depositions to be read. Defendant excepted. These depositions with other evidence of plaintiff tended to show that Swinton and Catherine Swinton, mother of plaintiff and of defendants, were slaves belonging to Frank Johnston; that during the war and before Cæsar and Catherine lived together as man and wife after the manner of slaves, and while they so lived together Catherine gave birth to Hester Bailey and Caroline Erwin and another child, who is also a defendant; that Hester and Caroline were born during slavery; and it did not appear when the last child was born, but at some period while Cæsar and Catherine lived together as man and wife; that
(630) they were thus living together at the surrender, and thereafter moved to North Carolina, where they continued to so live till the death of Catherine in 1868, or later; that they never went before the clerk or justice and made acknowledgment of their marriage, as required by the act of 1866, ch. 40, sec. 5; that Cæsar Swinton bought the land now sued for; that he and Catherine are both dead, and the parties now claim the land as his children and heirs at law.

To prove that plaintiff Caroline was not the child of Cæsar, the defendant introduced Mrs. Lelia Coffin, who testified that Cæsar and Catherine were slaves belonging to her father, Frank Johnston, and that Catherine was her mother's maid, who came with the family every summer to Flat Rock, N. C., and that Cæsar remained on the rice plantation in South Carolina; that the family came to North Carolina about the first of May and went back to South Carolina about the latter part of November, and Carolina was born about a month after the family had come to Flat Rock, some time during the war. The witness was further questioned about that date, and stated that the family were in the habit of coming up the first of May and went back the last of November, and that Caroline was born within a month after the family moved up to Flat Rock for the summer.

The defendants offered to show by this witness that it was the general reputation in her father's family that Caroline was not the child of Cæsar Swinton, but of her father's coachman. Plaintiff's objected; objection sustained, and defendant excepted. Defendant offered to show by this witness and others that both Cæsar and Catherine were heard to say, while they lived together as aforesaid, that Caroline was not the child of Cæsar. Plaintiff objected; objection sustained, and defendant excepted. Defendant further offered to show that it was the general reputation in Cæsar's family that Caroline was not the child (631) of Cæsar. Plaintiff objected; objection sustained, and defendant excepted. Defendant further offered to prove that while Cæsar and Catherine were thus living together they had constant quarrels about Caroline not being Cæsar's child. Plaintiff objected; objection sustained, and defendant excepted. Defendant offered evidence to show that Cæsar became dissatisfied with his wife's being in the mountains and asked his owner, Frank Johnston, to let him take another wife, and he gave his permission, and Cæsar did take another woman and lived with her as his wife till Catherine went back, and Catherine took on so about it that Cæsar gave up the new wife and renewed his relations with Catherine, which continued till the surrender and afterwards, as above set forth. This interruption of Cæsar's relation with Catherine was not during any period when Caroline was begotten or born; nor were any declarations of Cæsar or Catherine, tending to make Caroline illegitimate, shown to have been made while their relations were so interrupted. Defendant further offered Dr. Glenn as a witness, who testified that the ordinary and natural period of pregnancy was nine months; that children were born at 7 months not infrequently, and lived and became vigorous, though a child born at that period was ordinarily not fully developed at first—the finger-nails were not perfect or some other imperfection; that a child could be born and live at six months, but could not do so without the aid of an incubator, and witness did not think it possible for a child born at six months to live without such incubator. He did not state between six and seven months, except as shown in the above evidence.

The foregoing was the evidence in the case. The court was of (632) opinion, and so instructed the jury, that if Caroline was born during the period when Cæsar and Catherine, the mother, were living together as man and wife and were so living together at the surrender, and moved to North Carolina and lived as man and wife after the surrender till the death of Catherine, the statute declared them man and wife from the beginning of their relations as such, and that in that view there was no competent or sufficient evidence offered to show that Caroline was not Cæsar's child, and if the jury believed the evidence, the

issue should be answered for the plaintiff as to one-third of the land, as shown in the verdict. Defendant excepted, and moved for a new trial for error in the rulings of the court: first on the depositions, and second on questions of evidence, and third on the charge as given. The motion was overruled. Judgment for plaintiff for one-third of the land. Defendant appealed.

George A. Shuford for appellant.
A. S. Barnard and Moore & Moore, contra.

FURCHES, J. The land in controversy is admitted to have belonged to Cæsar Swinton at the time of his death, and that it descended to his heirs at law. The defendant Bailey is admitted to be an heir of Cæsar. It is also admitted that the other defendants, children of Regina, another daughter of Cæsar, who married Jerry Richardson, are heirs of Cæsar; but they deny that the plaintiff Caroline Erwin is a child and heir of Cæsar.

It appeared from the evidence that Cæsar and Catherine were slaves, the property of Frank Johnston, before their emancipation in (633) 1865; that said Johnston was a citizen of South Carolina and an owner of a summer residence at Flat Rock, Henderson County, N. C.; that Cæsar and Catherine lived together as man and wife after the manner of slaves, and that the plaintiff Caroline Erwin was born during the slavery of Cæsar and Catherine and while they lived together as man and wife; that Cæsar and Catherine moved to North Carolina after they obtained their freedom, and continued to live together as man and wife until the death of Cæsar, about 1868, and that Catherine has also died since the death of Cæsar.

The plaintiff during the trial offered two depositions in evidence for the purpose of sustaining her contention. The depositions were objected to by defendants upon the ground that the notices, upon which the depositions were taken, did not state the title of the case correctly. But it appeared that defendants were present at the taking of the depositions, and cross-examined the witnesses. The court overruled these exceptions and defendants excepted.

The exceptions cannot be sustained. If there was such error as is alleged by defendants, it was waived by their cross-examination. They suffered no injury by this error, if it existed, and cannot be heard now to complain.

The defendants contended that Cæsar was not the father of the plaintiff Caroline Erwin, and to sustain this contention offered evidence tending to show that Catherine, her mother, was the maid of Mrs. Johnston, and came with her to Flat Rock about the first of May, and remained

until about the last of November, while Cæsar was left on the rice plantation in South Carolina; and that from the time of the birth of Caroline she must have been begotten during the time Catherine was at Flat Rock, and that she was born about a month after she came (634) to Flat Rock.

It was also in evidence on the part of defendants that Cæsar complained that Catherine stayed too much of her time in the mountains of North Carolina and asked his master to allow him to take another wife; that the master granted this permission, and he took another wife, but when Catherine came back to South Carolina, Cæsar left his new wife and continued to live with Catherine as he had formerly done; and they continued to live together as man and wife until Cæsar's death. But it appeared that plaintiff was not begotten during the time Cæsar was living with the other woman as his wife. This evidence was objected to and excluded, and defendants excepted.

The defendants proposed to prove that there was a general reputation that plaintiff was not the child of Cæsar. This evidence was objected to and ruled out, and defendants excepted.

We do not think there was any error in the court's sustaining plaintiff's objections, and in overruling the exceptions of defendants to this evidence. The case of *Woodward v. Blue,* 107 N. C., 407, comes nearer sustaining defendant's exceptions than any case called to our attention. And that case does not do so, as we think.

The defendants then offered to prove that Cæsar and Catherine had frequent quarrels about Caroline, in which Cæsar alleged that she was not his child. This evidence was objected to and excluded, and defendants excepted. It seems to us that this exception is sustained by *Woodward v. Blue, supra,* and this evidence should have been admitted.

Cæsar and Catherine having lived together as man and wife (635) while they were slaves, and having continued to live together in this relation until the death of Cæsar, about 1868, this made them man and wife under our statute of 1866, whether they ever went before the clerk and had a record made of this relation or not. *State v. Whitford,* 86 N. C., 636. And children born during such cohabitation are presumed to be legitimate, and entitled to the benefit of the law of inheritance. But this presumption of legitimacy may be rebutted, in the case of children of former slaves who sustained the relation of man and wife, just as it may be as to children born during the existence of other legal marriages. *Woodward v. Blue, supra,* and authorities there cited.

This being so, we are of the opinion that the evidence tending to show the non-access of Cæsar, at the time Caroline must have been begotten, and the evidence of the quarrels that Cæsar and Catherine had about the illegitimacy of Caroline (improperly excluded) makes a case that

should have gone to the jury. It was not a case where the court could instruct the jury "that if they believed the evidence they should find for the plaintiff."

For the error in ruling out the testimony, as pointed out above, and the error committed in charging the jury that if they believed the evidence they should find for the plaintiff, there must be a

New trial.

Cited: Mebane v. Capehart, 127 N. C., 50.

(636)

H. S. HARKINS, E. W. KEITH, ADMINISTRATOR C. T. A. OF E. T. CLEMMONS, AND A. A. FEATHERSTONE, v. CITY OF ASHEVILLE.

(Decided 23 December, 1898.)

Condemnation Proceedings—Notice.

1. Where proceedings are instituted, under Private Acts of 1883, ch. 111, by a city to condemn and appropriate for a public street a portion of a city lot, notice to the equitable owner in actual possession is sufficient where the legal title is in a non-resident trustee under deed of trust.

2. Where such proceedings are *infra vires* the condemnation and appropriation to the public use must stand, the question as to who is entitled to the damages awarded cannot be raised in an action for the land itself.

CIVIL ACTION to recover land, tried before *L. L. Greene* at August Term, 1898, of BUNCOMBE Superior Court.

The land in suit was a city lot in Asheville, N. E. corner of Depot Street and Patton Avenue, and had formerly belonged to G. W. Cannon, who on 13 June, 1890, conveyed it in trust to C. J. McCape to secure a debt to Mrs. E. H. Hendrickson, of Philadelphia. Before settling the trust, the trustee left the State leaving the trustor in possession.

On 11 August, 1891, the city authorities instituted proceedings under Private Acts 1883, ch. 111, to condemn and appropriate a portion of this lot for a public street, notice of which proceedings were served on G. W. Cannon, the trustor, then in possession. The damages reported were $483.33, but Cannon being dissatisfied with that amount appealed to the Superior Court, where by consent the matter of damages was referred to arbitration, one of the two arbitrators being H. S. Harkins, one of the plaintiffs. They awarded the sum of $750, which was paid to said J. W. Cannon.

Thereafter under proceedings instituted for that purpose, J. M. (637) Westall was substituted as trustee in place of McCape on 4 Janu-

ary, 1895, and proceeded to close the trust by a public sale, at which H. S. Harkins became the purchaser, at the price of $3,800, and received a deed on 14 March, 1895.

E. T. Clemmons and A. A. Featherstone having each advanced one-third of the purchase money, Harkins, the purchaser, executed to them a deed or declaration of trust of the same date for their respective interest in the purchase.

This suit was instituted 5 April, 1896.

At the conclusion of the evidence his Honor intimated that in no view of the evidence were the plaintiffs entitled to recover. In deference to such intimation the plaintiffs submitted to judgment of nonsuit and appealed.

Moore & Moore and Whitson & Keith for plaintiffs (appellants).
George A. Shuford for defendant.

MONTGOMERY, J. At the conclusion of the evidence his Honor said that in no view of the evidence were the plaintiffs entitled to a verdict and judgment, whereupon the plaintiffs submitted to a judgment of nonsuit and appealed.

On the chief matter in dispute, and the only one necessary for us to consider in our view of the case, there was no conflict in the evidence, and from it the following facts might have been agreed upon by the parties as upon a controversy submitted without action if they had so desired; that in August, 1891, G. W. Cannon was in the possession and actual occupation of a parcel of land described in the (638) pleadings; that Cannon being the owner of the property theretofore on 13 June, 1890, executed a deed of trust to C. J. McCape upon the lot to secure a debt due to Mrs. Hendrickson; that on 11 August, 1891, the proper authorities of the city of Asheville, in the manner required by the Private Laws of the General Assembly of 1883, ch. 111, condemned for the purposes of a public street a part of the lot described in the complaint; that the jury summoned to assess the damages made report, to which report, on account of insufficiency of damages, Cannon made exception; that by consent of defendant and Cannon, arbitrators were appointed to settle the matter and to fix the amount of damages; that the arbitrators met and agreed upon the damages, reported the same and the amount was paid by the city to Cannon; that notice of condemnation was given to Cannon and no notice given to McCape, trustee; that the land, since its condemnation in 1891, has been used as a public street; that under a sale of the property made by one Westall, a substituted trustee in place of McCape, in 1895, the plaintiff became the purchaser of the whole lot of land and received a deed therefor.

In the argument here the counsel for the plaintiffs questioned the power of the city authorities to condemn the piece of land for a public street, but upon a review of the trial it appears that the objection was not made in the court below. The case was tried on the theory that the land had been condemned and the street laid out by the city authorities under the powers of law and under the authority of the act of the General Assembly. The meeting of the jury for the assessment of dam-

(639) ages, the dissatisfaction of Cannon to the amount of the assessment, the submission of the dispute between Cannon and the city authorities on the question of the assessment, the award of the arbitrators and the payment of the amount mentioned in the award were all put in evidence by the defendants without objection on the part of the plaintiffs. The contention on the trial below was, not that the city authorities acted *ultra vires,* but that they failed to give notice of condemnation proceedings to the trustee McCape; that the notice to Cannon, the equitable owner, who was in possession at the time of condemnation, was not a sufficient notice and that the whole proceeding was void. It is a fundamental principle that the State in the exercise of the right of eminent domain cannot appropriate the property of an individual without making to the individual due compensation for the property taken. It cannot be, however, that in a case where a city has condemned a piece of land, the property of an individual, for the purpose of a public street that the proceeding can be held void, because of a failure to give notice to all persons who may have had an interest in the land. If the proceedings of condemnation be *infra vires* the condemnation and appropriation to the public use of the land must stand, and the only question that can be left for settlement would be the compensation to the owner of the property. *Land v. R. R.,* 107 N. C., 72; *Narron v. R. R.,* 122 N. C., 856. The question as to whom the compensation for the land condemned by the city should have been paid, whether to Cannon, the trustor, or to McCape, the trustee of Mrs. Hendrickson, is not raised in this case. There was no error in the ruling of his Honor, and the judgment is

Affirmed.

(640)

STATE EX REL N. A. STONESTREET ET AL. v. E. FROST, ADMINISTRATOR OF W. STONESTREET, THE BOARD OF COMMISSIONERS OF DAVIE COUNTY ET AL.

(Decided 23 December, 1898.)

Administrators—Filing Claims—Statute of Limitations—Counsel Fees—Commissions.

1. Counsel fees paid by an administrator obviously for the purpose of obstructing a settlement will not be allowed as a charge against the estate.
2. Commissions will not be allowed an administrator who fails to file proper inventory and returns and mixes the estate funds with his own, and he should be charged with interest.
3. The exhibition by the sheriff within one year of date of administration to the administrator, of an execution in his hands at the time of the death of the intestate, issued upon a judgment in favor of the county against the intestate, which the administrator admits, is correct and does not pay for want of assets—is a sufficient "*filing*" required by The Code, sec. 164, so as to render unnecessary an action to prevent the bar of statute of limitations.

PLAINTIFF'S APPEAL.

CIVIL ACTION instituted by the next of kin and distributees of the estate of W. Stonestreet against the official bond of E. Frost, his administrator, heard before *McIver, J.*, at Spring Term, 1898, of DAVIE Superior Court upon exceptions to report of referee.

By leave of the court the county of Davie was allowed to interplead in this action in order to assert an unpaid claim, due by judgment recovered against the intestate in his lifetime.

The referee reported a balance due from Frost, administrator, of $544.59. In arriving at this amount, the referee excluded a charge of $100 counsel fees for services in this action, on the ground that the administrator had had the estate unsettled in his hands for seventeen years; had paid $40 in counsel fees at the start; had done nothing since, and was now resisting a settlement.

The administrator excepted to this action of the referee, and (641) the exception was sustained by his Honor, who allowed the charge, to which ruling the plaintiffs excepted.

In regard to the debt set up in the interplea by the county of Davie against the estate of the intestate the referee found these facts:

The intestate, W. Stonestreet, died 15 February, 1877, and the defendant E. Frost was appointed administrator 5 March, 1877. This action was commenced 30 August, 1894.

That at Fall Term, 1873, of Davie Superior Court, judgment was rendered in favor of M. Fulford, county treasurer, against said W.

Stonestreet and others for the sum of $1,642.15, of which sum $1,138.85 was principal money, and no part thereof has ever been paid.

That under an execution upon said judgment the homestead of W. Stonestreet was allotted to him prior to his death.

That after his death and appointment of E. Frost as his administrator, an execution issued on said judgment against said W. Stonestreet prior to his death, was presented to the said administrator by the sheriff of the county and payment demanded of him, within one year from date of his appointment as administrator, who did not dispute said debt nor the liability of the estate of his intestate to pay the same, but declined to pay for lack of assets in his hands at the time, and recognized said judgment as a valid debt against the estate of the intestate; that no other presentation of said claim has ever been made to said ad-
(642) ministrator and no other demand for its payment has ever been made of him by the county.

That said Frost, administrator, duly published notice to creditors to present claims as required by the statute.

REFEREE'S RULINGS OF LAW.

That the demand by the sheriff of Frost, administrator, within one year from the date of his appointment for payment of judgment of *Fulford, Treasurer, v. W. Stonestreet* and presentation of execution therefor, was a sufficient presentation of claim to the administrator, and especially so as he did not dispute its validity, but recognized it as a valid claim against the estate of intestate.

That upon the presentation of said judgment and recognition of its validity by the administrator, it became unnecessary for the holder to bring action to stop the running of the statute.

No final settlement having ever been made by Frost as administrator, this debt is not barred by any statute of limitations as to him, and must be paid before the distributees receive anything; and as there is not sufficient assets to pay said debt, that ever came into his hands, the county commissioners are entitled to judgment for the sum of $5,000 (penalty of the bond) to be discharged by payment of $544.59, with interest from 5 March, 1879.

The plaintiff excepted to the ruling of the referee that demand by the sheriff of Frost, administrator, within one year from the date of his appointment as administrator for the payment of the judgment and presentation of the execution, was a sufficient presentation of the claim to the administrator under the statute providing for the presenting of claims to an administrator.

The plaintiffs also excepted to the ruling of the referee that
(643) the presentation of the execution and the recognition of the

validity of the judgment by the administrator rendered it unnecessary for the holder to bring an action to stop the running of the statute.

Also to his ruling that the said judgment is not barred by the statute of limitations.

Also to his ruling that the said judgment must be paid by the administrator before the distributees receive anything.

His Honor overruled these exceptions, and the plaintiffs excepted and appealed.

Watson, Buxton & Watson for plaintiffs (appellant).

Glenn & Manly, E. L. Gaither, T. B. Bailey and Holton & Alexander for appellees.

CLARK, J., delivers the opinion of the court.

MONTGOMERY, J., dissents.

CLARK, J. The referee found as a fact that in July, 1897, Frost, the administrator, paid an attorney's fee of $100, and that he paid before that time to other attorneys for services in the settlement of the estate $40. Upon that finding of fact the referee held as a matter of law that as the administrator had paid $40 for counsel fees in the settlement of the estate, and as there was no evidence to show that he had any unusual trouble in transacting the business of the estate, and that the $100 was paid seventeen years after anything had been done by the administrator in closing up the estate and after this action was begun, the administrator was not entitled to have any allowance out of the estate for the fee of $100. The defendant Frost, administrator, excepted to these findings of the referee, the exception was sustained, and the (644) plaintiff excepted. There was error in the ruling of his Honor. We think that the administrator should not have been allowed the $100 fee which he paid to his attorney out of the assets of the estate, for the reason that the service rendered by the attorney was for the attempted prevention of the recovery against the administrator by the distributees of that which belonged to them.

It follows from what we have said as to the ruling of the court on the attorney's fee of $100 that the ruling in sustaining the exception of Frost, to which the plaintiff excepted, was erroneous, and that the amount, therefore, of the balance which the referee reported to be due by the administrator was the correct amount—the nonallowance of commissions to the administrator to the referee having been approved by his Honor.

The fifteenth finding of fact is as follows: "That after the death of W. Stonestreet and appointment of E. Frost as administrator of his

estate, and execution issued on said judgment against Stonestreet prior to his death was presented to the administrator by the sheriff and payment demanded of him, within one year from the date of his appointment as administrator, and the administrator did not dispute the debt or the liability of the estate to pay the same, but declined to pay for lack of assets in his hands at the time, and recognized said judgment as a valid debt against the estate." Upon that finding of fact the referee found as a conclusion of law 5, that the demand by the sheriff of Frost, administrator, within one year from the date of his appointment as administrator for payment of the judgment of Fulford, treasurer, against W. Stonestreet and the presentation of execution therefor was a
(645) sufficient presentation of the claim to the administrator, and especially so as he did not dispute its validity, but recognized it as a valid debt against his intestate's estate, and also afterwards, at the request of one of the distributees agreed to put off the final settlement of the estate so that it might pass out of date. 6. That at the time said execution was presented and payment demanded of said administrator, the said judgment was not barred by the statute of limitations, but was a valid judgment against the estate of W. Stonestreet. 7. That upon the presentation of said judgment and recognition of its validity by the administrator, it became unnecessary for the holder to bring action to stop the running of the statute. 10. That no final settlement having ever been filed by the administrator, the claim of plaintiff and the debt of the board of commissioners of Davie County are not barred by any statute of limitations as to him, and that the said judgment of Fulford, treasurer, against W. Stonestreet must be paid by the administrator before the distributees receive anything, and as there is not sufficient assets of the estate to pay said debt that ever came into the hands of the administrator, the board of commissioners of Davie County are entitled to judgment against E. Frost for the sum of $5,000, to be discharged on payment of the sum of $544.59 with interest thereon from 5 March, 1879, and on $29.20 from 11 October, 1881, and on $29.25 from 7 April, 1881. The exceptions to these findings were overruled and the court rendered judgment in favor of the commissioners of Davie County in accordance therewith.

It would seem that this was a strict and proper compliance with the provisions of The Code, sec. 164. The execution was not unadvisedly issued nor void, as it is found as a fact that it was issued prior
(646) to the death of W. Stonestreet; the sheriff was the agent of the judgment creditor, the county treasurer, to collect the execution, and upon the death of the judgment debtor he presented it to the administrator, "who did not dispute its validity, but recognized it as a valid debt against his intestate, and also afterwards at the request of

one of the distributees agreed to put off the final settlement of the estate so that it might pass out of date." In the same finding it is said that the sheriff, within one year after the qualification of the administrator, demanded of him "payment of the judgment of Fulford, treasurer, against W. Stonestreet" and presented the execution therefor. It is difficult to see how the county could have done more. The debt was merged in the judgment, and the judgment was recorded in the courthouse. The official agent of the county for purposes of collection, on behalf of the plaintiff in the judgment (the county treasurer) demanded of the administrator payment thereof and presented as evidence of the judgment and amount thereof the execution which had been issued thereon prior to the judgment debtor's death. The administrator acknowledged the validity of the debt—"recognized the judgment as a valid debt against his intestate." This would have been a sufficient "filing" if the judgment creditor had been a private individual, and there can be no reason why it should not be so when the plaintiff in the judgment is a county treasurer who is faithfully endeavoring to protect the rights of the public. *Turner v. Shuffler,* 108 N. C., 642; *Brittain v. Dickson,* 104 N. C., 547. If the county had lost the debt by the failure of its treasurer to present it, he would have been liable on his bond, but having presented it like any other creditor (who could do so by an agent), upon admission by the administrator of its validity, the amount being ascertained by (647) the judgment, there was no reason why the treasurer should have instituted suit. Had he done so, he should have been taxed with the costs individually.

The creditor can never compel the administrator to "string" the claim. He has done his part when he has presented it to the administrator with sufficient certainty as to the nature and amount of the debt, and the admission of its validity by the administrator dispenses with any formal proof thereof. When the administrator admitted the validity of the judgment he admitted the correctness of the amount. There was nothing else to prove.

Modified and affirmed.

MONTGOMERY, J., dissenting: The referee found as a fact that in July, 1897, Frost, the administrator, paid an attorney's fee of $100, and that he had paid before that time to other attorneys for services in the settlement of the estate $40. Upon that finding of fact the referee held as a matter of law that, as the administrator had paid $40 for counsel fees in the settlement of the estate, and as there was no evidence to show that he had any unusual trouble in transacting the business of the estate, and that as the $100 was paid seventeen years after anything had been done by the administrator in closing up the estate and after this action

was begun, the administrator was not entitled to have any allowance out of the estate for the fee of $100. The defendant Frost, administrator, excepted to these findings of the referee, and his Honor sustained the exception, and the plaintiff excepted. There was error in the ruling of his Honor. I think that the administrator should not have
(648) been allowed the $100 fee which he paid to his attorney out of the assets of the estate, for the reason that the service rendered by the attorney was for the attempted prevention of the recovery against the administrator by the distributees of that which belonged to them.

It follows from what we have said as to the ruling of his Honor on the attorney's fee of $100, that the ruling of his Honor in sustaining the third exception of the defendant Frost (to which the plaintiff excepted) was erroneous, and that the amount therefore of the balance which the referee reported to be due by the administrator Frost, was the correct amount—the non-allowance of commissions to the administrator by the referee having been approved by his Honor.

The board of commissioners of Davie County were made a party defendant, of their own motion, after the commencement of this action, and in their answer they averred that a judgment was had in their favor for $1,642.18, and costs at the Fall Term, 1873, of Davie Superior Court, and that the same is still due and unpaid. The board of commissioners further in their answer admit the allegations of the complaint, and pray for judgment that a first lien in their favor may be declared upon the estate of the defendant Frost's intestate. In their replication the plaintiffs plead the statute of limitations against the judgment of the board of commissioners. The referee found as a fact that "after the death of W. Stonestreet and appointment of E. Frost as administrator upon his estate, an execution issued on said judgment against W. Stonestreet prior to his death, was presented to the said administrator by the sheriff and payment demanded of him, within one year from the date of his appointment as administrator, and said administrator did not dispute
(649) said debt or the liability of the estate of his intestate to pay the same, but declined to pay for lack of assets in his hands at the time, and recognized said judgment as a valid debt against the estate of his intestate." Then followed findings of law to the effect that the presentation of the execution to Frost, administrator, was a sufficient presentation and filing under section 164 of The Code; that the presentation of the execution to the administrator Frost, and his recognition of the validity of the debt rendered it unnecessary for the county to bring an action to stop the running of the statute; that the judgment of the board of commissioners was not barred by the statute of limitations and that the same should be paid by the administrator Frost before

the plaintiffs, the distributees, should recover anything. The plaintiffs filed exceptions to these findings of law, and his Honor overruled the exceptions, and the plaintiff excepted.

I am of opinion that his Honor was in error in refusing to sustain those exceptions of the plaintiffs, which were numbered 3, 4, 5, 6. The language of that part of section 164 of The Code, on the filing of indebtedness with the personal representative, is: "But if the claim upon which such cause of action is based be filed with the personal representative within the time above specified, and the same shall be admitted by him, it shall not be necessary to bring an action upon such claim to prevent the bar." What is a reasonable construction to be placed upon the word "filed" as used in section 164? It has reference, certainly, to the old custom of stringing on a line or wire papers of value for past or future usefulness, or maybe both. The same end is subserved by tying together or bundling papers and labeling them or cataloguing them on rolls or lists for future use. Now the referee found no such filing as that by the sheriff with the administrator Frost. He found (650) that that officer presented to the administrator the execution for payment, and that the administrator recognized the debt as a valid one, but declined to pay it for lack of assets. The filing of claims as provided for under section 164 of The Code, is intended to be of advantage to creditors who do not receive or who do not expect to receive payment of their debts on presentation, in enabling them to leave with the personal representative a memorandum of their claims to save the trouble and expense of bringing suit, and to prevent the bar of the statute of limitations. And the act of the creditor in filing the claim is an admission on his part that he does not expect the immediate payment of the debt, but that he wishes the claim entered "filed," somewhere, in some way, by the personal representative—better in a book kept for that purpose, or in bundles labeled, or on a file (though such actual filing may not be essential to comply with the The Code).

The purpose of the creditor then is, by filing his claim with the administrator, to avoid the running of the statute against his debt, and to fix the debt by the admission of the personal representative—the very reverse of presenting the claim for instant payment. Now it is clear that the sheriff did not file the judgment of the board of commissioners with Frost, the administrator, in the sense of our construction of section 164. The referee did not find that he went to the administrator Frost, at the request or even suggestion of the board of commissioners, and the presumption must be, from the words of the finding of the referee, that the sheriff only wished, as the officer of the law to whom the execution was issued, to collect immediately the amount of the execution and return the same, less his commissions, to the (651)

board of commissioners. The execution was unadvisedly issued, to say the least, for the reason that it was issued after the death of the judgment debtor, and on that account was void, the judgment having been rendered in 1873, and the defendant in the execution having died in 1877. It follows from what we have said above that the judgment of the board of commissioners was barred by the statute of limitations, and that the defendant board of commissioners was not entitled to receive anything out of the estate or assets of the intestate of Frost, the administrator.

The case ought to be remanded to the Superior Court of Davie County to the end that the report of the referee might be reformed according to my view herein expressed and a proper judgment entered thereon in the Superior Court in favor of the plaintiffs.

Cited: Hinton v. Pritchard, 126 N. C., 10; *Justice v. Gallert,* 131 N. C., 395; *McLeod v. Graham,* 132 N. C., 475.

C. L. McPEETERS ET AL., TAXPAYERS, v. MILES H. BLANKENSHIP, TREASURER OF YANCEY COUNTY.

(Decided 23 December, 1898.)

County Commissioners—Public Bridges Across County Lines—County Warrants.

1. County bridges, across county lines, must be authorized by both counties and built at joint expense. The Code, sec. 707 (10), amended by the Acts 1895, ch. 135, sec. 2.

2. Where a county bridge is a necessity to one county alone, across a boundary stream, and the adjoining county refuses to join in the construction, an enabling act of the Legislature must be obtained.

3. Invalid county orders, warrants and bonds, although transferred to an innocent purchaser for value, and without notice, are open to all defenses against the original holder, and have not the protection that attaches to mercantile paper, even when negotiable in form. *Wright v. Kinney,* at this term.

(652) APPLICATION for injunction to enjoin the county treasurer of Yancey County from paying certain county warrants issued for the construction of a public bridge, heard before *Starbuck, J.,* at chambers in YANCEY County on 27 July, 1898.

The commissioners of Yancey County, deeming a public bridge necessary across Toe River, the dividing boundary between Yancey and

Mitchell counties, applied to the commissioners of Mitchell County to join them in the construction, which application was refused, and the commissioners of Yancey County made a contract for the construction of the bridge at the expense of Yancey County alone at the price of $4,000. The bridge was built by the contractor, an iron bridge, and was received by the commissioners, who authorized the issue of warrants on the treasurer of Yancey County for the amount of $4,000.

It was to enjoin the payment of these warrants that the plaintiffs, as taxpayers, applied for the injunction, on the ground that they were invalid because issued *ultra vires*.

His Honor heard the application upon affidavits not inconsistent with the facts stated, and declined the injunction. The plaintiffs excepted and appealed.

J. M. Gudger, Jr., for plaintiffs (appellants).
Hudgins & Watson for defendant.

CLARK, J. The Code, sec. 707, subsection 10, amended by the Laws of 1895, ch. 135, sec. 2 (which strikes out the proviso) gives county commissioners power "to construct and repair bridges in the county and to raise by tax the money necessary therefor; and (653) when a bridge is necessary over a stream which divides one county from another, the board of commissioners of each county shall join in the construction or repairing of such bridge, and the charge thereof shall be defrayed by the counties concerned in proportion to the number of taxable polls in each." The Code, sec. 2014, giving the county commissioners power "to appoint where bridges shall be made" is to be construed in connection with section 707 (10), and is not in conflict with it.

The commissioners of Yancey County deemed that a bridge was necessary over the Toe (or Estatoe) River at the point where the public road from Burnsville, the county seat, to Johnson City, Tennessee, crosses it, as that road is much used by citizens of the county, and rises of water in the river are not infrequent. The river at that place is the dividing line between Yancey and Mitchell counties, but as the road in question passes through a very narrow strip of Mitchell County, lying between the river and the Tennessee line, the commissioners of the latter county refused the application of the commissioners of Yancey to join in building the bridge, upon the ground that the interest of Mitchell County in having a bridge at that point was too slight to justify them in sharing the expense. Thereupon the commissioners of Yancey assumed the entire expense and caused an iron bridge to be constructed at a cost of $4,000 payable in five annual installments. The bridge has

been completed, and has been accepted by the commissioners, and five warrants for $800 issued to the contractor, the first of which falls due this year. This is an action by sundry taxpayers to restrain the (654) county treasurer from paying the warrants, on the ground that the erection of the bridge was *ultra vires* and the warrants are not a valid indebtedness of the county.

It would have been more seemly and just if some taxpayer had enjoined the erection of the bridge in the beginning, but there is no estoppel in matters of this kind. The county commissioners have only such powers as are conferred by statute, or plainly incident thereto, and in this matter of building bridges over a stream dividing one county from another, their powers are plainly prescribed and restricted. The commissioners of Yancey had no power to build the bridge across such boundary stream and throw the entire enpense upon Yancey County, nor to build it at all in the absence of the joining of the commissioners of Mitchell, in which county half of the bridge is situated. It was held in *Greenleaf v. Commissioners of Pasquotank,* at this term, that the county commissioners could not accept a bridge as a gift to the county, to be maintained at its expense, when at one end of the bridge the road was a private road and not under county control. Clearly therefore the county commissioners cannot build a bridge at county expense when half of it will be in another county, and the road at the other end will not be under their control, except in the manner prescribed by statute, unless a special statute is procured to authorize it. If the bridge is a necessity to Mitchell County also, and the refusal of its commissioners is arbitrary, possibly a mandamus might have issued to compel them to join in the erection of the bridge, but that point is not before us. If the bridge is a necessity to Yancey County alone, the commissioners of that county, upon the refusal of the commissioners of Mitchell to join in its construction, should have applied to the Legislature for a special act (655) authorizing the county of Yancey to construct the bridge at its sole expense. Certainly in the absence of such legislative authority the warrants are invalid and their payment must be restrained. *Washer v. Bullitt,* 110 U. S., 558, and *Bullitt v. Washer,* 130 U. S., 142, relied on by defendant, differ from this case in that there the necessity for the bridge was adjudged and the contract ordered by the county court, presided over by the county judge, and the justices of the county, and afterwards ratified by judicial decree. But the county commissioners of this State have not been held invested with any common law power to exceed a restricted authority conferred on them by statute, and in *Washer v. Bullitt, supra,* the court is careful to add: "We find nothing in the decisions of the Court of Appeals of Kentucky contrary to this," in recognition of the right of the highest court of the State to construe

the powers conferred by its statute upon its own officers. *Wilson v. N. C.*, 169 U. S., 586, reprinted in 122 N. C., 1108 A (at p. 1108 c).

Whatever hardship there is on the contractors, we cannot recognize any power in public officers to bind the public by contracts not authorized by law. If the warrants have passed for value and without notice to subsequent holders, they are equally invalid and unenforcible in their hands, as the warrants, orders and bonds of municipal corporations are not entitled to the protection that attaches to mercantile paper, even when negotiable in form. *Wright v. Kinney,* at this term.

Whether the Legislature (which will shortly be in session) may not, with or without a popular vote of the county, validate the warrants, is a matter which the holders may consider, but it is not (656) now before us.

The injunction will issue as prayed.

Reversed.

CHARLOTTE OIL AND FERTILIZER COMPANY v. J. P. RIPPY, ADMINISTRATOR OF WILLIAM RIPPY.

(Decided 23 December, 1898.)

Deceased Partner—Evidence Under Section 590 of The Code.

1. In an action upon a promissory note given by a firm, a member of the firm is asked by the plaintiff, "Who composed the firm?" with the view of proving that the intestate of defendant was a member. *Held,* to be rightly excluded on objection, under sec. 590 of The Code. *Lyon v. Pender,* 118 N. C., 150.

2. The same witness was then asked: "Outside of any transaction or communication with deceased, do you know whether or not he was a member of the firm?" *Held,* to be competent, on objection. *Sykes v. Parker,* 95 N. C., 232.

3. The same witness was further asked by the plaintiff: "Did you have any conversation with the administrator of the deceased in regard to the deceased's being a partner, of the firm? if so, give it." *Held,* on objection that the question was too broad in its scope, and should have been confined to some conversation in connection with the settlement and indebtedness of the estate.

CIVIL ACTION upon two promissory notes executed by the firm of D. F. Bridges & Co., payable to the plaintiff, tried before *Greene, J.,* and a jury at Spring Term, 1898, of the Superior Court of CLEVELAND County.

The complaint alleged that William Rippy, the intestate of defendant, was a partner in the firm of D. F. Bridges & Co.

(657) The answer denied this allegation.

Among other evidence, the plaintiff examined D. F. Bridges, who testified that he was a member of the firm of D. F. Bridges & Company.

The plaintiff then asked the witness: "Who composed the firm of D. F. Bridges & Company?" with a view to showing by the witness that the intestate of defendant was a member of it.

Objection by defendant under section 590 of The Code. Objection sustained; plaintiff excepted.

The notes sued on were shown to the witness and he identified the notes as those described in the complaint, and as being signed by him; and he stated that he had been sued on these notes and had made a payment on them.

The plaintiff then asked this witness: "Outside of any transaction or communication with the deceased, do you know whether or not William Rippy was a member of the firm of D. F. Bridges & Company?" Objection by defendant, which was sustained by the court, and plaintiff excepted.

Plaintiff then asked this witness: "Did you have any conversation with the administrator of the deceased in regard to the deceased being a partner of the firm of D. F. Bridges & Company? 'If so, give it." Asked for the purpose of showing the admission and declaration of the administrator. Objection by defendant; objection sustained; plaintiff excepted.

There were other exceptions taken by the plaintiff in regard to the evidence and to the charge of his Honor, which the court deemed it unnecessary to consider.

There was a verdict declaring that the intestate was not a member of the firm of D. F. Bridges & Company.

(658) Judgment in favor of defendant. Appeal by plaintiff.

Burwell, Walker & Cansler for plaintiff (appellant).
D. W. Robinson for defendant.

MONTGOMERY, J. A note in the sum of $430, signed "D. F. Bridges & Company," payable to the plaintiff, was executed and delivered, the signature having been written by D. F. Bridges. This action is brought to recover of the defendant the amount of the note, the allegation in the complaint being that William Rippy, the intestate of the defendant, was one of the partners in the firm of D. F. Bridges & Company. On the trial the plaintiff introduced D. F. Bridges himself, who said that he was a member of the firm. The witness was then asked who composed the firm of D. F. Bridges & Company, the object of the question being

to show that the intestate of the defendant was a member of the firm. An objection by the defendant was sustained and the plaintiff excepted.

His Honor's ruling was correct. The precise point was decided in *Lyon v. Pender,* 118 N. C., 150. The same witness was then asked this question, "Outside of any transaction or communication with the deceased, do you know whether or not William Rippy was a member of the firm of D. F. Bridges & Company?" to which an objection was interposed by the defendant and the objection sustained, and the plaintiff excepted. There was error in that ruling of his Honor. In *Sykes v. Parker,* 95 N. C., 232, the plaintiff sought by his own testimony to prove a partnership between himself and the intestate of the defendant. The conclusion of the Court there was that ordinarily and naturally it would be supposed that the witness got his information from a transaction or communication with the deceased, but that the contrary (659) might be shown. The Court in that case said: "This would be in the usual order of things. It might perhaps be possible that the plaintiff could have answered the question thus put to him without testifying to such a transaction or communication; but if he could, it ought to have appeared that he could in order to render his answers competent. He might have been interrogated as to the source of the information he had, pertinent to the matter inquired about, with a view to determine the question of the competency of such answers as he might make. He was competent to testify that he did not derive his information from a transaction or communication between himself and the intestate." The same principle of evidence is declared in *Armfield v. Colvert,* 103 N. C., 147. The question ought to have been allowed as a preliminary one to the further statement of the witness of any facts which tended to prove the partnership, outside of personal communications or transactions with the intestate. And if such evidence was found competent by the court, then it should have been submitted to the jury. The refusal of his Honor to allow the question cut off such inquiry, and was equivalent to a ruling that the witness under no circumstances could testify as to the intestate's being a partner, even though he might have information about the same outside of any personal communications or transactions with the intestate.

The same witness was further asked, "Did you have any conversation with the administrator of the deceased in regard to the deceased's being a partner of the firm of D. F. Bridges & Company? If so, give it." The defendant objected, and the objection was sustained. In general terms it is stated in Greenleaf on Evidence, sec. 179, that the admission of executors and administrators can be introduced (660) against themselves as to the representatives of the heirs, devisees, and creditors. But in our researches we have found no case where the

admissions or declarations of an executor or administrator, disconnected with the settlement of the estate—some matter of administration—where introduced against him as such representative; and we think, therefore, that the question was too broad in its scope. The witness might have been asked if he had heard the administrator, in connection with the settlement of his intestate's estate and in relation to its indebtedness, say anything in connection with the intestate's liability for the debts of the partnership, and what was said.

We will not consider the charge of the court, for it is not necessary. It is erroneous in some material respects.

New trial.

Cited: Cox v. Lumber Co., 124 N. C., 82; *Moore v. Palmer,* 132 N. C., 970; *Bonner v. Stotesbury,* 139 N. C., 7; *Hicks v. Hicks,* 142 N. C., 233.

J. W. MARSH v. A. T. GRIFFIN AND WIFE, E. A. GRIFFIN, AND MARION STEGALL.

(Decided 23 December, 1898.)

Motion to Set Aside Judgment—The Code, Section 274—Excusable Neglect—Judicial Discretion.

1. In passing upon a motion to set aside a judgment for excusable neglect, under section 274 of The Code, while the motion rests in the discretion of the court, that discretion is to be exercised in a legal and reasonable manner, and all material facts should be found, upon which his action is based. That discretionary power only exists when excusable neglect has been shown.

2. A failure to exercise sound legal discretion from a mistake of law or other cause is equally reviewable, and will require the cause to be remanded, in order that the application may be reheard and determined in the legal discretion of the court.

(661) CIVIL ACTION to foreclose a mortgage, made to the plaintiff by defendants, A. T. Griffin and wife, E. A. Griffin, and incidentally to compel the defendant Marion Stegall, vendor to the female mortgagor, to make her another deed, on the ground that she and her husband refused to put the original deed to her on record. The mortgage was given to secure a debt of the husband.

There was judgment by default for want of an answer at Fall Term, 1896, of UNION Superior Court, rendered for the debt against A. T. Griffin and wife, E. A. Griffin, and the land adjudged to be sold to pay the debt by commissioners appointed for that purpose.

This is a motion, made pursuant to notice, at Spring Term, 1897, of said court to set aside said judgment on the ground of surprise and excusable neglect, under section 274 of The Code.

The motion came on to be heard upon affidavits at a special term in July, 1898, before *Adams, J.*, and was refused.

The defendants excepted and appealed.

The facts are sufficiently stated in the opinion.

Adams & Jerome for defendants (appellants).
Shepherd & Busbee for plaintiff.

DOUGLAS, J. This is an appeal from the refusal of a motion, under section 274 of The Code, to set aside a judgment by default obtained through the excusable neglect of the defendants.

The action was brought to foreclose a mortgage, and incidentally to compel the vendor of the mortgagor to execute to the *feme* defendant a good and sufficient deed to the land embraced in the mort- (662) gage. The plaintiff does not ask for possession of the land, but asked and obtained, among other relief, a personal judgment against the *feme* defendant for the admitted debt of her husband. The following is taken from the case on appeal as settled by the court:

Judgment was rendered in the above-entitled cause at the August Term, 1896, of the Superior Court of Union County, N. C., as will appear from the record herewith sent.

At the January Term, 1897, of the said Superior Court the defendants A. T. Griffin and wife, after giving notice thereof, moved to set aside the said judgment, and filed certain affidavits in support of said motion. The plaintiff filed certain other affidavits, and the defendants rejoined with additional affidavits.

The said motion was continued from term to term, and was finally heard at the July Special Term, A.D. 1898, of the Superior Court of Union County, N. C., before his Honor, Spencer B. Adams, the presiding judge. His Honor, after hearing the affidavits of both parties and the argument of counsel, in the exercise of a sound discretion, refused the said motion, which said refusal was entered upon the docket at the time.

After his Honor had refused the said notice, the defendant gave notice of appeal, and the usual entries were made and the amount of appeal bond fixed, all of which will appear from the record herewith sent. The defendants then requested his Honor to find the facts upon which he based his refusal, and this his Honor agreed to do. It being Saturday of the last day of court, it was agreed by both parties that his Honor might find these facts after the expiration of the term upon state-

(663) ments to be submitted to him by the respective sides. These statements were accordingly submitted, and his Honor found the following facts as being the only facts sufficiently established by the parties, to wit:

FINDINGS OF FACT.

Upon the hearing of the motion made by the defendants A. T. Griffin and wife, E. A. Griffin, to set aside the judgment rendered at the August Term, 1896, upon the ground of excusable neglect, the court finds the following facts:

1. That the defendant E. A. Griffin is and was at the time of the execution of the mortgage sued upon and the rendition of the judgment a married woman.

2. That the summons in this case was issued on 30 March, 1896, and duly served on the defendants A. T. Griffin and wife, E. A. Griffin, on 6 April, 1896; that the complaint was filed on 30 March, 1896; that the Superior Court of Union County was held on the second Monday before the first Monday in September, 1896, at which term the judgment complained of was rendered, four and a half months after the service of the summons on the defendants; that on 4 December, 1896, after duly advertising according to law, the land described in the complaint and embraced in the mortgage that was foreclosed was publicly sold at the courthouse door in the town of Monroe, N. C., at which time and place neither of the defendants entered an appearance nor made a protest against said sale; that no counsel was employed, no bond filed as was required, it being an ejectment suit, and no action was taken by the defendants, or either of them, until the *feme* defendant filed her affidavit in this cause on 7 January, 1897.

(664) 3. That during the first week of the August Term, 1896, of the Superior Court of Union County the defendant Marion [Stegall], who resided in the county of Anson, and who was a nominal defendant, merely passed by and stopped at the residence of the other defendants while on his way to Union court; that while at the house of Griffin and wife, the other defendants, Mrs. Griffin said to Stegall that neither she nor her husband were well enough to go to court, and asked him (Stegall) to look after the matter for them; that the said Mrs. Griffin paid Stegall no money to employ counsel, furnished him with no bond nor means to secure one, and the said Stegall made no promise that he would employ counsel or furnish bond; that the said Stegall had no real interest in the suit, and was merely a nominal defendant; that the said Stegall went on to court, found that the case was not calendared for jury trial, and so reported to the other defendants; that he employed no counsel, gave no bond, made no arrangements to do so, all of which the other defendants well knew.

4. That it is the opinion of the court that it was inexcusable negligence on the part of the defendant Griffin and wife to remain still and make no effort to put in their defense from 6 April, 1896, the time of the service of the summons upon them, to 7 January, 1897, the time of the filing of their first affidavit, and to content themselves with simply requesting a nominal defendant who accidentally passed their house while en route to court to attend to the matter for them without furnishing him with the means to do so, and this is especially so when the said defendant failed to employ counsel or give bond, as Griffin and wife well knew.

And upon the facts found, as hereinbefore set forth, the court (665) refuses, in the exercise of a sound discretion vested in it by section 274 of The Code, to set aside said judgment.

SPENCER B. ADAMS,
Judge Presiding.

EXCEPTIONS.

To the said judgment and finding of facts, the defendants A. T. Griffin and E. A. Griffin except and assign the following exceptions and errors:

1. For that there was no evidence that the action was one of ejectment in which it was necessary for defendants to file bond, but on the contrary the complaint discloses plaintiff's cause of action as one for the foreclosure of a mortgage.

2. For that the judge failed to pass upon all the questions of fact raised by the respective parties, and which were necessary for a correct determination of the question of excusable neglect, in that he failed to pass upon and determine:

(*a*) Whether the plaintiff requested the defendant Stegall to come to Monroe and see plaintiff's attorneys about the matter, and whether plaintiff's counsel informed said Stegall that the case was not for trial at that term, and that if anything was to be done about the case at said term he would write to Stegall in time and inform him what was to be done, and whether Stegall told Mrs. E. A. Griffin on his return that nothing was to be done about the case unless they were notified.

(*b*) Whether A. T. Griffin and E. A. Griffin were prevented from attending the return term of court, when the judgment was rendered against them, on account of the sickness of A. T. Griffin and the ill-health of E. A. Griffin.

(*c*) Whether, under a rule of said court, applicable to all cases (666) brought in said court, sixty days were allowed to plaintiffs to file their complaints and sixty days thereafter allowed to defendants to file answers.

(*d*) Whether the plaintiff has taken a personal judgment against the *feme* defendant E. A. Griffin as a simple inspection of the said judgment will show such personal judgment against her.

3. For that he failed to set aside the personal judgment against the *feme* defendant E. A. Griffin after having found that she was a married woman at the time of the execution of the mortgage sued upon and the rendition of the judgment, and it appearing in the complaint that she was a married woman.

4. For that he erred in not setting aside the judgment upon the facts as found by the court.

The defendants filed several affidavits in support of their motion tending to prove the facts alleged therein.

Upon the foregoing facts *we are of opinion* that his Honor should have found all the material facts, both for the purpose of enabling him to exercise, in a legal and reasonable manner, the discretion vested in him by law, and to enable us to review his judgment to the extent of determining whether it was within his legal discretion. Section 274 of The Code 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; and may also in his discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through mistake, inadvertence, surprise or excusable neglect.

(667) In the cases construing this section the words "mistake, inadvertence" and "surprise" seem to have been ignored with singular unanimity. The phrase "excusable neglect" is apparently taken as embodying the meaning of the section. It has been uniformly held that such a motion rests in the discretion of the court, and yet the result of the decided cases is that such discretion is not reviewable when the judge overrules the motion, but is reviewable when he sustains it. In *Stith v. Jones,* 119 N. C., 428, 431, this Court in *reversing* the action of the court below in setting aside the judgment, says: "The judge does not *find* that there was excusable neglect, nor does he find facts which would justify such conclusion of law. If there *was* excusable neglect, the judge in his discretion might set aside the judgment or refuse to do so, and the exercise of such discretion is not reviewable. (Citing) *Simonton v. Lanier,* 71 N. C., 498; *Brown v. Hale,* 93 N. C., 188. *But the discretionary power only exists when excusable neglect has been shown.*" This rule, which is amply sustained by authorities, can have but one intelligent meaning, and that is that the discretion of the judge is a *legal* discretion which must be exercised within legal limits and upon legal principles. The matter is necessarily appealable, so that this Court may

determine whether that discretion has been legally exercised. If so exercised, it will not be interfered with unless clearly shown to have been abused. *Bank v. Foote,* 77 N. C., 131; *Kerchner v. Baker,* 82 N. C., 169; *Churchill v. Insurance Co.,* 88 N. C., 205; *Wyche v. Ross,* 119 N. C., 174, 176; *Cowles v. Cowles,* 121 N. C., 272, 275. It is well settled that a palpable abuse of this discretion is reviewable, and even where there is no actual or intentional abuse in the ordinary acceptation of the term, a failure to exercise such legal discretion, (668) from a mistake of law or any other cause, is equally reviewable.

The defendant is entitled to have his motion fairly heard, his material allegations found one way or the other, and the intelligent and reasonable exercise of the legal discretion of the judge upon the facts as found. In *Warren v. Harvey,* 92 N. C., 137, 139, 141, this Court says: "We have little hesitation in placing the present application within the discretionary power committed to the court, which the judge, holding the neglect not excusable, *did not undertake to exercise* . . . There was therefore error in the ruling that the facts do not show surprise or *excusable neglect* within the intent of the statute, and the application must be reheard to the end that the reasonable discretion confided to the judge may be exercised in the premises upon the facts as they now appear before us."

However incapable of exact definition, that judicial discretion is not absolutely without limitation, is clearly recognized in other jurisdictions entitled to respect. Lord Mansfield in *Rex v. Wilkes,* 4 Burr, 2539, says: "Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular." In *Tripp v. Cook,* 26 Wend., 152, it is said: "Judicial discretion is a phrase of great latitude, but it never means the arbitrary will of the judge. It is always (as Chief Justice Marshal defined it) a legal discretion to be exercised in discerning the course prescribed by law; when that is discerned, it is the duty of the courts to follow it. It is to be exercised, not to give effect to the will of the judge, but to that of the law."

In the case at bar there is no suggestion of any intentional (669) abuse on the part of his Honor, but it clearly appears that, in addition to his failure to find certain facts, he was inadvertent to other material facts. How this inadvertence arose does not appear from the record, but it has been suggested that certain papers were not before him. Whatever its cause, its existence is apparent. He states in his findings of fact that the action is an "ejectment suit," and bases his decision partially upon the fact that the defendant gave no bond. As the pleadings

show none of the requisites of an action in ejectment, the defendant was not required to give bond, and therefore the action of his Honor was clearly based upon a misapprehension of fact and law.

The case must be remanded, as was done in *Warren v. Harvey, supra,* in order that the application may be reheard and determined in the legal discretion of the court. Upon being remanded, it will stand for hearing as if it had never been heard.

Case remanded.

CLARK, J., concurring in result: On a motion to set aside a judgment for excusable neglect, the findings of fact by the judge are conclusive, and this Court cannot look into the affidavits to review his findings (*Weil v. Woodard,* 104 N. C., 94; *Albertson v. Terry,* 108 N. C., 75; *Sykes v. Weatherly,* 110 N. C., 231), and indeed they are no part of the record proper, and should not be sent up.

Whether, upon the findings of fact there was excusable or inexcusable negligence is a matter of law and always reviewable at the instance of either party. *Winborne v. Johnston,* 95 N. C., 46; *Weil v.* (670) *Woodard, supra;* Clark's Code (2 Ed.), pp. 230, 231, 232, 233.

If upon such findings of fact the negligence was inexcusable, the court below had no power to set the judgment aside.

If there was, upon such findings, excusable negligence, then the judge in his discretion can set aside or refuse to set aside the judgment, and the exercise of such discretion is irreviewable at the instance of either party (*Manning v. R. R.,* 122 N. C., 824; *Stith v. Jones,* 119 N. C., 428; *Sykes v. Weatherly,* and *Winborne v. Johnson, supra,* and cases there cited) except possibly for a gross abuse of discretion (*Wyche v. Ross,* 119 N. C., 174), which does not appear in this case.

There was no omission to find material facts, as in *Smith v. Hahn,* 80 N. C., 241, for his Honor says the facts found are "the only facts sufficiently established by the parties," and the credit a judge gives to the testimony of witnesses cannot be supervised by an appellate court. But while we cannot look into the affidavits to review the findings of fact, we see that his Honor found that there was "no bond filed as was required, it being an ejectment suit," when from the record proper it appears that the action was not an ejectment suit, but for foreclosure and no bond was required.

The judge below evidently found that this was a case of excusable neglect (as he refuses the motion in the exercise of his discretion), and as the plaintiff does not appeal, that finding stands. But it is impossible to see how far the exercise of his discretion was influenced by the erroneous opinion the judge expressed as to the nature of the action

and the necessity of filing a bond. I think the case should be remanded that the judge below exercise his discretion upon the facts already found.

Cited: Sheek v. Sain, 127 N. C., 273; *Hardy v. Hardy,* 128 N. C., 184; *Pepper v. Clegg,* 132 N. C., 313.

(671)

JOHN H. PARKER v. HASTINGS & CO.

(Decided 23 December, 1898.)

Allegation—Proof—Issue—Negligence.

Where a stream is found by the jury to be a "floatable" stream, and the complaint charges that the plaintiff's dam was injured by the defendant unlawfully and willfully floating logs over the dam, there being no allegation of negligence on the part of defendant, an issue as to such negligence ought not to be submitted to the jury, nor found by them without proof.

MONTGOMERY, J., concurring in the conclusion that there ought to be a new trial, is doubtful whether the defendants' evidence sufficiently established in law and in fact the *"floatability"* of the stream in question—the Canada prong of the Tuckaseigee River. *Comrs. v. Lumber Co.,* 116 N. C., 750.

CIVIL ACTION to recover damages for injuries to plaintiff's mill by defendants while floating logs in Tuckaseigee River, tried before *Norwood, J.,* and a jury, at Fall Term, 1897, of JACKSON Superior Court.

The complaint alleged: IV. That the defendants on 1 December, 1892, and before and since said day, have, regardless of the plaintiff's rights, unlawfully and willfully rolled and placed into said Tuckaseigee River large numbers of large logs, lumber and timber, and permitted and caused the same to be floated down and over said mill dam in such manner as to break down and destroy said dam, to the great damage of plaintiff, to wit, $1,000.

The answer alleges: 2. That the Tuckaseigee River, at, above and below the alleged location of the plaintiff's alleged dam, is a floatable stream, in fact and law, and is such and is now and has at all times heretofore been capable of being used for floating rafts, boats, logs, timbers and other products of the country to markets and mills lower down, and is now and has been at all times heretofore in this respect a navigable and floatable stream and subject to the public use as a (672) public highway; and as such public highway was and had been for a long period of time prior to the first day of December, 1892, used by all persons desiring to float rafts, boats, logs, timbers and other products of the country along its banks to markets and mills lower down.

Among the issues submitted by his Honor was: 4. At the time of the alleged injury was the Canada Fork of the Tuckaseigee River, at the point of the alleged injury such a stream, that business men may calculate that with tolerable regularity as to seasons the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to markets or mills lower down?

The jury responded, Yes.

His Honor also submitted issue 6: Was said dam injured by the negligence of the defendants?

The defendants objected to this issue on the ground that there was no negligence alleged in the complaint. Objection overruled; defendants excepted.

The jury responded, Yes.

The defendants objected not only to the submission of this issue to the jury, but also to the finding of the jury thereon, on the ground that there was no evidence of negligence. Objection overruled; defendant excepted.

Upon the question of negligence allegation and proof appear to be wanting.

The jury assessed the plaintiff's damages at $20.

Judgment accordingly. Appeal by defendant.

Moore & Moore and W. E. Moore for defendants (appellants).

W. T. Crawford for plaintiff.

(673) CLARK, J. This action was brought by the plaintiff against the defendants to recover damages which the plaintiff alleges that he had sustained by reason of the defendants having unlawfully and willfully rolled and placed into Tuckaseigee River large numbers of logs, lumber and timber, and permitted and caused the same to be floated down against his mill dam, by which the dam was broken down and destroyed. The defense was that the stream was a floatable one and therefore a natural highway, and that the plaintiff's injury, if any he suffered, was without remedy, no negligence being alleged or proved.

The court submitted an issue as to whether the dam was injured by the negligence of the defendants, and instructed the jury that if they should find that the river was a floatable stream where the plaintiff's mill and dam were located, still the defendants would be liable if they negligently injured the plaintiff's dam in the floating of the logs. The defendants objected to the issue and excepted to the charge of his Honor upon it.

The issue should not have been submitted, for the complaint did not allege negligence on the part of the defendants, nor was there a scintilla of evidence that the defendants did anything except cut the logs and put them in the stream for floating down the river. The words unlawfully and willfully mean simply that the act of cutting and putting the logs in the stream was contrary to the plaintiff's right and *intentionally* done. There must be a new trial of this case for that error.

New trial.

MONTGOMERY, J., concurring: I concur with the Court in the conclusion that there ought to be a new trial in this case, and I desire to add, as my own views, on account of the serious public importance of the matter involved, that if the question had been raised in (674) the trial below, in such a way as that the court could take notice of it, I would be of the opinion that there was no sufficient testimony offered, such as a jury ought to consider—under the main issue submitted to warrant the finding of the jury in the affirmative. The issue to which I refer was in these words: "At the time of the alleged injury was the Canada Fork of the Tuckaseigee River, at the point of the alleged injury, such a stream that business men may calculate that, with tolerable regularity as to seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down?"

Justice Furches in his dissenting opinion, in *Comrs. v. Lumber Co.*, 116 N. C., 750, said that "Floatable water courses" was a term not known to our law until within the last six or eight years, and I think an examination of our decisions will verify the statement. The right to float logs at certain times of high water in a stream not navigable for craft of any kind at ordinary water, has been recognized by this Court; and the law in reference thereto has been formulated or rather announced under an oft repeated definition of a "floatable stream." That definition repeated in *Comrs. v. Lumber Co., supra,* is as follows: "It is not necessary, in order to establish an easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage; but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to mills or markets lower down."

The learned Judge (*Avery*) who wrote the opinion in that (675) case of course made his definition from reading and digesting the works of text-writers and decisions of the courts upon the subject. He quotes as authority from Gould on Waters, where the writer says, "It is

not necessary that the stream, in order to be a highway, should be capable of floating logs at all seasons of the year, but its public character depends on its fitness to answer the wants of those whose business requires its use. If the stream is not always navigable, it must be capable of floatage as the result of natural causes at periods recurring from year to year and continuing for a sufficient length of time in each year to make it useful as a highway." Mr. Gould cites the case of *Morgan v. King,* 35 N. Y., ... to sustain his position, and in the New York case will be found this announcement: "If it (the stream) is ordinarily subject to periodical fluctuations in the volume and height of its water attributable to natural causes and occurring as regularly as the seasons, and if its period of high water or navigable capacity ordinarily continues a sufficient length of time to make it useful as a highway, it is subject to the public easement." The principle of law then, which is announced in *Comrs. v. Lumber Co., supra,* is the same as that stated in Gould on Waters, and the same as that announced in the case of *Morgan v. King, supra.* Therefore, to make a stream such as I have described a floatable one, the rises of water must be at recurring seasons during each year with tolerable regularity. They must not be produced by artificial means. They must be habits of the stream produced by natural causes to be known and to be anticipated, and upon which prudent business men might make investments with a reasonable
(676) hope of returns. As was said in *Morgan v. King, supra,* "these periodical fluctuations must be attributable to natural causes and occur as regularly as the seasons." Sudden and irregular freshets, however high the water may become, will not make a stream a floatable one. If that were the rule, then every creek, if only a few yards wide, in moderately hilly sections, at times of sudden and unexpected heavy falls of rain, would become floatable streams with the result of the destruction of a large proportion of the milling and ginning properties of the State.

Now, have the defendants by their evidence brought themselves within the principles of law mentioned above? The evidence of the plaintiff tended to prove that there was no regularity in the rises of the river at periodic or recurring seasons of the year, and some of the witnesses said that sometimes years would elapse between rises sufficient to float logs. The strongest evidence of the defendants on the subject is as follows: T. H. Hastings said, "there were from three to eight or ten rises in the river each year that would float logs. There was a continuous tide in 1890 for six weeks that would have floated logs. There was a tide in November, 1891. We had some small tides in December, 1891. In 1892 we had tides in February and March, three tides, four tides. We had one in September that brought in a lot of logs. We had tides in 1893,

one in July and a very large one in August." John Wike said, "I was raised near Tuckaseigee River and have known it all my life. Some years we have three to four tides a year; on the average we have three tides a year." M. F. Galloway testified that "some years there will be five or six freshets that will float logs; other years there will not be more than one or two rises. The river will not carry the logs down without a freshet. It might be a year sometimes between (677) the freshets. There was generally one or two freshets a year. You could not count with any certainty on the time of these freshets. The freshets were generally in the fall and spring." L. J. Smith testified, "I know the Tuckaseigee River; it will not float logs without a considerable rise. There are usually from four to five tides or rises a year sufficient to float logs. There might be a year that there would not be a freshet that would float logs. I think that the rises or tides can be counted upon with reasonable certainty." E. D. Davis said: "In common years there would be water enough to float logs three or four times a year—some years more and some years less. I could not count on regularity, but I could count on its coming along some time during each year." Mrs. Annie L. Buffum testified as follows: "I kept a weather report and diary in 1891, 1892, 1893, 1894, and 1895. (Witness reads diary.) Tide on 22 January, 1891, 150 logs came into the boom. Tide 1 February, 1891, 150 logs came into the boom. Tide 9 February, 1891, the river rose six feet, the shore dam broke and a number of logs were lost. Tide 10 November, 1891 (freshet), 5,000 logs came into the boom. Tide 11 November, 1891, brought logs to boom. Tide 3 November, 1891, fine freshet, logs coming. Tide 3 December, 1891, fine freshet, 1,000 logs came into the boom. Tide 7 December, 1891, logs came into boom. Tide 13 January, 1892, freshet, logs came into boom. Tide 14 January, 1892, water 7 inches above counters in stores. Freshet 14 August, 1893, logs coming to boom; 10 September, 1893, rise, logs coming to boom; 12 September, 1893, boom broken; 10 December, 1894, logs came; 12 December, 1894, logs came; 7 April, 1895, logs came, boom burst." She also testified that during portions of the years mentioned she was not at Dillsboro and did (678) not keep her diary.

I am of opinion that the evidence, in a just and reasonable view of it, was not sufficient to be submitted to the jury under the issue.

W. H. McCLURE AND W. H. JARRETT v. SAMUEL SPIVEY AND G. B. CARDON.

(Decided 23 December, 1898.)

Probate of Wills Not Subject to Collateral Attack—Title.

1. Title from the State down to the plaintiff, if believed, and no counter evidence, entitles him to recover against the defendant in possession and the jury may be so instructed.
2. Probate of a will by the clerk of the Superior Court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. *Mayo v. Jones*, 78 N. C., 402.

CIVIL ACTION for the recovery of land, originally commenced in the Superior Court of Clay County, but removed for trial, on affidavit of defendant, to Cherokee County, where it came on for trial before *Norwood, J.*, at Fall Term, 1897, of the Superior Court of CHEROKEE County.

The plaintiff introduced a connected paper title from the State down to himself. The answer admitted the defendants were in possession.

The defendants offered no evidence.

(679) In deducing his title, the plaintiff offered in evidence the book of Record of Wills in Clay County with the record of a will, purporting to be the will of A. W. Spivey, recorded on page 200, etc., dated 8 February, 1888, who died in possession of the land.

Objection by defendant to the probate on the ground that the probate is irregular, and not in compliance with the statute.

Objection overruled; defendant excepted.

The will devised a life estate to Eliza Spivey, the widow of testator, with remainder to his daughter Emma, under whom the plaintiff claimed by deed. The widow was dead before the suit was brought.

The defendant having offered no evidence, his Honor instructed the jury that if they believed the evidence the plaintiff was entitled to recover, and it was for them to consider the question of the value of the rents.

Defendant excepted.

Verdict for the plaintiffs; judgment; appeal by defendants.

J. W. Cooper and A. C. Avery for defendants (appellants).
Ferguson & Ferguson for plaintiffs.

MONTGOMERY, J. The plaintiffs introduced grants from the State taking title to the land out of the State, and also subsequent and successive conveyances connecting their title with the grants. The defend-

ants offered no evidence. His Honor told the jury that if they believed the evidence they should find the first issue, "Are the plaintiffs the owners of the land described in the complaint?" in favor of the plaintiffs, and there was no error in that instruction.

In the plaintiffs' chain of title the will of A. W. Spivey was (680) introduced as evidence. The defendants objected to the same on the ground that it had not been proved according to the requirements of The Code. One of the subscribing witnesses, after the will was attested, removed from the State, and a witness to his signature and handwriting proved the same; but there was no proof of the handwriting of the testator except the testimony of the other living witness to the will, and that was the objection raised by the defendants. There is no force in the objection. Section 2149 of The Code requires that the clerk of the Superior Court shall take, in writing, the proofs and examinations of the witnesses touching the executions of wills, and that the substance of the same shall be embodied, in case the will is admitted to probate, in his certificate of the probate, and that the clerk record the same with the will. The proofs and examination must be filed in his office. Section 2150 of The Code reads: "Such record and probate are conclusive in evidence of the validity of the will until it is vacated on appeal or declared void by a competent tribunal." The probate of the will by the clerk of the Superior Court is therefore a judicial act, and his certificate is conclusive of the question adjudicated until it is vacated or declared void by a competent tribunal in a proceeding instituted for that purpose. If the probate of a will could be vacated in a collateral manner, as is sought to be done in this case, because of some failure of the clerk to examine the witnesses thereto in the strictest matters of the law, or to have proved by them some matter of detail required by statute—thus rendering all that might have been done in the administration of the estate void and of no effect—interminable confusion would result, and the office of executor or administrator would be so embarrassing and so full of pecuniary risk to those officers that the settlement (681) of estates of deceased persons (probably the most important of human transactions) could hardly be had. But the matter has been decided by this Court. In *Mayo v. Jones,* 78 N. C., 402, it is said, "there is, however, a difference in the formal probate of a deed for registration and the formal probate of a will. A deed is proved by witnesses or acknowledged by the grantor for registration, for preservation, and for notice as a substitute for livery of seizin. But the formal proof of a will amounts to more than that. . . . When the probate judge takes probate of a will in common form where there are no parties present to look after their interests, and he has the interests of all in his hands, it is just and proper that he should satisfy himself not

only of the formal execution of the will, but of the capacity of the testator, because the law attaches great solemnity to his action and makes his record of probate conclusive as to all the world until it shall be vacated by a competent tribunal. But where the parties interested come forward and make an issue and go before a jury to try the validity of a will, it takes precisely the same form and is governed by the same rules as the trial of the validity of a deed or any other instrument. Most of the confusion and conflict of decisions upon the question has grown out of the fact that the distinction between probate in common form and the trial of an issue *devisavit vel non* before a jury has not been observed."

The defendant set up a counterclaim against the plaintiff in these words: "That the defendant recover from the plaintiffs the sum of $25 as forfeiture for buying his land under pretended titles, one-half to the use of Clay County, the other half to the use of this defendant for suing for the same." It is amusing to notice the intense earnestness (682) with which the defendant G. B. Cardon presses this matter of the counterclaim in the brief filed by himself. He insists, notwithstanding that the plaintiffs made out their case and were entitled to the possession of the land, that, because the plaintiffs did not reply to the counterclaim, therefore the defendants were entitled to judgment on account of the counterclaim; and he cites us to section 1333 of The Code (Rev. Code, ch. 43, sec. 7; 32 Henry VIII, ch. 9, secs. 2 and 4) as the foundation of his counterclaim. It is only necessary to say that that section of The Code is inoperative, as it was repealed by section 177 of The Code, Acts 1874-75, ch. 256, sec. 1.

There was no error, and the judgment is

Affirmed.

BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY v. C. B. CANDLER, SHERIFF, ET AL.

(Decided 23 December, 1898.)

Amendment—New Parties Plaintiff—Demurrer.

Where a demurrer is sustained for want of proper parties plaintiff, an amendment may be allowed in the discretion of the court, provided it does not change substantially the nature of the claim demanded in the complaint. *Tillery v. Candler*, 118 N. C.

CIVIL ACTION on the official bond of C. B. Candler, sheriff of Madison County, to recover balance of school funds due the county, tried before *Hoke, J.*, on demurrer at Spring Term, 1898, of the Superior Court of MADISON County.

The action was originally instituted in the name of B. Tillery, (683) county treasurer. Before the trial there was a change in the law requiring the county commissioners to bring such action, and there was an amendment allowed to meet the requirement, and the board of county commissioners of Madison County were substituted as plaintiff. Since that amendment there has been another change in the law which makes the county board of education the proper relator in such actions. Thereupon this demurrer was filed, the ground alleged being that the board of education were the proper plaintiffs in such actions.

His Honor sustained the demurrer, but on motion of plaintiffs allowed an amendment substituting the board of education as party plaintiffs in the complaint.

The defendants excepted and appealed.

W. W. Zachary and Geo. A. Shuford for defendants (appellants).
J. M. Gudger, Jr., for plaintiffs.

FURCHES, J. This action was originally brought on the relation of Tillery, treasurer of Madison County, against the defendant Candler, as sheriff and tax collector, and his bondsmen for failing to pay over and account for the taxes of the county. After the action was commenced and before it was tried, the Legislature changed the law, so as to make it the duty of the county commissioners to bring such actions. To meet this legislative change in the relator, the plaintiff moved to amend the complaint by substituting the names of the commissioners for that of treasurer. This motion was allowed and defendants appealed to this Court, where the action of the court below was approved and affirmed (118 N. C., 888).

The case went back, but before it could be tried the Legislature (684) made another change—making the county board of education the proper relator in such actions. Plaintiff again, at Spring Term, 1898, found that he had been again legislated out of court, and another motion was made to be allowed to substitute the "board of education" instead of that of the board of commissioners. This was allowed, and defendants again appealed.

The only question presented by the appeal is whether the judge had the power to make this order or not. And this very point is decided in this case at February Term, 1896—*Tillery v. Candler,* 118 N. C., 888.

It is true that defendants demurred and the demurrer was sustained. Therefore while the demurrer was argued by counsel for defendants, no question is presented by the demurrer for the reason that it was sustained.

There is something about this case rather remarkable to our minds. When it was here before there was nothing in the case specially to attract our attention. But when it appears that, after the first change in the law with regard to the *formal* parties, before a trial could be had after the necessary change of the plaintiff relator had been made, another legislative change is made, and another order to name new parties becomes necessary; but when it is made, it is resisted by defendants. And although the very question had been decided by the Court in this very case, the defendants again appealed.

It may not be so, but such action as this by a public officer who has been entrusted with the public confidence, has the appearance of trifling with public justice, and as being an effort to hold public money that he has no right to hold. The judgment below is

Affirmed.

Cited: Brooks v. Holton, 136 N. C., 307.

(685)

E. RAMSEY, ADMINISTRATOR OF JOHN RAMSEY, v. W. C. RAMSEY.

(Decided 23 December, 1898.)

Express Trust—Agency.

The paper writing herein is an express trust and not an agency.

CIVIL ACTION heard upon exceptions to report of referee before *Hoke, J.,* at Spring Term, 1898, of the Superior Court of MADISON County.

The complaint alleged that the defendant as agent of the intestate, John Ramsey, had collected $1,845 from one J. F. Tilson, and the sum of $50 from one William Edwards, and upon demand made refusal to settle.

The answer alleged that the defendant acting under authority in writing from the intestate, marked exhibit "A" filed as part of the answer, had collected $1,818 and had fully disbursed to said John Ramsey and for his use all the moneys that came into his hand as agent or trustee, as per itemized account appended—aggregating $1,933.23, which amount included $50 paid to the widow, Drucilla Ramsey, since John Ramsey's death.

And the answer denies that the plaintiff, as administrator, has any interest in the fund received by defendant under the paper-writing referred to.

Exhibit "A" is copied into the opinion and is construed by the Court as creating an express trust, and not a mere agency or implied trust.

The referee reported that the defendant, as agent of John Ramsey, intestate of plaintiff, had received $1,848—and had properly paid out on his behalf the sum of $1,842.98 and reported a balance due from him of $5.02 in favor of plaintiff, as administrator. The referee excluded the payment of $50 made by defendant to Drucilla Ramsey, widow, after the death of her husband.

Defendant excepted.

His Honor at the hearing sustained the exceptions, and found (686) as a conclusion of law that the widow, now living, is the proper owner of any amount due at present by reason of this fund—and that the payment to her of the $50 was a proper payment and should be allowed, and adjudged that the defendant go without day and recover his costs.

Plaintiff excepted and appealed.

W. W. Zachary for plaintiff (appellant).
Davidson & Jones for defendant.

FAIRCLOTH, C. J. The question presented is whether W. C. Ramsey was an agent or trustee of John Ramsey, and that depends on the construction of the following written instrument marked "Exhibit A":

"Know all men by these presents that I, John Ramsey, have this day constituted and appointed W. C. Ramsey my lawful agent and attorney in fact with full power and authority to do and transact all of the business hereinafter named; that is to say, the said W. C. Ramsey is to prosecute in my name a suit I have commenced against R. J. Sams for a certain tract of land, and to have authority to have the deed to the same made to himself, said W. C. Ramsey, and is hereby directed that out of the proceeds of the sale of said lands, which the said W. C. Ramsey is hereby authorized to make, the said W. C. Ramsey is to maintain me and my wife Drucilla, or the survivor of us during our natural life or the life of the survivor of us, and then at the death of the survivor of us, to use the balance of the proceeds of said lands, if any is left, to the payment of such of my children as have not been so much advanced as the others, so as to make my advancements to them agree; the said W. C. Ramsey is to his trouble and expenses in every way paid off and discharged of once about the business where named. (687)

Given under my hand and seal this 31st of August, 1880.

(Signed) JOHN RAMSEY. (SEAL.)
(Signed) J. M. GUDGER. (SEAL.)

After the pleadings were filed a reference was ordered to state an account between the parties. The referee reported and found that a

small balance was due the plaintiff. He also held that under Exhibit "A" W. C. Ramsey was an agent of John Ramsey, who is dead, leaving him surviving his wife and children. The defendant filed exceptions to the report and they were sustained by his Honor, who entered the following judgment, after allowing one or more payments made by the defendant since the death of John Ramsey:

"It is agreed in open court that the money claimed by the plaintiff in this suit went into the hands of defendant under and by virtue of the power of attorney and instrument alleged in and annexed to the answer. The court sustains the exceptions of the defendant, and further finds as a fact that there was no demand for settlement or termination of agency during the lifetime of John Ramsey, the intestate, but demand was made by the administrator before bringing this suit.

"The court further finds that defendant did not receive entire amount charged against him by $25 (see evidence of Tilson), and is therefore entitled to an additional credit for that amount, and that defendant was in no default, but in exercise of ordinary care and prudence in not litigating about the same with Tilson.

"The court therefore sustains all of defendant's exceptions, and finds as conclusions of law that the widow of John Ramsey, now living, is proper owner of any amount due at present by reason of this (688) fund. That the payment of fifty dollars to said widow is a proper payment and should be allowed; that defendant is entitled to an additional credit of $25, the evidence showing that said amount of the compromise money was not received by him, and it is ordered and adjudged that defendant go without day and recover of plaintiff and sureties on his bond [and] costs of the action to be taxed by the clerk, including the sum of $20 to referee."

On the back of the case on appeal is the following endorsement: "I accept service of the written case on appeal, this 13 April, 1898. . . . I agree that the judgment of the court is the case in Supreme Court, 13 August, 1898. J. S. McElroy, attorney for defendant." The defendant elected to take the proceeds of the sale of the land involved in the suit with Sams, instead of taking title to himself. If Exhibit A is construed as only an agency, the plainly expressed intention of John Ramsey would be defeated. Treating it however as a trust, the intention can be fully enforced. Exhibit A is a plain *express* trust reduced to writing, and does not fall within the class of *constructive* trusts referred to in *Wood v. Cherry,* 73 N. C., 110. This is our conclusion in any point of view we can take. That view gives full effect to the kind intention of the husband and father, and it seems that in *justice* it should be so considered.

Affirmed.

(689)

T. M. DELOZIER v. R. L. AND J. BIRD.

(Decided 20 December, 1898.)

Appeal—Practice—Contempt.

1. A motion by appellee in the Supreme Court to dismiss the appeal because not taken in time will not be entertained when the judgment, appealed from, states that the appeal was taken—it must necessarily have been in time.
2. Neither will a similar motion be allowed because no exceptions are filed. The appeal itself is a sufficient exception to the judgment rendered upon the facts as found by the court.
3. The advice of counsel is no protection to an intentional violation of the orders of the court placing property in possession of a receiver—and may subject counsel themselves giving such advice to proceedings for contempt.
4. An appeal is the proper remedy for a supposed erroneous order, and not a violation of it.
5. While the court may not punish a contempt already committed by indefinite imprisonment, it may enforce obedience to its order of restitution by imprisonment until complied with.

CIVIL ACTION pending in the Superior Court of SWAIN County for the recovery of land. One W. A. Enloe was appointed receiver and was put in possession of the property by order of court. Upon application to the court a rule and order to show cause was issued against the plaintiff and three other persons, why they should not be attached for contempt for entering upon, injuring and forcibly holding possession of the premises, in defiance of the orders of the court.

The rule came on to be heard before *Hoke, J.*, at Spring Term, 1898, of the Superior Court of Swain County. His Honor made an order of attachment after finding the facts stated therein, as follows:

The court being organized, the following proceedings are had:

North Carolina, Superior Court, Spring Term, 1898, Swain (690) County:

ORDER OF ATTACHMENT FOR CONTEMPT.

T. M. Delozier v. R. L. & Jonathan Bird.

This motion coming on to be heard at Spring Term, 1898, of Swain Superior Court before his Honor W. A. Hoke, Judge, and it appearing that an order was made at chambers at Marshall in Madison County, N. C., before his Honor Judge Hoke ordering T. M. Delozier, Holmes Patterson, and John Painter to appear before his Honor at chambers in Asheville, N. C., on 15 March, 1898, and it further appearing that said Delozier, Patterson and Painter had been duly served with said order

and said motion having been continued to be heard at Bryson City, N. C., and the said Delozier, Patterson and Painter having appeared and answered, the court finds the following facts:

I. The defendant J. Bird was landlord and in possession of all the land in controversy; the same was all under one fence and in same enclosure with the residence where J. Bird resided, and in one hundred and fifty yards of same.

II. That said lands were in possession and control of the court by its receiver, W. A. Enloe, as shown by the order appointing said Enloe receiver.

III. That the plaintiff, T. M. Delozier and Holmes Patterson and John Painter, entered on the premises in the night-time and took possession of said property so in the custody and control of the court, and holds the possession of same by force and in defiance of the orders of this court.

(691) IV. That they have torn down the dwelling house which was on said land and removed the same from the premises, and have committed other spoil and injury to said property.

V. Plaintiffs acted under advice from counsel and have disclaimed any intentional contempt or disobedience of court's orders. It is therefore considered, ordered and adjudged by the court that said plaintiffs, T. M. Delozier, and Holmes Patterson, and John Painter, are in contempt of this court and that they be and they are hereby attached for contempt of court; that they restore said house to said property in the same plight and condition as it was before the wrongful and unlawful acts of them in tearing same down, and that they turn over and deliver possession of said property immediately to the defendant J. Bird, to be held by him subject and under the orders of the receiver heretofore appointed, and that said Delozier, Patterson and Painter, their agents, attorneys, their aiders and abettors be and they are hereby committed to the common jail of Swain County till they comply with all things and all the orders of this court, and they be and they are hereby enjoined from trespassing or otherwise interfering with said property. It is further ordered by the court that when they shall make it appear that they in all things have complied with the orders of the court this attachment for contempt may be dissolved. This may be done before any judge of the Superior Court in the Twelfth Judicial District at chambers, but they must first give the defendant J. Bird due notice of any intention to move to dissolve same.

(692) From this order the said Delozier, Patterson and Painter appealed to the Supreme Court. Appeal bond fixed at $25 and the bond for appearance and obedience to this order is taxed at $200. Capias

ordered to issue. Capias not to issue for ten days and not then, if parties show they have in all things complied with order of court.

W. A. HOKE,
Judge Presiding.

Parties under rule, plaintiff and others, except to order attaching for contempt and appeal to the Supreme Court. Appeal bond fixed by Court at $25.

Davidson & Jones for appellee.
Appellant not represented in this Court.

CLARK, J. The record must show that notice of appeal was served, unless it affirmatively appear that the appeal was taken in open court. *Investment Co. v. Kelly,* at this term. If this were not so, there would be a presumption that notice of appeal was given, when on the contrary it must appear from the record in order to constitute the appeal in this Court. *Howell v. Jones,* 109 N. C., 102, and cases there cited. But, here, the findings of fact and the judgment thereon, which constitute the case on appeal, state that the appeal was taken. This necessarily shows that it was taken in time. *Atkinson v. Ry. Co.,* 113 N. C., 581.

Neither do we find any force in the objection that no exceptions are filed. The appeal is itself a sufficient exception to the judgment which is rendered upon the findings of fact by the court. *Cumming v. Huffman,* 113 N. C., 267. The motion of the appellee to dismiss upon the above grounds is denied.

This is an appeal from a judgment in contempt. From the facts found by the judge it appears that the plaintiff in the cause and the other two appellants, aiding him, entered in the night-time upon the premises which by an order in the cause were in the posses- (693) sion and control of the court through its receiver, theretofore duly appointed in this action, and hold possession of the same by force and in defiance of the orders of the court; that they have torn down and removed the dwelling house which was on the premises, and have committed other spoil and injury to the premises and property. The said Delozier and his two associates appeared in response to the notice served upon them, and replied that they acted under advice of counsel and disclaimed any intentional contempt or disobedience of the orders of the court. Thereupon the court adjudged them in contempt till they restore the house to said premises in the same condition as before their wrongful tearing down and removing the same, and that they turn over the premises to the defendant to be held by him subject to and under the orders of said receiver, and, if this order is not obeyed within ten days, said parties to be committed to the common jail of the county until they

shall comply with the above order, with leave to move before any judge at chambers in that judicial district, upon notice to the defendant, to have the attachment for contempt dissolved upon showing compliance with this order.

From this order the respondents appealed, but they do not appear here and show any cause why it should be held invalid in any respect, and upon examination of the record we find none.

The plaintiff was fixed with a knowledge of the order appointing a receiver to take charge of the property, the entrance in the night time to get possession was significant, and when ordered to restore the
(694) possession of the premises to the receivers, the respondents merely content themselves with saying they acted under advice of counsel and intended no intentional contempt of the court, and they do not show any inability to return the house. The failure to obey the order of the court to restore the possession of the premises to the receiver is a direct contempt. *S. v. Davis,* 49 N. C., 449; Code, sec. 648 (4). This is also true as to the return of the house unless evidence of inability to comply has been shown. *Boyette v. Vaughan,* 89 N. C., 27; *Smith v. Smith,* 92 N. C., 304; *Pain v. Pain,* 80 N. C., 322.

The advice of counsel is no protection to an intentional violation of the orders of the court placing the property in possession of the receiver (*Green v. Griffin,* 95 N. C., 50; *Baker v. Cordon,* 86 N. C., 116), and counsel in such cases advising violation of the orders of a court may become guilty of contempt himself. The remedy for a supposed erroneous order of a court is by an appeal and not by a forcible violation of it.

While the court could not punish the contempt already committed, by imprisonment of indefinite duration, it had the right to coerce obedience to its order of restitution by imprisoning the contumacious parties until they shall comply. *Cromartie v. Comrs.,* 85 N. C., 211; *Thompson v. Onley,* 96 N. C., 9.

No error.

Cited: Williamson v. Pender, 127 N. C., 489; *Wilson v. Lumber Co.,* 131 N. C., 164.

(695)

STATE v. JOHN HORTON AND GEORGE W. WARD.

(Decided 10 October, 1898.)

Forfeited Recognizance.

A defendant bound over to answer a criminal charge at a regular term of the Superior Court, which term is not held in consequence of the absence of the judge, is required by virtue of section 919 of The Code to attend at an intervening special term subsequently appointed and held.

SCIRE FACIAS upon forfeited recognizance, heard before *Norwood, J.*, at Spring Term, 1898, of the Superior Court of PASQUOTANK County.

The defendant Horton, with Ward as his surety, was bound over by a justice of the peace for his appearance at Fall Term, 1897 (3d Monday in September, 1897) of the Superior Court of Pasquotank County, to answer a charge of larceny. This term was not held owing to the sickness of the judge. The defendant was in attendance.

A special term was advertised and held for the county in January, 1898, at which term the grand jury found a true bill of indictment against Horton, who was called and failed to appear, and judgment *nisi* was rendered against him and his surety, Ward, and a *scire facias* was ordered, returnable to Spring Term, 1898, and duly served. The defendant Ward filed his answer to the *scire facias,* setting forth substantially the foregoing facts:

The Solicitor for the State moved for judgment adsolute upon the *scire facias* and forfeited recognizance, which motion his Honor refused, and directed the writ of *scire facias* to be discharged.

The State excepted to the ruling, and appealed.

Zeb V. Walser, Attorney-General for the State (appellant). (696)
G. W. Ward for defendant.

CLARK, J. The defendant gave recognizance for his appearance "at the next term of the Superior Court on the third Monday in September." At that term the judge, being ill, did not appear, and the court was "adjourned until next term." Code, sec. 926. It would be a grave miscarriage of justice if on such facts all recognizances are discharged when no officer is present authorized to take renewals. In *Askew v. Stevenson,* 61 N. C., 288, it was held that the cause was continued "certainly for one term" and probably "from term to term until the attendance of a judge to hold the court," by virtue of Revised Code, ch. 31, sec. 24. That section was brought forward in The Code, sec. 919, with the words stricken out which formerly restricted its application to civil cases. Certainly this section applies in the present case, as a special term was held

in January following, of which "due notice was given by publication in the newspapers and otherwise," and section 919 provides that all persons "bound to appear at the next regular term of the court shall attend at the special term under the same rules, etc." The recognizance to appear at September Term was not to "depart the same without leave." There being no judge present no leave was given beyond the adjournment "till next term." The Code, sec. 926, by operation of law carried all matters over to "the next regular term" in the same plight and condition (*Walker v. State,* 6 Ala., 350), and this was transferred to the intervening special term by virtue of The Code, sec. 919. No hardship can accrue from any *bona fide* mistake in such matters, as the judge has discretion to remit or lessen forfeitures in all cases (Code, sec. (697) 1205), but in refusing judgment on the *scire facias* there was error. *State v. Houston,* 74 N. C., 174, has no application, for thereafter the bond was given a new regular term was established by law to be held before the term at which the defendant was bound over to appear.

Error.

STATE v. H. D. GODWIN ET AL.

(Decided 10 October, 1898.)

Void Tax Levy—Unconstitutional Statute, Liability Under.

1. The Act of March 7, 1897, Public Laws, ch. 514, providing a special system for working the public roads of Hertford County is unconstitutional and void, because the constitutional equation between the tax on the poll and that on property was not observed, its provisions being all interdependent.
2. An individual officeholder is not required to be wiser than the whole people represented in their General Assembly; therefore, he is not indictable for obeying an unconstitutional legislative act (unless it required the commission of a crime, which is not for a moment to be supposed); nor is he indictable for refusing to perform certain duties under a former law, attempted to be repealed by a subsequent unconstitutional statute, until at least after a decision by competent authority.
3. The case of *Norton v. Shelby,* 118 U. S., 425, cited by counsel for the prosecution, distinguishable from this case.

INDICTMENT tried before *Norwood, J.,* at Spring Term, 1898, of HERTFORD Superior Court against the defendants, justices of the peace of said county, for failing to perform the duties imposed upon them as a board of supervisors of the public roads, by sections 2014-2024 of The Code.

(698) The jury returned a special verdict, as follows:

"We find that on 7 March, 1897, the General Assembly passed an act to provide for working the roads of Hertford County, as the same appears in chapter 514 of the Public Laws of North Carolina, Session 1897, and which said act is made a part of this finding. That on the first Monday in June, 1897, the county commissioners of Hertford County met in regular session, and after consultation with counsel and upon advice, they decided that the said act was inoperative and void and unconstitutional, because the act did not observe the constitutional equation of taxation; and at the said meeting the county commissioners refused and declined to levy said road tax or to elect the officers named in the act, or in any way to put in operation the provision of the said act; and this official decision and conduct of the said commissioners was known to each of the defendants named in the bill of indictment in this cause; that the commissioners at said meeting levied the full constitutional limit of taxation for the ordinary and necessary expenses of Hertford County, and this was known to the defendants; that on 1 June, 1897, and since that time, they have all been acting justices of the peace in St. John's Township in Hertford County; that on the first Thursday in August, 1897, the said defendants, after taking the advice of counsel and being of opinion that the provisions of the general law relating to public roads in Hertford County had been repealed by said act and that the said act was in force, declined and refused to hold the meeting required by sections 2015 and 2016 of The Code, and also made no report to this Court at the Fall Term of the condition of the roads in said township; that the failure of the said defendants to hold said meeting and to make the said report was owing to the fact that (699) they were advised and believed that their duties in regard to the public roads of Hertford County had been taken from them by the said act and vested in the officers named in said act; and being ignorant of the law, the jury say that if upon the facts, as above stated, the court is of opinion that under the law these defendants are guilty, the jury find them all guilty as charged; and if the court is of opinion that under the law the defendants are not guilty, then the jury find that all the defendants are not guilty."

The judgment of the court was that the defendants were not guilty.

The Solicitor for the State appealed.

B. B. Winborne, with Zeb V. Walser, Attorney-General, for the State (appellant).

Francis D. Winston for defendants.

MONTGOMERY, J. The defendants were justices of the peace, and by virtue of their office (Code, sec. 2014) were a board of supervisors and were required to look after the public roads in their townships. They

were required also (Code, sec. 2015) to hold stated meetings for the purpose of consulting on the condition of the roads, and, by section 2024 of The Code, to make to the Superior Court at term time an annual report of the condition of the roads. The General Assembly of 1897 in chapter 514 undertook to repeal the provisions of The Code, above referred to, as to Hertford County, and to impose upon others the duties required of the defendants. The defendants after the enactment of the act of 1897, failed and refused to discharge the duties enjoined upon
(700) them under the provisions of the former law (The Code), and they were indicted on account of such failure and refusal. The act of 1897, in its entirety, is contrary to the provisions of our State Constitution and is therefore void. In the act a tax for making, repairing and keeping up the public roads of Hertford County, a necessary county expense, was authorized to be levied upon property, *solely*. The constitutional equation between the tax on the poll and that on property was not observed. It was contended here by the counsel of defendants that a part of the act was in conformity to the Constitution, and that such part should be upheld, but upon a careful reading of each of its provisions it is manifest that they are all interdependent. The county commissioners had refused from the beginning to act under the law of 1897, and hence the question of the appointment of the officers prescribed by that act, in place of the defendants, and the consequent effect of such appointment does not arise.

The whole act appears on its face to be one common plan for working the public roads of Hertford County, and the enforcement of its provisions depends entirely upon the tax provided for in the first section, and that section being void because it disregards the equation of taxation between property and the poll, the whole act fails.

The question for decision then is, Is one who is a public officer under a former provision of law compelled under pain of indictment and punishment to perform the duties of the office during the time when there was on the statute books a subsequent act unconstitutional in all of its provisions? The matter is an important one both to the public and to the individual. With us, public office is a public trust and public officers are merely the agents of the people. This fundamental
(701) principle of republican government may not always be recognized by the officer, but it is nevertheless the true theory. When the people, through their representatives, create a public office and prescribe the duties of the officer, the people act for the common good and the incumbent of the office is the mere instrument used for the general welfare. His gain or profit is not in contemplation of the lawmakers. The public interest is the chief consideration. What an anomalous state of things would we have then, if a person believing himself to be a public

officer, because of the discharge of the duties which he thought he owed to the public, should afterwards be indicted and punished because the courts had held the act, which created the office and prescribed its duties, to be against the provisions of the Constitution and void. Such a proposition would be equivalent to declaring that the individual officeholder must be wiser than the whole people represented in their General Assembly. Such a proposition to us seems opposed to every idea of justice. It could not be true. The criminal law cannot be invoked to punish one who acts as a public officer—as an agent of the people—and who in the discharge of a public duty had obeyed an act of the lawmaking power even though the law be unconstitutional, unless the act itself had required the committal of a crime—a thought which could not be entertained for a moment. And it makes no difference that in the case before the court the defendants are indicted for a *refusal* to perform certain duties under a former law attempted to be repealed by a subsequent unconstitutional statute and not for doing positive acts under an unconstitutional law. The principle is the same in both cases. The defendants here cannot be punished under the criminal law for failing and refusing to perform the duties of an office which (702) office and the duties pertaining to it had been sought to be repealed by a subsequent act of the Legislature, afterwards declared by the courts to be unconstitutional. Until the subsequent statute was declared to be unconstitutional by competent authority, the defendants, under every idea of justice and under our theory of government had a right to presume that the lawmaking power had acted within the bounds of the Constitution, and their highest duty was to obey.

It is not necessary to a proper determination of this case to go into the realm of the effect of contracts, executed or executory, made by a person claiming to be a public officer, but where there is no lawfully created office. The counsel for the prosecution cited to the court in support of his position the case of *Norton v. Shelby County,* 118 U. S., 425, and especially to that portion of the opinion wherein it was declared by the court that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never passed." The opinion in that case was rendered upon the effect of an executory contract made by one who claimed to be a public officer, the office having been created without authority of law. For the reasons given in this opinion, the case of *Norton v. Shelby County, supra,* does not apply to the facts in this case.

Upon the special verdict the judgment of the court below was that the defendants were not guilty, and the judgment is

Affirmed.

(703)

STATE v. MOSES DEBERRY.

(Decided 10 October, 1898.)

Criminal Intent.

On the trial of an indictment charging an assault, with intent to commit rape—the intent is a question of fact for the jury and not for the court. Intent, in such cases, is a material and essential ingredient, and must be established beyond a reasonable doubt in the mind of the jury.

INDICTMENT, charging an assault with intent to commit rape, tried before *Norwood, J.*, at April Term, 1898, of HERTFORD Superior Court.

Maggie Vann, prosecutrix, testified that the defendant, at her house, caught hold of her and tried to throw her on the bed; that she told him to let her go, he threw her on the bed and pulled up her clothes a little way; she got away from him and ran off; that the defendant threatened to kill her if she told it.

The defendant, examined in his own behalf, denied the assault and the threat to kill.

The court, among other things, charged the jury: That if they were fully satisfied from the testimony, that defendant caught hold of Maggie and threw her violently on the bed and pulled up her clothes, as stated by her, then he would be guilty of the crime charged in the indictment, and the jury should so find.

To this part of the charge the defendant in apt time excepted.

Verdict of guilty.

Defendant moved for a new trial, assigning as one ground: That the court erred in giving the jury the instruction above set out, whereas the jury ought to have been instructed, that if they were fully satis-
(704) fied that defendant caught hold of prosecutrix and threw her violently on the bed and lifted up her clothes, as testified to by her, then these would be facts from which the jury might infer that the assault was made with the intention of committing the rape.

Motion for new trial overruled, and the defendant appealed from the judgment pronounced by the court.

Zeb V. Walser, Attorney-General, for State.
George Cowper for defendant (appellant).

FAIRCLOTH, C. J. The defendant is indicted for an assault with intent to commit rape. Several witnesses were examined. The prosecutrix testified that he, the defendant, "threw me on the bed and pulled up my clothes a little way. I got away from him."

His Honor charged the jury "that if they were fully satisfied from the testimony that the defendant caught hold of Maggie Vann and threw her violently on the bed and pulled up her clothes, as stated by her, then he would be guilty of the crime charged in the bill of indictment and the jury should so find."

There is error. The charge assumes as a fact that the defendant intended to accomplish his purpose at all hazards, even by force. Intent, in the crime charged, is a question of fact for the jury and not for the court. Intent, in such cases, is a material and essential ingredient, and must be established beyond a reasonable doubt in the mind of the jury.

This rule has been so often iterated and reiterated by this Court that it seems sufficient to refer to the following decisions, which with the authorities cited, cover the whole ground. *S. v. Brooks,* 76 N. C., 1; *S. v. Massey,* 86 N. C., 658; *S. v. Mitchell,* 89 N. C., 521; (705) *S. v. Williams,* 121 N. C., 628.

New trial.

STATE v. THOMAS ANDERSON.

(Decided 10 October, 1898.)

Stock Law.

The Act of 1885, ch. 106, known as "The Stock Law," makes it unlawful for any one to permit his live stock to run at large in the county of Edgecombe. The Act of 1897, ch. 301, amends said Act of 1885 by adding after the word "Edgecombe" the words "between 1 March and 31 December." "The Stock Law" relieved every planter from keeping a lawful fence around his farm as required by The Code, sec. 2799. The amendment did not repeal the Act of 1885, and put The Code, sec. 2799, in operation.

INDICTMENT instituted in the Criminal Circuit Court of EDGECOMBE County against the defendant for failing to have a lawful fence around his farm on 20 January, 1898.

The jury rendered a special verdict finding the facts, and upon their finding the court directed a verdict of guilty to be entered, and fined the defendant one penny and costs.

The defendant appealed to the Superior Court. The appeal coming to be heard in the Superior Court of EDGECOMBE County, *Brown, J.,* the judgment of the Circuit Court was reversed, and the defendant discharged. The State appealed to the Supreme Court.

The indictment, special verdict, etc., are appended.

(706) INDICTMENT.

The jurors for the State, etc. . . . present, that Thomas Anderson, etc., on 20 January, 1898, with force and arms, etc. . . . unlawfully did take up and impound a certain hog, running at large, the property of one J. M. Pittman, the said hog being allowed to run at large in the county aforesaid, between 31 December and 1 March of each year, against form of the statute, etc.

And the jurors aforesaid, etc., do further present, that the said Anderson . . . on the day and year aforesaid, with force and arms, etc., did unlawfully and willfully fail, omit and neglect to have and make a sufficient fence about the cleared ground of him the said Thomas Anderson under cultivation, at least five feet high, there being no navigable stream and no deep watercourse instead of such fence, and there being at the time aforesaid no stock law in force within the limits of said county of Edgecombe within which said land is situated, against the form of the statute, etc.

. . . And thereupon the following jurors (naming them) being chosen, etc. . . . upon their oath say that the defendant owned and was in the possession of a farm situated in said county of Edgecombe, whereon he cultivated and grew various crops during the year 1897; that he had winter crops growing thereon at the time of the commission of the misdemeanor wherewith he is charged. That said farm is situated within the stock law territory of said county, and has been so situated since March, 1885; that during the month of January, 1898, one J. M. Pittman owned a certain hog which he permitted to run at large within said territory; that said hog came upon the farm of the defendant, and did damage in the cultivated fields of the defendant, and that
(707) while said hog was so at large upon the farm of the defendant, doing damage, the said defendant took up said hog and impounded same during the month of January, as aforesaid; that while said hog was impounded the defendant fed same; that the defendant refused to surrender the hog to Pittman, the owner, until defendant had been paid for the damage done by said hog, and the food furnished to it by the defendant; that there is no fence of any kind enclosing the farm of said defendant and his cultivated fields nor has there been any enclosure since 1885; that defendant does not permit his stock to run at large; that defendant impounded said hog because he thought he had a right so to do. But whether the defendant be guilty of the misdemeanor as charged in said indictment against him, the jurors are altogether ignorant and pray the advice of the court thereupon. And if upon the whole matter, etc., it shall appear to the court that he is guilty in law . . . then they find him guilty. If upon the whole matter it

shall appear to the court that he is not guilty, etc. . . . then the jurors find . . . that the defendant is not guilty.

Upon considering the foregoing the court is of opinion that the defendant is guilty, and directs that a verdict of guilty be entered, and that defendant be fined one penny and costs. The defendant appealed to the Superior Court.

JUDGMENT.

This cause coming on to be heard upon appeal from the judgment of the Circuit Court, the court is of opinion that the act of 1885, ch. 106, by implication repealed section 2799 The Code relating to fences, as to Edgecombe County; that the amendment of 8 March, 1897, (708) chapter 301, does not have the effect to reenact that section; that Edgecombe County being in stock law territory generally by virtue of act 1885, ch. 106, the said section of The Code does not apply to it; that no indictable offense is stated in the bill, being an offense when committed in said county; that upon the special verdict the defendant is not guilty. Judgment of circuit court reversed. Let the proceedings be quashed and defendant go without day, etc.

(Signed) BROWN, *Judge.*

From the foregoing the State appealed to the Supreme Court.

A. B. Andrews, Jr., with Zeb V. Walser, Attorney-General, for the State (appellant).

John L. Bridgers for the defendant.

FAIRCLOTH, C. J. The act of 1885, ch. 106, makes it a misdemeanor for any person to permit his or her livestock to run at large in the county of Edgecombe, and the act of 1897, ch. 301, amends the said act of 1885 by adding after the word "Edgecombe" the words "between March the first and December the 31st." The first act, called the "stock" law act, relieved every planter from keeping a lawful fence around his farm, as required by The Code, sec. 2799. The defendant is indicted for failing to have such fence around his farm on 20 January, 1898. The case hinges upon the effect of the amending act of 1897, ch. 301.

The contention of the State is that the amendment repealed the act of 1885 and put The Code, sec. 2799, in operation, on the principle that the repeal of the statute, repealing a former statute, leaves the latter in force. We cannot adopt that view in this case. The (709) amending act does not profess, or in effect repeal the first statute. We think the amendment must be taken as if it had been inserted in the original act, uncovering or excepting the period from 31 December to March the first. In England the common law did not permit stock to

run at large. In this country the conditions were so different, owing to the vast forests and the small number of acres under cultivation, that the rule was practically changed and by common consent the custom obtained of allowing stock to run at large. It was rather the necessity of the situation than a rule of law, and this custom still continues, when not changed by statute. Our Court has frequently recognized this custom in the various instances in which the question arose in different forms. *Laws v. R. R.*, 52 N. C., 478; *Morrison v. Cornelius*, 63 N. C., 351; *Burgwyn v. Whitfield*, 81 N. C., 263.

Our conclusion therefore is that the judgment of the Superior Court upon the special verdict was not erroneous.

Affirmed.

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(710)

STATE v. J. A. WOODARD.

(Decided 10 October, 1898.)

Unlawful Fishing in Albemarle Sound—Venue.

1. Regulation of fishing in the navigable waters of the State, is within the power of the Legislature.
2. *Venue* is under the control of the Legislature.
3. Improper *venue* to be objected to by plea in abatement.

INDICTMENT for unlawful fishing in the waters of Albemarle Sound, tried before *Brown, J.*, at Spring Term of the Superior Court of BERTIE County.

The defendant was indicted under chapter 51, acts 1897, which prohibits the setting of any anchor, drift, or staked gill nets in Albemarle Sound over 20 yards in length for the purpose of catching fish.

The act further provides that upon conviction of its violation in the Superior Court of any of the counties bordering on Albemarle Sound, the offender shall be fined, etc.

There was a special verdict that the defendant set certain gill nets for the purpose of fishing in the waters of Albemarle Sound, twenty yards long, fastened together, ten in number, with cords at top and bottom, the space between each net being not more than six inches, but when set during ordinary wind and tide, the space midway between the top and bottom lines of the nets was from three to six feet between the nets.

That if setting the aforesaid nets as aforesaid is a violation of the law, the defendant did the act willfully and knowingly.

Upon the special verdict the court rendered a judgment of guilty, and defendant appealed.

W. M. Bond for defendant (appellant).

Francis D. Winston and R. B. Peebles, with Zeb V. Walser, (711) *Attorney-General, for the State.*

FURCHES, J. This is an indictment under chapter 51, acts 1897, for unlawfully fishing in the waters of Albemarle Sound. The statute is singularly drawn and its policy is not apparent to us. It is contended on behalf of the State that its object is to protect the citizens from the depredation of persons from other states, while it is contended by the defendant that its object is to destroy the small fisheries in the interest of the large beach seine fisheries. And it seems rather singular that a gill net 80 yards long is permitted to be used in Roanoke River, one-fourth of a mile wide, while one not more than 20 yards long is allowed to be used in Albemarle Sound, which is from 6 to 12 miles wide. But we have nothing to do with these matters of policy further than they may assist us in putting a proper construction upon the act of the Legislature, under which the defendant is indicted. And as neither the evil to be remedied nor the benefit to be attained by this statute is apparent, we are furnished no aid from this source.

The defendant contends that this act is unconstitutional, as it interferes with the natural right of a citizen of the State to fish in its navigable waters. But this question seems to have been decided against the contention of the defendant. *Rae v. Hampton,* 101 N. C., 51.

The defendant also objects to the venue, in Bertie, and says that it should have been in Chowan County. But this is a matter under the control of the Legislature, and upon examination of the act it is found that Bertie is included in the counties where the indictment may be had. Besides, if there was ground for this objection it should have been taken by plea in abatement.

This brings us down to the question as to whether the matters (712) found in the special verdict were a criminal violation of the act under which the defendant is indicted, and we are of the opinion that they were; that under this act he could only fish with nets 20 yards long. The defendant for some reason, and we must suppose for the purpose of evading the penalty of this act, cut his nets up into sections of 20 yards in lenth, then tied half a dozen of them together, leaving only six inches between them, and puts them out. This, to our minds, was rather a stupid device to evade the penalty of the statute. It is like the case where the defendant, to evade the penalty of the law for retailing liquor by the small measure, would sell his customer a cob for a dime and then give him a drink for buying one of his cobs. The court said this would not do. Another liquor dealer would leave a bottle of liquor on a table, with a slot in the table, where his customers would find it,

trusting to their honor to drop a nickel in the slot every time they took a drink. But the court said this would not do; that these were efforts to evade the law by means of these stupid devices which the law would not allow.

And so it was with the defendant in this case. Such attempts to evade the law cannot be allowed to succeed. The judgment is

Affirmed.

Cited: S. v. Holder, 133 N. C., 711; *S. v. Ledford, ibid.,* 721; *S. v. Lewis,* 142 N. C., 635.

(713)

STATE v. JAMES BOOKER.

(Decided 25 October, 1898.)

Indictment for Murder—Presumption at Common Law from Killing with a Deadly Weapon—Presumption Since the Act of 1893—Special Instructions.

1. The trial judge is not required to give special instructions in the precise words asked, even when unobjectionable. A substantial compliance is sufficient. Attention called to a misprint in *Norton v. R. R.*, 122 N. C., page 934, line 13, where "objectionable" should have been printed "unobjectionable."

2. Killing with a deadly weapon implies malice. At common law the prisoner guilty of it was presumed to be guilty of murder until the contrary appeared. Since the Act of 1893 this presumption extends only to murder in the second degree. In *State v. Finley,* 118 N. C., 1161, the eighth syllabus is incorrect and differs from the opinion, in asserting the presumption of murder in the first degree.

INDICTMENT for murder tried before *Timberlake, J.,* at March Term, 1898, of WAKE Superior Court.

The prisoner was convicted of murder in the first degree of Mahaley White upon the following bill of indictment:

North Carolina—Wake County.

Superior Court—January Term, 1898.

The jurors for the State upon their oaths do present that Jim Booker, *alias* Jim Chavis, late of the county of Wake, with force and arms at and in the said county on the 29th day of August, in the year of our Lord one thousand eight hundred and ninety-six, willfully, feloniously, and of his malice aforethought did kill and murder Mahaley White, contrary to the form of the statute in such cases made and provided,

(714) and against the peace and dignity of the State.

POU, *Solicitor.*

STATEMENT.

Indictment for murder tried before *Timberlake, J.* The indictment charges the prisoner with the murder of Mahaley White.

Penny White testified for the State: Deceased was my daughter; she died year before last. Her head was shot off. The prisoner came to my house that morning after pepper, and after he went off the deceased was sitting on the steps. In about an hour the prisoner came back. I heard deceased hallo. She said "My Lord, have mercy, look here," and fell over on her side. Prisoner shot her in the head. He had a gun in his hand pointed at her, and shot off the back of her head. I have known him five years. He got black pepper and went off, but came back again. The deceased came from the garden and sat down on the door step. There was a barrel near by. When prisoner came first he had no gun. About 10 o'clock he came back again, and I heard deceased say, "My Lord, look here," and I looked and the prisoner came around with a gun, shot her, and she fell behind the barrel on her side; the gun was about three feet from her when he shot; load went in the back of her head; she never spoke a word after that. (Witness shows part of a dress said to have been worn by deceased at the time of the shooting. The puff on one of the sleeves shows a hole, and red stains appear upon the lining of the garment.) Deceased had on this when she was shot. Prisoner said nothing after he shot her, but went back to Crabtree. Robert and Richard Blake came to me first; I told them Jim Booker shot her. I was in hearing distance and heard my daughter say nothing to provoke the difficulty. There was no fight as I saw, and I could (715) have seen it if there had been one. I could have heard, too, if there had been any quarreling. On cross-examination: I was not as far away as it is from where I am sitting to the courthouse door. Deceased didn't go into the house from the time she got him the pepper until she was killed and carried in. I did not tell Mr. Walters that I had to scuffle with prisoner before he shot my daughter. When prisoner came back the second time he did not talk with deceased. She was behind a barrel, squatting, and he shot her behind the barrel. He did not shoot her with my gun. He carried the gun off with him.

Robert White testified for the State: I am fourteen years old; deceased was my mother, and was killed when I got there. I had been hunting with a single-barrel gun; we had two guns, and the double-barrel gun was there where I left it, and when I came back both barrels were loaded. My mother was behind the barrel dead when I came home. Grandmother told me Jim Booker had come there and killed my mother. She said nothing about a fuss between them. On cross-examination: No scuffling there; no evidence of any there. I know our gun was loaded because I shot both loads out the next week.

Robert Blake testified for State: I heard report of gun that morning and some one screaming. I started towards home, and as I came to the corner of the fence I saw Robert White coming up the hill; asked him what was the matter, and he said the prisoner had shot his mother. I went on and saw the old lady, who said Jim Booker had killed her.

I saw the deceased resting on her side with her head shot off.
(716) I looked at the gun in the house and found that it had not been shot. I saw nothing of prisoner. Old lady said he went off towards Crabtree.

C. M. Walters, deputy sheriff, testified for State: Went to this house at 11 in the morning; found some people there; found deceased behind the barrel; back of her head was turned over on her face and brains scattered and pieces of skull blown about. Old lady Penny said the deceased was sitting on the door step (as she stated on her examination) and that Booker shot her as she started up. She said the deceased started to run. Deceased was near the house and behind the barrel. I saw no signs of scuffling, and there was no suggestion that any fight had taken place. Old lady said, as prisoner and deceased went off that morning before the shooting that they were quarreling. Prisoner could have gotten through the house from behind and shot deceased without being seen by the old lady. There were two ways by which he could have got there without being seen.

Prisoner's evidence: Blake recalled and testified: "I found no shot about deceased."

R. M. Haughton testified: Found the deceased 7 of 8 feet from the barrel; did not measure the distance.

Old lady Penny said she saw prisoner with a gun and ran to meet him and caught the gun and said to him, "Jim, you are not going to shoot my child," and that prisoner threw her away from him and shot her daughter. Walters and others were present. On cross-examination: She said the first she knew prisoner was going out of the house with the gun.

Redirect by the State. Walters, recalled: I was there with Haughton, and did not hear anything about a fuss or scuffling that he testified about.

(717) Pearce testified: "I was there with Haughton and did not hear Penny say what Haughton testified about."

The foregoing is all the evidence introduced on the trial. The prisoner in apt time requested the court to charge the jury as follows:

1. That malice must be shown by the State before prisoner can be convicted of murder in the first degree. Refused, except as covered by general charge. Prisoner excepted.

2. That to convict prisoner of murder in the first degree, the same degree of deliberation and premeditation must have been used by the prisoner as would have been used by him if he had killed deceased with poison. Refused, except as covered by general charge. Exception.

3. That to convict of murder in the first degree the prisoner must have used the same degree of deliberation and premeditation as would have been used if he had killed deceased with starvation. Refused as above and prisoner excepted.

4. To convict of murder in the first degree the same degree of premeditation and deliberation must have been used by prisoner as he would have used if he had killed deceased with imprisonment. Refused as above, and prisoner excepted.

5. That before prisoner can be convicted of murder in the first degree the jury must be satisfied beyond a reasonable doubt that he used the same degree of deliberation and premeditation as he would have used if he had killed deceased by torture, starvation, poison, or imprisonment. Refused as above, and prisoner excepted.

6. That if jury believe that killing resulted from a fight between prisoner and deceased, which occurred immediately before the death of deceased, the prisoner is not guilty of murder in the first degree. Refused as above, and exception by prisoner. (718)

7. That if jury should not be satisfied beyond a reasonable doubt that the death did not result from a fight, which occurred shortly before the killing, between prisoner and deceased, they should not find prisoner guilty of murder in the first degree. Refused as above, and prisoner excepted.

8. That if they should find that the death occurred from a fight which was entered into by prisoner, deceased and her mother, shortly before the killing, he is not guilty of murder in the first degree. Refused as above, and prisoner excepted.

9. That unless they shall be satisfied beyond a reasonable doubt that the death did not occur in consequence of a fight which took place between the prisoner, deceased and another shortly before the death of deceased, he is not guilty of murder in the first degree. Refused as above, and prisoner excepted.

10. That if jury should believe that the killing was the result of a quarrel that had, immediately prior thereto, occurred between deceased and prisoner, the prisoner is not guilty of murder in the first degree. Refused as above, and prisoner excepted.

11. That unless they are satisfied beyond a reasonable doubt that the killing did not result from a quarrel between prisoner and deceased,

which quarreling occurred immediately before the killing, the prisoner is not guilty of murder in the first degree. Refused as above, and exception by prisoner.

12. That to constitute murder in the first degree all the elements must be united to constitute that offense. Refused as above, and exception by prisoner.

13. That before the jury can convict of murder in the first degree, they must be satisfied beyond a reasonable doubt of the truth of
(719) each fact which constitutes the crime. Refused as above, and exception by prisoner.

14. That prisoner is not guilty of murder in the first degree if the jury shall believe there was a quarrel between him and deceased some minutes before the killing, unless they shall be satisfied beyond a reasonable doubt that he used the same kind of degree of premeditation or deliberation as would be used in killing by poison, lying in wait, starvation, torture, or imprisonment. Refused as above, and prisoner excepted.

15. That they must be satisfied beyond a reasonable doubt that prisoner used the same degree of premeditation or deliberation in killing the deceased, no matter what length of time elapsed after a quarrel or fight between them, as would be necessary to kill by poison, lying in wait, starvation, torture, or imprisonment. Refused as above, prisoner excepted.

16. That in weighing the testimony of the mother of deceased it is the duty of the jury to consider the fact that she is the mother. Refused as above, prisoner excepted.

17. That the same weight is not to be allowed to the testimony of a witness who has made contradictory statements about material matters, and, unless such witness is supported by testimony of a convincing nature, the jury should not convict of murder in the first degree. Refused as above, prisoner excepted.

18. That in considering the flight of prisoner, the jury should take into consideration the fact that prisoner is a colored man of but little intelligence. Refused as above, prisoner excepted.

19. There is no presumption of malice from the fact that the deceased was killed. It is the duty of the State to satisfy the jury beyond a reasonable doubt that malice existed from prisoner towards de-
(720) ceased, at the time of the killing. Refused as above, prisoner excepted.

20. That the kind or degree of malice that prisoner had towards deceased at the time of the killing must have been such as a person has towards another whom he kills by way of poison, lying in wait, imprisonment, starving, or torture. Refused as above, prisoner excepted.

21. That the jury must be fully satisfied, or satisfied beyond a reasonable doubt, that prisoner had such malice (as indicated in above prayer No. 20) before they can convict the prisoner of murder in first degree. Refused as above, prisoner excepted.

Charge of the court: Prisoner is charged in the indictment with murder in the first degree. Under the bill, however, the jury may find a verdict for murder in the first degree or second degree, manslaughter, excusable homicide, which would be not guilty, according as the jury may find the facts to be from the evidence. I say, according as they may find the facts from the evidence, and I want to emphasize this expression, for juries have no right when certain facts are established to find a verdict for a degree of homicide different from that which the law says must follow such a finding of facts. To illustrate: Suppose the evidence establishes the fact that prisoner slew deceased through necessity in order to save his own life or prevent great bodily harm to himself, the law says this will be excusable homicide, and your verdict must be not guilty. Again, suppose the evidence establishes the fact that the killing, though unlawful and felonious, was without malice, either expressed or implied, the law says this would be felonious slaying, and your verdict must be manslaughter. Suppose, again, (721) the evidence establishes the fact that the killing was unlawful, felonious, and with malice, but without premeditation or deliberation, the law says this is murder in the second degree, and so your verdict must be. Again, suppose the evidence establishes the fact that the killing was unlawful, felonious and with malice, also that it was with premeditation, the law says this is murder in the first degree, and so your verdict must be.

I know there is a common idea among the people that in criminal cases the jury is the judge both of the law and fact, and can render just such a verdict as it may see fit, regardless of how the facts may be found, but I tell you, you have no such right under your oaths; your province is exclusively to find facts and your oaths require that you should apply the law as given you by the court to these facts, and render a verdict in accordance therewith. Your own common sense and reason tell you it must be done. If you are to be the judges of both the law and fact, why require the court to instruct you at all? It would be idle to do so. Again, if you follow the court and the court makes a mistake, there is the Supreme Court to correct it. If you refuse to do this and follow your own ideas of law, and mistake the law, there is no power to correct it. I said I need not cite authority to sustain these positions, but to impress what I have said I will quote what the Supreme Court has said in *S. v. Covington,* 117 N. C.: "That the statute does not give juries the discretion when rendering their verdict to determine of what degree

of murder a prisoner is guilty. They must find a verdict according to the evidence, and believing a prisoner guilty beyond a reasonable (722) doubt in the first degree, it is their duty to so find, however much inclined to show mercy by rendering a verdict for the lesser offense." And I will also add, as I have already said, believing the prisoner guilty of murder in the second degree, manslaughter, or not guilty at all, they must so find, however much sympathies or prejudices might incline them to find otherwise.

In criminal cases the prisoner is presumed to be innocent and the burden of establishing his guilt is upon the State, and the State must do this beyond a reasonable doubt. However, when the State has satisfied the jury beyond a reasonable doubt in an indictment for murder that prisoner slew deceased with a deadly weapon, the law presumes that the prisoner is guilty of murder in the second degree, and the burden shifts to the prisoner to satisfy the jury, not beyond a reasonable doubt, but simply to satisfy them that he was excusable, or that the crime is for the lesser offense, to wit, manslaughter. So the first thing you will consider is, Did the prisoner slay the deceased as alleged? The State relies on the following testimony (the court here read the testimony in full). The State says this testimony should satisfy you beyond a reasonable doubt of the killing as alleged. You must say how that fact is, and if you are not so satisfied, that is, if you are not satisfied beyond a reasonable doubt that prisoner killed deceased, you need not go further. But if you should be so satisfied, then you will proceed to determine whether the crime be murder in the first degree, second degree, manslaughter, or excusable homicide. Under the law, as the court sees it, there is no evidence to support a verdict of excusable homicide or manslaughter. So that if you should be satisfied beyond a reasonable (723) doubt that the prisoner did the killing it will be your duty to return a verdict of murder in the first or second degree, as you may find the facts to be, applying the principles of law which I have given you. Now, although you may be satisfied beyond a reasonable doubt that the prisoner did the killing, as alleged, with a gun, which would make him guilty, as I have already explained, nothing less appearing, you should render a verdict of murder in the second degree. Before you can render a verdict of murder in the first degree you must be satisfied further, beyond a reasonable doubt, that the killing was willful, deliberate, and premeditated. Now it is not necessary that the purpose or design to kill must exist for any particular length of time, but it must have existed before the killing, else it will not be murder in the first degree. The testimony relied on by the State to show this is that which tends to show that on the way to the house of the deceased the first time, the prisoner and deceased had some words, that afterwards he left and in

an hour returned with a gun and slew the deceased under the circumstances detailed by the witnesses, if they are to be believed. Prisoner says this ought not to so satisfy you that the testimony of the State tending to show this is unreliable, but even if believed is not sufficient to fully satisfy you that the killing was willful and premeditated. You are the ministers of the law chosen to decide the facts, to pass upon the weight of testimony, to say whether it is to be believed or not believed, to say that it establishes certain facts or that it does not. In weighing the testimony it will be your duty to consider the interest of any of the witnesses, if you find that there is any. In considering his flight, if he did flee, the fact that he is an ignorant man. To consider, for instance, that the witness Penny is the mother of deceased. To consider any conflicting statements, if you find there are any. To con- (724) sider the demeanor of witnesses on the stand and any other facts or circumstances which tend to uphold or discredit the testimony of any of the witnesses. You will not let the fact that the prisoner did not go on the stand prejudice you against him.

The prisoner excepts to the charge of the court as not indicating the sort or degree of malice which is required by the act of 1893, ch. 85. Exception also as not containing any one or more of the 21 requests for charge by prisoner. Motion for new trial overruled. Prisoner excepted and appealed from the judgment pronounced.,

S. G. Ryan for appellant.
Zeb V. Walser, Attorney-General, for the State.

DOUGLAS, J. This is a conviction for murder in the first degree. The evidence tended to show that the prisoner went to the home of the deceased in the morning of the day she was killed, and got some black pepper; that he went off, but came back in about an hour with a gun, and without provocation shot the deceased in the back of the head, killing her instantly.

The only exceptions are to the charge and refusal to charge, none of which, in our opinion, can be sustained.

The able charge of his Honor correctly stated the law, and fully and clearly presented every reasonable contention of the prisoner. It met the requirements of section 413 of The Code, which provides that the court "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." He is not required to give in *ipsissimis verbis* the instructions prayed by the defendant, either in civil or criminal cases, even if they are proper. It is sufficient if they are given substantially in the charge. *S. v. Bowman,* 80 N. C., 432; *Rencher v. Wynne,* 86 N. C., 268; *S. v.* (725)

Boon, 82 N. C., 637; *S. v. McNeill,* 92 N. C., 812; *S. v. Anderson,* 92 N. C., 732; *S. v. Jones,* 97 N. C., 469; *S. v. Brewer,* 98 N. C., 607; *Newby v. Howell,* 99 N. C., 149; *Michael v. Foil,* 100 N. C., 178; *Conwell v. Mann,* 100 N. C., 234; *S. v. Hargrove,* 103 N. C., 328; *Edwards v. Phifer,* 121 N. C., 388; *Norton v. R. R.,* 122 N. C., 910, 934. In the last case, on page 934, in line 13, a mistake of the printer inserted the word "objectionable" instead of "unobjectionable." What we said was, "That the court is not required to give the special instructions *as asked,* even when *unobjectionable,*" if they are substantially included in the charge. A clear and connected charge, giving all the proper instructions in their logical order, without undue prominence to any one phase of the case, is better calculated to give the jury a correct impression of the law as applicable to the facts under consideration than can be obtained from any number of special instructions. Of course, the prisoner has the right to have every reasonable theory of his defense properly presented to the jury, but when this is done he has no further cause of complaint.

The exceptions are practically all pointed to the provisions of chapter 85 of the Laws of 1893, the first two sections of which are as follows:

"SECTION 1. All murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any kind of willful, deliberate and premeditated killing, or shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony shall be deemed to be murder in the first degree, and shall be punished with death.

(726) "SEC. 2. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the penitentiary."

It has been settled by a long line of authorities that the killing with a deadly weapon implies malice, and that where it is admitted or proved beyond a reasonable doubt the prisoner is presumed to be guilty of murder, and the burden then rests upon him of showing such facts as he relies on in mitigation or excuse. This rule of the common law has never been questioned in this State. *S. v. Byrd,* 121 N. C., 684, and cases therein cited.

Since the passage of the act of 1893, this presumption extends only to murder in the second degree, and the State is still required to prove beyond a reasonable doubt the facts necessary to bring the homicide within the statutory definition of murder in the first degree. *S. v. Fuller,* 114 N. C., 885, 898; *S. v. Covington,* 117 N. C., 834, 862; *S. v. Wilcox,* 118 N. C., 1131, 1132; *S. v. Dowden, ibid.,* 1145, 1150; *S. v. Lockyear, ibid.,* 1154, 1157; *S. v. Thomas, ibid.,* 1113, 1118; *S. v. Finley,*

ibid., 1161, 1172. In this last case the eighth syllabus is incorrect, as it differs from the opinion in asserting the presumption of murder in the *first* degree.

Where the circumstances of the killing do not bring it within the classes which by the statute are made *per se* murder in the first degree, the State must prove deliberation and premeditation, but this it may do circumstantially, and not necessarily by express and positive evidence. If all the circumstances surrounding the killing are such as satisfy the jury beyond a reasonable doubt that the homicide was willful, deliberate and premeditated, it is their duty to find the prisoner guilty of murder in the first degree. This is the rule deducible from all (727) the cases above cited, and is generally approved. 1 McClain on Criminal Law, sec. 359; Desty Am. Crim. Law, sec. 129 k, p. 399; Bishop's New Criminal Law, sec. 728, subsec. 3.

It appears from the evidence that the prisoner had some words with the deceased, went off, and came back in about an hour armed with a loaded gun with which he shot and killed deceased. We may well adopt the words of the Court in *People v. Conroy,* 97 N. Y., 62, 72, and say that "we are of the opinion that the jury was justified in inferring from the facts and circumstances proved that the death of the deceased was the result of deliberation and premeditation on the part of the prisoner."

The several prayers of the prisoner to the effect "that to convict of murder in the first degree, the prisoner must have used the same degree of deliberation and premeditation as would have been used if he had killed the deceased with starvation," etc., were properly refused. The law mentions certain kinds of homicide which are *per se* murder in the first degree, and then further provides that *"any* other kind of willful, deliberate, and premeditated killing" shall also constitute murder in the first degree. In the former class, deliberation and premeditation are presumed, while in the latter they must be proved. Even if we were to make the law read "any other *like* kind" of killing, as contended by the prisoner, we could see but little difference between the act of one who lies in wait and one who arms himself and goes to seek his helpless and unsuspecting victim.

We are always willing and anxious to give to any one charged with a capital felony the fullest protection of the law, and it is only after the gravest consideration that we ever affirm a judgment carrying with it the sentence of death. Whatever may have been his crimes, he (728) who stands in the shadow of the gallows on the threshold of eternity receives our sincere commiseration; but we owe a duty to the majesty of the law and to the helpless thousands who can look to it alone for protection. In the performance of that duty the judgment must be

Affirmed.

Cited: S. v. Smith, 125 N. C., 622, 627; *S. v. Hicks, ibid.,* 640; *S. v. Medlin,* 126 N. C., 1130; *S. v. McDowell,* 129 N. C., 529; *S. v. Caldwell, ibid.,* 685; *S. v. Hicks,* 130 N. C., 710; *S. v. Bishop,* 131 N. C., 752; *S. v. Daniels,* 134 N. C., 675; *S. v. Clark, ibid.,* 714; *S. v. Worley,* 141 N. C., 767.

STATE v. W. A. WHITLEY.

(Decided 9 November, 1898.)

Frivolous Prosecution—Costs.

Where there is some evidence to support the order of the trial judge in imposing the costs upon the prosecutor, upon an acquittal, on the ground that the prosecution was frivolous and malicious and not warranted by the public interest—the judgment will not be reviewed.

INDICTMENT for disposing of crop before paying rent, tried before *Robinson, J.,* and a jury, at August Term, 1898, of DUPLIN Superior Court.

The defendant was acquitted, and his Honor imposed the costs upon the prosecutor, W. H. Williams, on the ground that the prosecution was frivolous and malicious, and not required by the public interest. There was some evidence that such was the case. The prosecutor excepted and appealed.

Stevens & Beasley for appellant.
Zeb V. Walser, Attorney-General, for the State.

(729) FURCHES, J. The defendant was a tenant of W. H. Williams (the prosecutor) in 1897, and is indicted under the statute for moving the crop raised by him without giving the five days notice required by law, and before the rental and advances made by the landlord were paid. The defendant was acquitted, and Williams was marked as prosecutor and taxed with the costs. From this order Williams appeals to this Court; and while the State cannot appeal from a general verdict of not guilty, a party taxed with the costs, as prosecutor, may. *S. v. Morgan,* 120 N. C., 563; *S. v. Powell,* 86 N. C., 640. But in such appeals, this Court cannot review and correct any errors committed by the court on the trial, if such errors should appear. Nor can this Court review the findings of fact by the court, upon which the prosecutor is taxed with the costs. *S. v. Morgan* and *S. v. Powell, supra.* Nor can this Court review the judgment of the court below upon the weight of

the evidence or sufficiency of the evidence, showing that the prosecution was frivolous or malicious (as either will justify the court in making the order), unless it should appear that there was no evidence.

In this case there are no specific findings of fact by the court, but all the evidence offered on the trial is sent up in the record. And the prosecutor, Williams, contends that this evidence does not prove or show malice. The defendant Whitley testified: "I was to pay 1,000 pounds of seed cotton. Nothing said at the time about delivery at Pierce's gin. Had one and a half acres in cotton and four or five acres in corn—all very poor. My horse gave out in May. I picked out 292 pounds of cotton. The cows ate some. I did not dispose of any. I offered him the corn. He said he did not want the corn and fodder, and said he was going to indict me; that he had $50 to spend on me. I did not make a bale of cotton." (730)

Taking this evidence to constitute the special finding of the court, we cannot say that there was no evidence to support the order of the court in taxing the prosecutor with the costs.

Such orders must depend to a very great extent upon the judgment of the court trying the case, who sees and hears all that is said and done. The judgment is

Affirmed.

STATE v. GEORGE ROBBINS, ALLEN ROBBINS AND WILLIAM HUNT.

(Decided 6 December, 1898.)

Forcible Entry and Detainer—Indictment—Separate Counts—General Verdict—Tenancy.

1. Where a tenant in possession, through intimidation or indifference, did not forbid the entry of parties taking possession, and the landlord learning of the entry, went the same day and ordered them off, and they refused to go, and plowed up the land, the entry became forcible after being forbidden, if not so at the beginning.

2. Separate indictments, and at different terms, may be treated as different counts in the same bill, if germane.

3. Where the transaction, alleged in different counts, was one and the same, the possession in one stated as the possession of the landlord, and in the other the possession being stated as that of the tenant, the two counts were not repugnant, but were a mere statement of the same transaction to meet the different phases of proof; and the court properly refused to quash, or to require the Solicitor to elect, or to arrest judgment.

4. While the possession is *sub modo* in the tenant, yet it remains in the landlord certainly to the extent that he can warn off trespassers and intruders.

5. Where there are two counts, a general verdict of guilty is such verdict as to both, and will sustain the judgment, even though there was error in the instruction as to one, provided the other was unexceptionable.

(731) INDICTMENT for forcible entry and detainer, tried before *Allen, J.*, at July Term, 1898, of the Superior Court of RANDOLPH County.

There was a verdict of guilty; judgment, and appeal.

The bill of indictment is as follows:

BILL OF INDICTMENT.

First count. Personal property. The jurors for the State on their oath present: That George Robbins, Allen Robbins and William Hunt, late of the county of Randolph, on 1 November, 1897, at and in the said county, with force and arms, and with a strong hand unlawfully, violently, forcibly and injuriously did enter into and upon the premises, viz., of Caroline Haroldson, the same being then and there in the peaceable possession of one Caroline Haroldson, and that the above-named defendants with force and arms, and with a strong hand, unlawfully, violently, forcibly, and injuriously, after so entering as aforesaid, did remain on the said premises, committing the acts following, that is to say, cursing, swearing and threatening to tear down the house of said Caroline Haroldson, being armed with an axe. She, the said Caroline Haroldson, being then and there personally present and forbidding the said defendants to enter and remain as aforesaid, to the great damage of her, the aforesaid Caroline Haroldson, and to the said example of all others in like cases offending, and against the peace and dignity of the State. HOLTON, *Solicitor.*

(732) Second count. Realty. And the jurors for the State upon their oaths present: That George Robbins, Allen Robbins, and William Hunt, late of the county of Randolph, on 1 November, 1897, at and in the said county, with force and arms, and with a strong hand, unlawfully, violently, forcibly, and injuriously, did enter into and upon the premises, viz., of Betsy Black, the same being then and there in the peaceable possession of Betsy Black, and that the above-named defendants, with force and arms, and with a strong hand, unlawfully, violently, forcibly, and injuriously, after so entering as aforesaid, did remain upon the said premises, committing the acts following, that is to say, cursing, declaring that they would take possession, having axes and clubs. She, the said Betsy Black, being then and there personally present, and forbidding the said defendants to enter and remain as aforesaid, to the great damage of her, the said Betsy Black, and to the said example of all others in like cases offending, and against the peace and dignity of the State. HOLTON, *Solicitor.*

On the back of the above *"first count"* was endorsed as follows: "A true bill. R. E. Mendenhall, foreman grand jury." On the paper marked "second count" there was no endorsement. The two papers were pinned together.

The following statement of the cases was filed and served upon the State's solicitor in due time, to which the said solicitor did not except or file any countercase.

DEFENDANT'S CASE ON APPEAL.

This was an indictment for forcible trespass, tried at July Term, 1898, of the Superior Court of Randolph County, before his Honor, *O. H. Allen,* judge presiding.

Upon the call of the case the defendants moved to quash the (733) bill of indictment, a copy of which is hereto attached as a part of this case and marked Exhibit "A," for the reason that the bill of indictment showed to be two bills of indictment which were repugnant to each other. His Honor overruled the motion and defendants excepted. Defendants then moved to quash the bill of indictment because the two counts, if they were counts as held by the court, were repugnant to each other, constituting two offenses repugnant to each other. Motion overruled, and defendants excepted.

The defendants moved to quash the first count for the reason that it was a distinct bill of indictment signed by the solicitor, and no return thereon by the grand jury. Motion overruled, and defendants excepted.

Mrs. Haroldson, the prosecutrix, testified for the State: They went on and sowed wheat on my land in October; George Robbins, Allen Robbins and Hunt; George told them to go on, it was his land; LaFayette Briles was present; I was there at 12 o'clock; I told them not to plow any more; I had forbidden them before; Betsy Black was there in possession of the premises, and had been for two years as my tenant. The State then proposed to ask the witness how long she had been the owner and in possession of the land. The defendant objected to this question on the grounds title or length of time of peaceable possession had nothing to do with the offense of forcible trespass. Objection overruled. Defendants excepted.

The witness then testified: "I have had it in peaceable possession for seventeen years; George Robbins ordered me off; said it was his land; cut limbs off the trees; sold him eighty-two pines off the same land." (734)

Cross-examined: "Betsy Black was in possession as my tenant; has been some surveying done; I was summoned before the clerk; these men were in there plowing when I got there."

Betsy Black testified for the State: "I was there living in the house close to three years; was in possession of house and land; Mr. Robbins

came that morning to sow the wheat; had implements; Mrs. Haroldson came at noon and ordered them to go off her land; no fussing; I did not say anything to him or them; I was afraid to forbid them when they first came; I was present; they plowed up some turnips."

"I was not afraid of them that day; I said I was afraid to order them out because that was not my business; he did not ask permission; I did not give him leave; I asked him if he was going to take possession." Here State rested.

Defendants then moved to compel the State to elect on the two counts for the reason that they were repugnant, charging two different offenses. Motions overruled, and defendants excepted.

George Robbins, one of the defendants, testified in his own behalf: "Betsy Black and her son Tom were living on the place; both Betsy and Tom told me to sow the wheat there; I saw my counsel and he told me I could sow the wheat if I was not forbidden; I went ahead of the boys and told Betsy I had come to sow the wheat if there was no objection; she said go ahead, and I went ahead sowing; at dinner Mrs. Haroldson came and forbid me; I called for an axe to trim up some fruit trees; Betsy gave it to me and I trimmed the trees."

Cross-examined: "I did not own the land at the time I bought the pine trees; I bought it afterwards." Several witnesses here testified to the good character of defendant George Robbins, and other wit-
(735) nesses corroborated the State and the defendant, and the case closed.

The judge charged the jury, among other things: "That if the defendants went upon the premises then in possession of Betsy Black and Tom Black, peaceably and by their permission, and their possession was as tenants of Mrs. Haroldson, and afterwards Mrs. Haroldson, the landlady, came and in the presence of the tenants ordered them from the premises, and they refused to go, and their numbers or conduct was such as was calculated to put them in fear, they would be guilty. That the possession of the tenant was the possession of the landlord. The jury returned a verdict of guilty.

Defendants moved an arrest of judgment on the grounds that the two counts in the bill were repugnant. Motion overruled. Defendants excepted. The defendants then moved for a new trial, assigning as a reason:

1. That the judge erred in overruling the several motions to quash, as set out in this case.

2. That the judge erred in overruling the motion to compel the State to elect on the counts in the bill of indictment, as set forth in this case.

3. That the judge erred in permitting the testimony for the State objected to by the defendants.

4. That the judge erred in his charge to the jury.

5. That the judge erred in not arresting the judgment for the reasons set out in this case.

Motion for new trial overruled, and defendants excepted.

Judgment that the defendants pay a fine of one dollar each and the costs.

The defendants appeal to the Supreme Court in open court. Notice of appeal waived. Appeal bond fixed at twenty-five dollars. Appearance bond in the same amount as before. (736)

By agreement in open court defendants are to have 30 days to serve case on appeal, and State 30 days thereafter to serve countercase or exceptions.

WILEY RUSH,
Attorney for Defendants.

Wiley Rush for appellants.
Zeb V. Walser, Attorney-General, for the State.

CLARK, J. The indictment consisted of two papers pinned together and returned into court as one bill, the two charges being numbered, first count and second count. We see nothing objectionable in this. Even if they had been returned as separate indictments and at different terms, they could be treated as different counts in the same bill, if germane. *S. v. Perry,* 122 N. C., 1018.

The charge in the first count was forcible entry and detainer upon the premises in the peaceable possession of Caroline Haroldson, and the second count was for the same offense upon the premises in possession of Betsy Black. The transaction alleged was one and the same, Mrs. Haroldson being the landlord and Betsy Black her tenant. The court properly refused to quash, or to compel the solicitor to elect, or to arrest judgment, for the two counts were not repugnant, but "a mere statement of the same transaction to meet the different phases of proof." *S. v. Harris,* 106 N. C., 682, and numerous precedents cited at page 686. In *S. v. Eason,* 70 N. C., 88, the indictment for forcible entry and detainer was sustained, though there were four counts laying the possession in different persons.

The State showed by the testimony of the prosecutrix that she was the owner and in possession of the premises, and had been such for seventeen years. It was not necessary to prove this much, as (737) proof of peaceable possession (by one not a mere intruder or trespasser himself) would have been sufficient, but we do not see how the defendant was hurt by proving more than was necessary.

The court charged the jury, "If the defendant went upon the premises, then in possession of Betsy Black and Tom Black, peaceably and by their permission, and their possession was as tenants of Mrs. Haroldson,

and afterwards Mrs. Haroldson, the landlord came, and in the presence of the tenants, ordered the defendants from the premises and they refused to go, and their numbers or conduct was such as was calculated to put her in fear, they would be guilty. The possession of the tenant was the possession of the landlord." In this there was no error. The possession is *sub modo* in the tenant, but it remains in the landlords certainly to the extent that he can warn off intruders and trespassers. The defendants were not mere visitors on premises by consent of the tenant, but took possession, plowing the land up under claim of ownership against the landlord in possession. They could not avoid an action of ejectment of this forcible way of taking possession. The tenant could not give such intruders the right of possession by actual attornment, still less could he do so, as here, by silence that was caused by intimidation, as the tenant stated on the direct examination, or by indifference, as intimated on the cross-examination.

The prosecutrix was not at the precise point of entry at the identical moment; she could not be everywhere, but went the same day, on learning of the entry, and ordered the defendants off, and they refused
(738) to go, and plowed up the land. The entry became forcible after being forbidden, if not so in its beginning. *S. v. Webster,* 121 N. C., 586; *S. v. Lawson,* at this term, and cases there cited. The entry of three persons, their remaining and plowing up the land after being forbidden by the landlord, a woman, was sufficient force. *S. v. McAden,* 71 N. C., 207; *S. v. Armfield,* 27 N. C., 207; *S. v. Pollock,* 26 N. C., 305, and other cases cited in *S. v. Lawson,* at this term.

There were two counts and a general verdict on both, which is a verdict of guilty on each (*S. v. Cross,* 106 N. C., 650), as the defendants did not exercise their right to require a separate verdict on each count. There being no exception as to the other count, the verdict thereon would have sustained the judgment, even had there been error in the instruction on this count, it being surplusage. *S. v. Toole,* 106 N. C., 736, which has been cited and approved in *S. v. Brady,* 107 N. C., 882; *S. v. Hall,* 108 N. C., 776; *S. v. Edwards,* 113 N. C., 653; *S. v. Perry,* 122 N. C., 1018, and in other cases.

No error.

Cited: S. v. Elks, 125 N. C., 605; *S. v. Conder,* 126 N. C., 988.

(739)

STATE, EX REL ATTORNEY-GENERAL, v. JOHN T. BLAND.

(Decided 9 November, 1898.)

Vacating Grants—Parties.

Where the State has no interest in the land an action to vacate a grant must be brought by the party in interest in his own name and at his own expense.

CIVIL ACTION to vacate a grant, heard upon demurrer by *Adams, J.*, at March Term, 1898, of the Superior Court of PENDER County.

It appears from the pleadings that the State has no interest in the land.

Demurrer was sustained, and the case dismissed at costs of plaintiff. Plaintiff appealed.

Zeb V. Walser, Attorney-General, and Stevens & Beasley for plaintiff (appellant).

Frank McNeill for defendant.

CLARK, J. This is a civil action brought by the State to annul and vacate a grant. It is averred in the complaint, and is admitted by the demurrer, that the State has no interest in the land. The action is brought for the benefit of another claimant. In such case, the other claimant has full relief by a direct action as authorized by The Code, sec. 2786, and should have brought it at his own cost and charges, and as required by The Code, sec. 177, requiring all actions to be brought by the party in interest. *Carter v. White,* 101 N. C., 30. The Code, sec. 2788, authorizing the State to bring actions to vacate and annul letters patent applies to the canceling of grants only in those cases in which, upon the cancellation, the title to the realty would revest in the State, which is thus the party in interest. *S. v. Bevers,* (740) 86 N. C., 588. If this were not so, parties contesting the validity of grants, alleged to be junior, could overwhelm the State with the costs of litigation in which it has no interest.

This action is not brought by the State "upon relation," in which the relator is the real party in interest, and, indeed, section 2786 of The Code does not authorize an action of that kind, but a direct proceeding in his own name by the party who conceives he has been injured by the grant he seeks to set aside.

In dismissing the action there was

No error.

Cited: Wyman v. Taylor, 124 N. C., 431; *Henry v. McCoy,* 131 N. C., 589.

STATE v. JOHN LAWSON AND WILLIAM CHEATHAM.

(Decided 29 November, 1898.)

Forcible Entry and Detainer—Forcible Trespass—Former Acquittal.

1. The only distinction between forcible trespass and forcible entry and detainer is that the former is as to personal property, and the latter as to realty, which distinction is not always observed. *S. v. Davis*, 109 N. C., 809.
2. It is not necessary that the party shall be actually put in fear—it is sufficient if there is such a demonstration of force as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace. The demonstration of force may be by numbers or by weapons.
3. In an indictment for forcible entry and detainer the plea of former acquittal will be sustained by proof of an acquittal in a prosecution for forcible trespass for this same transaction in respect to the same land.

(741) INDICTMENT for forcible entry and detainer, tried before *Coble, J.*, at April Term, 1898, of STOKES Superior Court.

The defendants, with one William Collins, were included in the indictment for forcible entry and detainer of the premises of the prosecutor. All the defendants pleaded not guilty—and Lawson and Collins pleaded, in addition, former acquittal.

The solicitor for the State admitted that this is the same transaction for which Lawson and Collins were indicted and tried at last term of the court under an indictment for forcible trespass and a verdict of not guilty rendered.

These two defendants then asked his Honor to direct the jury to find their plea of former acquittal in their favor.

His Honor declined, and they excepted. At the conclusion of the State's testimony, the defendant's demurred *ore tenus* to the evidence, and asked his Honor to instruct the jury that there was no evidence to warrant a verdict of guilty, which his Honor declined, and the defendants excepted.

Verdict of not guilty as to Collins, and of guilty as to Lawson and Cheatham. Judgment as to them, and appeal.

The evidence is sufficiently stated in the opinion.

A. M. Stack for appellants.
Zeb V. Walser, Attorney-General, for the State.

CLARK, J. Cheatham, Lawson, and Collins are indicted for forcible entry and detainer. Lawson and Collins pleaded former acquittal, as well as not guilty. The solicitor admitted that they had been tried for forcible trespass at last term for this same transaction and acquitted.

The court erred in refusing the prayer of defendants Lawson and (742) Collins to instruct the jury to sustain the plea of former acquittal as to them, though the jury cured this as to Collins by acquitting him. It is true the same act, with an additional circumstance, may be an offense against two statutes (*S. v. Stevens,* 114 N. C., 873; *S. v. Robinson,* 116 N. C., 1047), but the only distinction between forcible trespass and forcible entry and detainer is that the former is as to personal property and the latter as to realty, which distinction is not always observed. *S. v. Davis,* 109 N. C., 809. There being in evidence nothing of personal property, on the admission of the solicitor that it was "the same transaction," we must take it that it was the same offense. *S. v. Nash,* 86 N. C., 650.

The defendant Cheatham further contends it was error to refuse the prayer for instruction that there was no evidence to warrant a conviction as to him. There was evidence by the State that the prosecuting witness was in possession of the land, had sowed rye thereon, and in March the three defendants came on the land and began plowing up the rye, that he was not present when they entered, but when he learned of it he went where the defendants were and ordered them to desist, but they refused, and went on and plowed up the rye, and he was "afraid to say much to them," and did not stay long; that they worked there that day and Cheatham held and worked the land that year. In the defendant's evidence it appeared that the three went on the land with plow, hoe, axe and mattock and acted as prosecutor stated. It is true defendants denied possession of the land by prosecutor, and asserted that there was no demonstration of force. Upon this conflict of evidence the court properly submitted the case to the jury, and we presume under (743) proper instruction, as the charge is not sent up, not being excepted to. The appearance of defendants in such force, with axe, mattock, hoe and plow, with the avowed and executed purpose to plow up the rye the prosecutor had sown, and in spite of his personal protest was reasonably calculated to put him in fear, and he says he was in fact put in fear, was "afraid to say much," and left the invading host in possession then and for the balance of the year, which was some evidence of the truth of his statement.

Indeed, in *S. v. Davis,* 109 N. C., 809, it is said: "It is not necessary that the party shall be actually put in fear. *S. v. Pearman,* 61 N. C., 371. It is sufficient if there is such demonstration of force as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace. *S. v. Pollock,* 26 N. C., 305; *S. v. Armfield,* 27 N. C., 207. Such demonstration of force may be a 'multitude' or by weapons. *S. v. Ray,* 32 N. C., 29, citing *S. v. Flowers,* 6 N. C., 225; *S. v. Mills,* 13 N. C., 555." It was not necessary that the prosecutor

should be present at the very moment of entry, he could not be present at every point in his premises. The defendants did not enter with his permission, and when he found they were there he ordered them off, but relying on their numbers they intimidated him and remained in forcible possession. *S. v. Webster,* 121 N. C., 586; *S. v. Woodward,* 119 N. C., 836; *S. v. Davis, supra; S. v. Lawson,* 98 N. C., 759.

The defendant Cheatham further relies on *S. v. Simpson,* 12 N. C., 504, that the entry of three, though without violence (if against the prohibition of the party in possession who is present), is a sufficient demonstration of force, and that Lawson and Collins having been (744) acquitted on a former trial, he alone could have been present on this occasion, and there being no physical violence, threats or weapons he could not be guilty. But this case must be tried by the evidence in this case, and by the evidence of the State, and indeed according to defendant's own evidence all three defendants were present. If in the former trial Lawson and Collins had been convicted, that verdict could not have been produced on this trial against Cheatham to prove that two others were present. *E converso* the verdict of acquittal cannot be produced in Cheatham's favor as evidence that they were not present. The former verdict of acquittal as to them may have been procured by absence of witnesses or for other reasons. It can have no bearing in this case, which depends upon the evidence of the transaction itself as laid before this jury. It is available to Lawson and Collins, but not to Cheatham, who was not a party to it. A similar case and ruling is that in indictments for fornication and adultery, though that is necessarily an offense committed by two, if the parties are tried at different times, or even at the same time, the acquittal of one is not a bar to the conviction of the other, as there may be more evidence against one, as his or her confession, for instance, which would not be evidence against the other (if not made in that other's presence). *S. v. Cutshall,* 109 N. C., 764 (at page 771).

Besides, there may be a demonstration of force by less than three. *S. v. McAden,* 71 N. C., 207.

For failure to give the instruction asked upon the plea of former acquittal there must be a new trial as to Lawson.

There is no error as to Cheatham.

Cited: S. v. Robbins, ante, 738; *S. v. Elks,* 125 N. C., 605; *S. v. Conder,* 126 N. C., 988; *S. v. Simpson,* 133 N. C., 679; *S. v. Lytle,* 138 N. C., 740; *S. v. Hooker,* 145 N. C., 584.

(745)

STATE v. WILL PIERCE.

(Decided 23 December, 1898.)

Felony—Misdemeanor—Burning a Gin House—Motion in Arrest of Judgment—Temporary Absence of Prisoner.

1. An indictment which charges that the defendant did unlawfully, willfully and feloniously set fire to and burn a certain gin house belonging to J. L. Bennett is a valid indictment under The Code, sec. 985 (2).
2. Where a statute either makes an act unlawful, or imposes a punishment for its commission, such act becomes a crime, without any express declaration to that effect. In the former case, it is a misdemeanor—in the latter, a felony or misdemeanor according to the nature of the punishment prescribed.
3. Temporary absence of the prisoner from the court room during the trial, during the argument of his counsel, who waives the objection and proceeds with his argument, is no ground of exception in a case not capital.

INDICTMENT for burning a gin house, tried before *Starbuck, J.*, at Fall Term, 1898, of the Superior Court of UNION County.

The indictment charged that the defendant did unlawfully, willfully and feloniously set fire to and burn a certain gin house belonging to J. L. Bennett and in possession of one G. W. Bailey.

The defendant was convicted.

He moved for a new trial on the ground that during his absence from the court room the court had proceeded with the trial.

The facts were: That the court had taken a recess, and on reassembling, the court not noticing that the prisoner had not been brought in, his counsel commenced his address to the jury—the solicitor brought to the attention of the court that the prisoner was not in court; his counsel then said he would waive that objection and proceeded with his address for a few minutes, when the prisoner was brought (746) into court.

His Honor refused the motion.

The prisoner then moved in arrest of judgment for defect in the bill of indictment. The ground of the objection is fully stated in the opinion. There were other exceptions in the case which this Court concluded did not require discussion. Motion in arrest refused. Judgment and appeal.

Adams & Jerome and Armfield & Williams for defendant (appellant).
Zeb V. Walser, Attorney-General, for the State.

CLARK, J. The indictment charges that the defendant "did unlawfully, willfully, and feloniously set fire to and burn a certain gin house,

belonging to J. L. Bennett and in the possession of one G. W. Bailey." Verdict of guilty and defendant moved in arrest of judgment for that The Code, sec. 985 (6), has been amended (Laws 1885, ch. 66), by striking out the words "unlawfully and maliciously" and inserting in lieu thereof "wantonly and willfully," and that the words used in the indictment are not synonymous with those required by the amended statute. The objection would be well taken if this indictment was sustainable only under subsection 6 of section 985. *S. v. Morgan,* 98 N. C., 641; *S. v. Massey,* 97 N. C., 465. But it is a valid indictment under The Code, sec. 985, subsec. 2, as was held in *S. v. Thorne,* 81 N. C., 555, cited and followed by *S. v. Green,* 92 N. C., 779.

The defendant, however, insists that subsection 2, section 985, does not create an offense because it merely prescribes that "every person
(747) convicted of" the acts therein described "shall be imprisoned in the penitentiary not less than five nor more than ten years," and does not expressly add that such person shall be guilty of a felony. The objection is without force. Convictions under subsection 2 were expressly sustained in the two cases last cited, and its validity has also been directly recognized in *S. v. England,* 78 N. C., 552, and *S. v. Wright,* 89 N. C., 507. Indeed, the doctrine is well settled that where the statute either makes an act unlawful, or imposes a punishment for its commission, such act becomes a crime without any express declaration that it shall be a crime or of its grade. In the former case it is a misdemeanor, and in the latter a felony or a misdemeanor, according to the nature of the punishment prescribed. Laws 1891, ch. 205; *S. v. Parker,* 91 N. C., 650; *S. v. Bloodworth,* 94 N. C., 918; *S. v. Addington,* 121 N. C., 538. Indeed, the Court has held recently that the bare addition to section 35 of The Code of a provision that one found to be the father of a bastard child, upon an issue of paternity, shall be "fined" "not exceeding $10, which shall go to the school fund," of itself nothing more being said, made the father guilty of a crime, and changed the proceeding from a civil action, as it had always theretofore been recognized, into a criminal action, with all the incidents following such change. In *S. v. Ostwalt,* 118 N. C. (at page 1212), the Court says: "It seems never before to have been doubted that the Legislature creates a criminal offense whenever it prescribes that a certain act shall be punishable either by fine or imprisonment, or forbids it generally, and by implication empowers the court to impose either fine or imprisonment." The dissenting
(748) opinions in *S. v. Ostwalt, supra,* and in *S. v. Ballard,* 122 N. C., 1024 (which hold bastardy a criminal offense) do not controvert that as a general proposition, but rest upon the ground that the bastardy act, taken as a whole, and the construction the courts had uniformly placed upon it, and the nature and purpose of the proceeding negative

the inference of any intention in the Legislature to change the proceeding into a criminal action, with its grave inconveniences, from the incidental provision (in one section of the chapter on bastardy) of $10 for the school fund—a doctrine analogous to that of *S. v. Snuggs,* 85 N. C., 541—but the majority of the Court settled the law otherwise. If the incidental imposition of "not exceeding $10" for benefit of the school fund creates a crime, *a fortiori* a provision that "every one convicted of the willful burning of a gin house . . . shall be imprisoned in the penitentiary not less than five nor more than ten years," creates a crime.

"During the argument there was a recess of the court at noon, and defendant was taken to the jail. Upon reassembling of court, one of defendant's counsel began his argument to the jury. Defendant had not been brought into court, but the court did not notice his absence until defendant's counsel had proceeded with his argument about a minute, when the solicitor suggested that the defendant was in custody and not in court. Thereupon the defendant's counsel stated he would waive defendant's presence, and proceeded with his argument. About ten minutes later the sheriff produced the defendant in court." No exception was taken to this at the time, and it was too late to make this exception for the first time in the appellant's case on appeal, which is admissible only as to exceptions to the charge. *Taylor v. Plummer,* 105 N. C., 56; *Lowe v. Elliott,* 107 N. C., 718; *Blackburn v. Ins.* (749) *Co.,* 116 N. C., 821. But had the exception been taken at the time, it would not have availed the defendant, in a case not capital, unless it had been clearly made to appear that he had been prejudiced thereby. *S. v. Paylor,* 89 N. C., 539.

The other exceptions in the case do not require discussion.

No error.

Cited: S. v. Rippy, 127 N. C., 517; *S. v. Liles,* 134 N. C., 737; *Alley v. Howell,* 141 N. C., 116.

STATE v. JOHN E. AUSTIN (TWO CASES)—No. 1.

(Decided 13 December, 1898.)

Landlord and Cropper—Possession—Forcible Entry—Assault.

1. A cropper has no estate in the land, and his possession is that of the landlord.

2. All crops raised on the land, whether by tenant or cropper, are by statute (The Code, sec. 1754) deemed to be vested in the landlord, in the absence of an agreement to the contrary, until the rents and advancements are paid.

3. An attempt to appropriate and carry off the crop may be repelled by the landlord by force, provided no more force is used than is necessary to protect his possession.

INDICTMENT for assault and battery with a deadly weapon upon Henry Keziah, tried before *Greene, J.*, at January Term, 1898, of UNION Superior Court.

The defendant Austin had employed a son of the prosecutor as a cropper on his wife's land, but who died before the crop was matured. After the crop was matured the prosecutor, his daughter, and two other members of his family went upon the land, picked cotton, and were carrying it off when the defendant, an old man aged 82, came with
(750) a pair of steelyards to weigh the cotton and forbid them to carry off the cotton, and upon their persisting, he threatened them with his walking stick, shaking it over their heads in striking distance. This caused them to desist, and he took the cotton and carried it to the house.

His Honor charged the jury that if the defendant drew the stick on the prosecutor when in striking distance of him, thereby causing him to desist from taking the cotton from defendant, the defendant would be guilty.

Defendant excepted.

Verdict of guilty, judgment, and appeal by defendant.

Osborne, Maxwell & Keerans for appellant.
Zeb V. Walser, Attorney-General, for the State.

CLARK, J. In *Harrison v. Ricks,* 71 N. C., 7, it is said: "A cropper has no estate in the land; that remains in the landlord. Consequently, although he has in some sense the possession of the crop, it is only the possession of a servant and is in law that of the landlord. The landlord must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop. *McNeely v. Hart,* 32 N. C., 63; *Brozier v. Ansley,* 33 N. C., 12." As against a cropper, the landlord always has a right to have possession of the crop. *S. v. Burwell,* 63 N. C., 661. But it has now become immaterial whether the producer of the crop is a cropper or a tenant under The Code, sec. 1754, which provides that "any and all crops raised on land," whether by a tenant or cropper (in the absence of an agreement to the contrary), "shall be deemed and held to be vested in possession of the landlord or his assigns at all times
(751) until the rent for said land shall be paid to the lessor or his assigns, and until said party or his assigns shall be paid for all advances made and expenses incurred in making and saving said crop." There is no evidence here that such payments had been made. The defendant was the landlord, and in taking charge of the basket of cotton to carry it to his house, he was in the exercise of his legal right. "Even

if Henry Keziah had been the cropper or tenant himself when he seized the basket of cotton and attempted by force to take it from the defendant, the latter used no more force than was necessary to protect his possession when he shook his stick at him with a threat to strike, and was not guilty." *S. v. Yancey,* 74 N. C., 244. Here, the condition of the defendant was still stronger, for the cropper or tenant was dead and Henry Keziah was not his administrator. In entering upon the premises of the defendant, an old man of 82, with a multitude, after being forbidden to do so, and picking out and carrying off the crop, Henry Keziah and his companions were guilty of forcible entry as to the land and of forcible trespass in removing the cotton after being picked out. He was a wrongdoer *ab initio,* and the defendant was only using sufficient force to protect the possession guaranteed him by the law. It is true that if the cotton had already been carried off, the landlord could recover it by claim and delivery, but this is only an additional remedy (which in many cases would be futile), and does not take away the landlord's right to retain possession till he is paid for his share and his advancements. If the landlord unjustly detains the crop, the cropper or tenant has his remedy to obtain a division upon claim and delivery, after five days notice. The Code, sec. 1755. He had no right to go on the premises after being forbidden, and pick out and carry off the crop. (752)

Error.

STATE v. JOHN E. AUSTIN—No. 2.

SIMILAR indictment for assault and battery upon M. A. Keziah, daughter of Henry Keziah, defendant, upon the same evidence as in preceding case. Verdict guilty; judgment, and appeal.

PER CURIAM. This case is governed by the foregoing opinion, and is a part of the same transaction, the only difference being that here the landlord was obstructed in taking possession of another basket of cotton by the daughter of Henry Keziah sitting down on it. According to her testimony, the defendant told her to get up, and threatened to hit her with a stick which he had in his hand if she did not, and she jumped up and ran off. The defendant denies threatening to strike her with the stick. But in any aspect of the evidence Henry Keziah and his force of hands were on the old man's land, without a shadow of right, forcibly taking possession of the crop to which they had no legal claim, and after being forbidden the premises. The defendant used no more force than was reasonably necessary to protect his possession. The court should have instructed the jury to return a verdict of not guilty.

Error.

(753)

STATE v. MILTON BARRETT.

(Decided 13 December, 1898.)

Larceny—Felonious Intent—Judge's Charge.

1. Larceny is a felony, and a charge is fatally defective that does not submit the question of felonious intent to the jury, as that is one of the necessary ingredients of larceny.

2. The proper expression to be used in a charge to the jury should be: "If you find from the evidence such to be the fact, or facts," instead of: "If you believe such a fact or facts," which is often, but improperly used.

INDICTMENT, larceny of an axe, tried before *Greene, J.*, at Spring Term, 1898, of UNION Superior Court. The evidence was circumstantial, of which possession by the defendant was the principal circumstance against him.

The charge of his Honor was very brief and is given in full in the opinion. Exception by defendant.

Verdict of guilty; judgment and appeal.

Armfield & Williams for defendant (appellant).
Zeb V. Walser, Attorney-General, for the State.

FURCHES, J. This is an indictment for the larceny of an axe. The defendant had been in the employ of the prosecutor, who was a sawmill owner, and some time after the defendant left the prosecutor's employment he missed an axe. He testified that he did not know the axe was stolen, and, if it was stolen, he did not know that the defendant had stolen it.

But there was evidence tending to show that some time after defendant left the prosecutor, he went to work for one Shannon and carried with him an axe; and there was evidence tending to show that
(754) the axe he carried with him to Shannon's was the axe that belonged to the prosecutor, and the one that he said he had lost. The defendant alleged, in explanation of his possession, that he traded for the axe, and got it from a strange negro from South Carolina. Upon this evidence the court charged the jury as follows:

"If you believe from the evidence that the prosecutor missed an axe, and if you should believe that the axe described by the witness Shannon, as in the possession of the defendant, was that axe of prosecutor, and believe all this beyond a reasonable doubt, you will bring in a verdict of guilty, otherwise you will acquit the defendant."

This was the whole charge, and the jury "brought in" a verdict of guilty. Defendant excepted and appealed.

The charge is fatally defective for the reason that it does not submit the question of felonious intent to the jury, which is one of the necessary ingredients of larceny. *S. v. Coy,* 119 N. C., 901, and cases there cited. For this error the defendant is entitled to a new trial.

We have before called attention to the careless manner in which juries are often charged—"if you believe" such a fact or facts, when the charge should be, "if you find from the evidence" such to be the fact or facts. This manner of charging the jury is probably the result of carelessness of expression. But it should not be indulged in, as there is a substantial difference in the two manners of charging the jury. A juror may very well *believe* a thing is so, when he would not be willing to *find that it was a fact established by the evidence.*

For the error pointed out in the charge, there must be a (755)
New trial.

Cited: Wilkie v. R. R., 127 N. C., 213; *Sossoman v. Cruse,* 133 N. C., 473; *S. v. McDonald, ibid.,* 684; *S. v. Green,* 134 N. C., 661; *S. v. Garland,* 138 N. C., 683; *Merrell v. Dudley,* 139 N. C., 59; *S. v. Hill,* 141 N. C., 772; *S. v. Simmons,* 143 N. C., 617; *S. v. Godwin,* 145 N. C., 463; *S. v. R. R., ibid.,* 572, 577.

STATE v. JASPER HINSON.

(Decided 23 December, 1898.)

Criminal Courts—Appeals.

1. While a defendant convicted in the Circuit Criminal Court can appeal to the Superior Court, he is not entitled to a trial *de novo* there, but only to a review of questions of law passed upon by the inferior court.
2. The cause goes from the Criminal to the Superior Court by appeal, as it does from the Superior to the Supreme Court. The appeal should contain a concise statement of the case, as in appeals to this court from the Superior Courts.
3. The State can only appeal in criminal cases to the Supreme Court in the instances specified in sec. 1237 of The Code.

INDICTMENT for murder.

The prisoner was indicted for the murder of Jim Crawford in the First Criminal Circuit Court of Mecklenburg County, held by *Sutton, J.,* at June Term, 1898, and was found guilty of murder in the first degree. From the judgment pronounced he appealed to the Superior Court of MECKLENBURG County, and his appeal came on to be heard at October Term, 1898, of the Superior Court before *Starbuck, J.*

The prisoner claimed a trial *de novo*. The Solicitor contended that only questions of law arising in the case should be passed upon.

His Honor adjudged that the defendant is entitled to a trial *de novo* in the Superior Court. From this judgment the Solicitor appeals to the Supreme Court.

Appeal granted.

(756) *Zeb V. Walser, Attorney-General, for the State (appellant). Osborne, Maxwell & Keerans, and Clarkson & Duls for the prisoner.*

FAIRCLOTH, C. J. The defendant was indicted in the Circuit Criminal Court of Mecklenburg County for murder and convicted. The case was certified to the Superior Court of said county, and there the defendant claimed the right to have his case tried on its merits before a jury.

The Solicitor of the Superior Court contended that his Honor should only hear and pass upon questions of law presented in the record from the Criminal Court. His Honor ruled that the defendant was entitled to a trial *de novo* in the Superior Court, and the Solicitor appealed.

The appeal must be dismissed, as it is not one of the only instances in which the State can appeal. Code, sec. 1237; *S. v. Moore,* 84 N. C., 724. The question argued is of such public importance that we have no hesitancy in passing on it without further delay.

In *S. v. Ray,* 122 N. C., 1097, it was held that the act of 1895, ch. 75, sec. 5, providing that appeals to the Supreme Court may be prosecuted from the judgments of said criminal courts in the same manner as from the Superior Courts, was unconstitutional, and that decision applies equally to the same act, ch. 156, sec. 5. *Tate v. Comrs.,* 122 N. C., 661. No appeal can lie from a criminal or inferior court direct to the Supreme Court. *S. v. Hanna,* 122 N. C., 1076. The appeal must be taken to the Superior Court and thence to the Supreme Court. *Rhyne v. Lipscombe,* 122 N. C., 650.

(757) Recurring to the main question, Was the defendant entitled to a trial *de novo* in the Superior Court? The question is answered by The Code, sec. 809 (Acts 1879, ch. 141; Constitution, Art. IV, sec. 8) in these words: "The practice, pleading, process and procedure in such (inferior) courts shall be in all respects as provided for the Superior Courts. Appeals may be taken from these courts to the Superior Courts in term time for error assigned in *matters of law* in the same manner and under the same restrictions provided by law for appeals from the Superior Courts to the Supreme Court, and the final decision of each Superior Court shall be certified to the court below that final judgment may be rendered."

In *S. v. Thompson,* 83 N. C., 595, and *S. v. Ham, ibid.,* 590, it was expressly held that a defendant convicted in the inferior court was not entitled to a trial *de novo* upon appeal to the Superior Court, but only to a review of questions of law passed upon by the inferior court. Our conclusion is that the defendant was not entitled to a trial *de novo* in the Superior Court, but only to a review of matters of law or legal inference found in the case on appeal from the criminal court. Under the broad provisions of The Code, sec. 809, the cause goes from the criminal to the Superior Court by *appeal,* as it does from the Superior to the Supreme Court. The appeal should contain a concise statement of the case, as in appeals to this Court from the Superior Courts.

Appeal dismissed.

Cited: S. v. Davidson, 124 N. C., 839, 844; *S. v. Bost,* 125 N. C., 709; *Mott v. Comrs.,* 126 N. C., 877, 882; *S. v. Savery, ibid.,* 1088.

(758)

STATE v. C. C. MISENHEIMER.

(Decided 23 December, 1898.)

Slander of Innocent Woman—The Code, Section 1113—Husband—Wife—Evidence—Judge's Charge.

1. The admission of defendant that he had been divorced from the prosecutrix in another State is competent evidence.
2. A certified judgment of the court of another state unaccompanied by the whole certified record is not in compliance with the Act of Congress (Code, Vol. 2, page 732) and is inadmissible.
3. Statements made by defendant before his church council to which he had been summoned to explain his separation from his wife were properly excluded. Such statements partake of the character of privileged communications and do not create a presumption of malice.
4. Where defendant repeated to a witness a confession of guilt which he informed witness his wife had made to him, it was error to charge the jury, that if the prosecutrix was an innocent woman, the law presumed the statement was malicious—in the absence of proof that she had made no such confession, and where the statement was made without exhibition of malice, but of sorrow only, in a friendly conversation induced by witness.
5. It being admitted that the parties had had illicit intercourse with each other before their marriage and that the prosecutrix had given birth to a child five months after marriage—but her character being proved to be

good before and since marriage, with this exception—his Honor properly refused to charge that she was not an "*innocent woman*" under section 1113 of The Code. *S. v. Grigg*, 104 N. C., 882.

INDICTMENT for slander of an innocent woman, tried before *Starbuck, J.*, at Fall Term, 1898, of STANLY Superior Court.

The defendant and the prosecutrix had been man and wife. There was evidence that he had seduced her before marriage, and that she had a child about five months after marriage; that after the birth of the child defendant went to Texas and remained there three
(759) years, and on his return stated that he had procured a divorce from his wife in the Texas court.

The defendant was examined on his own behalf. During his cross-examination he was shown a copy of a divorce judgment, and was asked if that was a copy of the divorce he obtained?

Defendant objected to the examination of defendant in regard to divorce, and also to the reading of the judgment. Objection overruled; defendant excepted.

Defendant admitted it was a correct copy, and it was read in evidence by the State.

Defendant excepted.

A State witness, Pearson Allmond, testified that in a conversation between himself and the defendant the latter explained the reason of his leaving the State. He said his wife had confessed to him that she had had connection with John Dry and others, and that one was a colored man.

Defendant spoke kindly of his wife—showed no malice toward her—seemed to regret the matter.

Before defendant went to Texas he made the same statement to me about his wife.

On this point his Honor charged the jury: That as to the statement of Allmond, if the prosecutrix was an innocent woman, the law presumed that the statement was malicious, and the burden was put upon the defendant to show to the satisfaction of the jury that it was not malicious. Defendant excepted.

Outside of the matter, both defendant and prosecutrix was proved to have good characters. She denied making the confession imputed to her.

The defendant asked the court to charge the jury: That it being admitted that the prosecutrix had had criminal intercourse with the
(760) defendant before their marriage, that she was not an innocent woman under section 1113 of The Code, and that the jury should return a verdict of not guilty. The prayer was refused; defendant excepted.

There was a verdict of guilty; judgment and appeal by defendant.

Adams & Jerome for defendant (appellant).
Zeb V. Walser, Attorney-General, for the State.

FURCHES, J. This is an indictment under the statute, section 1113 of The Code, for slandering an innocent woman.

The defendant and the prosecutrix, L. C. Misenheimer, whom it was alleged the defendant had slandered, had been married, but troubles having arisen between them, the defendant left the prosecutrix (his wife), and went to the State of Texas, where he remained some three years, when he returned. Upon his return, he stated that while he was in Texas he procured a divorce in the courts of that State from the prosecutrix. The prosecutrix testified that while defendant was absent, papers were served on her in a case of the defendant against her in an action of divorce in Texas. The State also offered in evidence a properly certified "judgment" of a court in Texas, granting a divorce of defendant from the prosecutrix.

Upon the view we take of the case presented by the record, it does not turn upon the ruling of the court on the admission of evidence. But as the same questions may be presented upon another trial, and as we have considered them, it seems to be proper to say that in our opinion the admissions of the defendant that he had been divorced from the prosecutrix, were competent and admissible as evidence.

It is held in *S. v. Melton,* 120 N. C., 591, in an indictment for (761) bigamy, that the admissions of the defendant that he had been married to another woman in South Carolina were admissible as evidence for the purpose of showing a former marriage. And we do not see the difference in principle in allowing declarations to show marriage and in allowing declarations to show that a marriage had been dissolved.

But as it seems that only the *judgment* of the court of Texas was certified, we do not think this was a compliance with the act of Congress (Code, Vol. 2, p. 732) which requires that the whole record shall be certified. For this reason the judgment offered in evidence was incompetent and should have been excluded.

The defendant and the prosecutrix were members of the same church, and the church took up the matter, passed resolutions requiring the defendant to appear before the church and show cause why he abandoned his wife, and appointed a committee to notify defendant of the action the church had taken in the matter. This committee waited on the defendant, notified him of the action the church had taken, and a church trial ensued. The statements of defendant to this committee, and the statement he made at the church trial were properly excluded by the judge on the trial below, or where they were not entirely excluded, the jury were properly instructed that there was no presumption of malice

against the defendant, and that to convict the defendant on these statements the State must establish malice beyond a reasonable doubt.

But the court, after properly charging the jury as to the other evidence, charged them as follows in a separate paragraph: "That as to the statement of Allmond, if the prosecutrix was an innocent
(762) woman the law presumed that the statement was malicious and the burden was put upon the defendant to show to the satisfaction of the jury that it was not malicious." In this paragraph there is error. The defendant alleged that the prosecutrix had told him what he told Allmond, and that he only repeated to Allmond what the prosecutrix had told him; that he told Allmond that prosecutrix had told him what he told Allmond. This was not contradicted by Allmond, but he testified that what defendant told him was in a friendly conversation between them, induced by Allmond; that defendant exhibited no malice, but sorrow only.

This in our opinion did not imply malice, unless it was shown that the prosecutrix did not tell the defendant what she told Allmond she did; and that, in the absence of the finding of that fact—that the prosecutrix had *not* told the defendant what he told Allmond she did—there was no presumption of malice, and the burden was not thrown on the defendant to rebut such presumption.

If the court in this paragraph of the charge had submitted the truth of this statement to the jury, so as to make the paragraph read as follows: "That as to the statement of Allmond, if the prosecutrix was an innocent woman (and she had not told the defendant what the defendant told Allmond she had), the law presumed that the statement was malicious and the burden was put upon the defendant to show to the satisfaction of the jury that it was not malicious," the charge would have been correct.

It was in evidence and admitted that the prosecutrix had had sexual intercourse with the defendant before their marriage (under promise of marriage as she alleges) and that she became the mother of a
(763) child about five months after they were married. But her character was proved to be good before and since her marriage, with this exception.

It was contended by the defendant, and the court was asked to charge the jury, that it being shown and admitted that the prosecutrix had had criminal intercourse with the *defendant* before their marriage, that she was not an innocent woman, under section 1113 of The Code, and that the jury should return a verdict of not guilty. This prayer for instructions was properly refused. *S. v. Grigg*, 104 N. C., 882.

It must be understood that a man cannot seduce a virtuous woman and then slander her with impunity, and, when indicted for such slander,

claim protection against the penalties of the law by pleading her disgrace which he had caused to be brought upon her. The statute would fail to give that protection to innocent women that was intended if this was allowed. There were some other exceptions presented by the record, but they cannot be sustained.

For the error pointed out in the charge of the court below there must be a

New trial.

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(764)

STATE v. ARTHUR MCDOWELL AND MANUEL HARTNESS.

(Decided 23 December, 1898.)

Tales Jurors—Challenges.

1. Persons who are not bystanders in the court may be summoned as talesmen, for when they come in they are bystanders. *S. v. Lamon*, 10 N. C., 175.

2. Challenge is not given to the prisoner that he may select a particular individual on the jury, but that he should not have one against whom he had a valid objection.

INDICTMENT for robbery, tried before *Hoke, J.*, at Spring Term, 1898, of the Superior Court of CHEROKEE County.

The defendants were indicted for robbery from the person of William Bush.

In getting a jury, the original panel was exhausted and so were the talesmen summoned from the bystanders. Having failed to complete the jury, the sheriff was directed by the court to summon fifty or sixty freeholders, citizens, residents of the county to attend the following day, that a jury might be procured; and an adjournment was taken until the following morning. The trial was proceeded with the next day, most of the persons summoned being in attendance.

The court then directed the sheriff to call into the box from any persons, who were then bystanders, and the same were tendered to State and defendants. The defendants having exhausted their peremptory challenges, objected to several of the jurors then summoned, for that they were not bystanders the day before, and were then present in court by reason of having been summoned by sheriff for the express purpose of trying the case, and were present by reason of said summons, and only for that reason.

The court overruled the cause of challenge, and no other cause (765) being alleged, the jurors were sworn and the jury completed.

The court did not direct the sheriff in the morning to summon the remaining talesmen from the citizens he had notified to be present pursuant to order of court, nor to confine himself to them, but directed the sheriff to summons talesmen from any freeholders or citizens of Cherokee County who were then present, and jury was completed.

Nine of the jurors, who were so summoned and sworn, were called from the number who had been notified to attend by sheriff, pursuant to judge's order, and had come from their homes pursuant to sheriff's notice.

The jurors were otherwise competent and impartial. These nine were all sworn as jurors, and defendants objected for reasons above set out. Objection overruled and defendants excepted.

There was evidence on the part of the State tending to show that William Bush, the prosecutor, and his wife were going through Cherokee County in December, 1897, to their home in Tennessee, when they were pursued by the prisoners to a retired place in said county, where the prisoners raped the woman in presence of her husband—one defendant holding a drawn knife at the husband's throat, while the other ravished the wife; and both then robbed the husband and threatened to kill them if they didn't immediately leave the country or if they made known what had been done.

There was no exception to the rulings of the Court on questions of evidence or to the charge.

Verdict, guilty; judgment; appeal by prisoners.

(766) *Ferguson & Ferguson for defendants (appellants).*
Zeb V. Walser, Attorney-General, for the State.

FAIRCLOTH, C. J. The defendant was tried and convicted of robbery. There was no exception to the evidence or the charge to the jury. The case was called on Wednesday. The regular jurors were exhausted by challenge for cause or peremptorily. The few persons in the court room were summoned as tales jurors and they were challenged for cause or peremptorily. Failing to get a jury from persons present or in call of the court, his Honor adjourned court until next morning and directed the sheriff to summon fifty freeholders from the county to attend next day. Next day the court directed the sheriff to call any persons who were then bystanders into the jury box, and they were tendered. The defendant, after exhausting his peremptory challenges, objected to several of the jurors because they were not bystanders on the day before, and were then present only by reason of said summons by the sheriff under said order of the court. Objection overruled, and several of the said summoned jurors sat on the jury.

The case states that the jurors were otherwise competent and impartial. Motion for new trial was overruled and the defendants appealed.

At common law the jury is summoned by a *venire* and the sheriff makes return of the writ. 1 Chitty Cr. Law, 505-509. In well nigh all the states the matter is regulated by statute. Code, ch. 39. The power to arrange the order and to provide for the probable necessities of the business of the court, is incident to all courts. The order was not to bring in *talesmen* for any particular case; it was an order to bring freeholders of the county within reach of the court, when it might become necessary to order *talesmen.* The order was an *expedient* (767) act in reference to the business of the court. It was calculated to secure an impartial jury, by getting men from the county, honest, uncommitted, unbought and unmerchantable men, rather than the professional, loafing jurymen, who hang about the courthouses, ready to be used if it should happen that prosecutors or prosecuting officers, or defendants or defendants' counsel or sheriffs, or their deputies should so far forget their occupation and honorable obligation as to bring them into the jury box. The purity of the administration of the criminal law does not seem to be endangered by such course. If growing out of the want of a venire, there was anything going to show that the prisoner is not tried by an impartial jury, *boni et legales homines,* that would be a ground for a new trial. There may be no bystanders then present, or all present may be unfit persons, or they may have been procured to be present by parties in anticipation of a failure of the regular panel. The business of the court must proceed with reasonable dispatch, without injury or prejudice to the rights of the accused. "Persons who are not bystanders in the court may be summoned as talesmen, for when they come in they are bystanders." 5 Bacon Ab., 337.

S. v. Lamon, 10 N. C., 175, was a case of murder. The sheriff summoned as talesmen men who were not bystanders in the courthouse, and it was held that when they came in they were bystanders and bound to serve, although they had been called from a distance.

S. v. Cody, 119 N. C., 908, was a case of burglary. The defendant's exception was that the judge, in ordering a special venire, directed the sheriff to summon as far as possible only freeholders who were not disqualified by our statute, *i. e.,* to summon *legales homines.* (768) This was not only no error, but was considered by this Court as a mode of getting a jury less liable to challenge than would be *tales* jurors picked up in the court room.

U. S. v. Loughery, 13 Blatch, 267, was an indictment for coining, and under an order of the court the marshal summoned as jurymen persons not in or about the courthouse when the order was made, or when summoned, and it was held that they became bystanders when present, and

the opinion states that, how long they had been present or how they happened to be present, is of no consequence, provided no fraud or collusion or improper action is suggested.

Challenge is not given to the prisoner that he should have a particular individual on the jury, but that he should *not* have one against whom he had a valid objection. In other words he has the right to accept or reject, but not the right to *select*.

The decided cases cited above are cases of felony, but we see no reason why the principle should not apply to misdemeanors, when a necessary occasion arises, provided always that no prejudice to the rights of the prisoner shall appear.

Affirmed.

Cited: S. v. Kinsauls, 126 N. C., 1096; *Perry v. R. R.,* 129 N. C., 334; *Ives v. R. R.,* 142 N. C., 137; *Hodgin v. R. R.,* 143 N. C., 95.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS

COBB *v.* MORRIS, from Pasquotank. *Per Curiam.* Affirmed 30 September.

LAMB *v.* HAND, from Pasquotank. *Per Curiam.* Affirmed 11 October.

STATE *v.* SHIELDS, from Halifax. *Per Curiam.* Appeal dismissed 4 October.

JOHNSTON *v.* WILLIAMS, from Warren. *Per Curiam.* Affirmed 10 October.

GATLING *v.* MITCHELL, from Northampton. *Per Curiam.* Affirmed 4 October.

BRYAN *v.* BILLUPS, from Halifax. *Per Curiam.* Affirmed 18 October.

COLLINS *v.* PETTITT, from Halifax. *Per Curiam.* Error, 25 October.

STATE *v.* ARRINGTON, from Nash. *Per Curiam.* Affirmed 18 October.

STATE *v.* CRAFT, from Pitt. *Per Curiam.* Affirmed 18 October.

THOMPSON *v.* THOMPSON, from Wilson. *Per Curiam.* Affirmed 18 October.

MARTIN *v.* JONES, from Franklin. Motion to docket and dismiss plaintiff's appeal under Rule 17 allowed 12 October.

STANTON *v.* SPRUILL, from Wake. Motion to docket and dismiss plaintiff's appeal under Rule 17 allowed 21 October.

BLACKNALL *v.* ROWLAND, from Durham. *Per Curiam.* Affirmed 20 December. *Douglass, J.*, dissenting.

JORDAN *v.* GREENSBORO FURNACE CO., from Guilford. *Per* (770) *Curiam.* Affirmed 9 November.

DURHAM FERTILIZER CO. *v.* SANDERS, from Durham. Motion to docket and dismiss defendant's appeal under Rule 17 allowed 28 October.

CHEEK *v.* RAILROAD, from Alamance. Motion to docket and dismiss plaintiff's appeal under Rule 17 allowed 1 November.

TROLLINGER *v.* RAILROAD, from Alamance. Motion to docket and dismiss plaintiff's appeal under Rule 17 allowed 1 November. Motion of plaintiff to reinstate appeal filed 20 December.

MCMICHAEL *v.* HOSKINS, from Guilford. Motion to docket and dismiss defendant's appeal under Rule 17 allowed 1 November.

KERR *v.* WADLEY, from Sampson. Motion of defendant to reinstate appeal allowed 29 November.

WALKER *v.* MERCER, from New Hanover. *Per Curiam.* Affirmed 9 November.

ARMWOOD *v.* BIRD, from Sampson. *Per Curiam.* Affirmed 15 November.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

KING *v.* MECHANICS' HOME ASSOCIATION, from New Hanover. Motion to docket and dismiss defendant's appeal under Rule 17 allowed 1 November.

MORRIS *v.* JONES, from Greene. Motion to docket and dismiss defendant's appeal under Rule 17 allowed 1 November.

WILMINGTON IRON WORKS *v.* DARBY, from New Hanover. Motion to docket and dismiss plaintiff's appeal under Rule 17 allowed 1 November.

MALLARD *v.* CARR, from Duplin. Motion to docket and dismiss defendant's appeal under Rule 17 allowed 2 November.

HOBBS *v.* HOBBS, from Sampson. Motion to docket and dismiss defendant's appeal under Rule 17 allowed 3 November.

(771) GRAY *v.* EVERETT, from Cumberland. *Per Curiam.* Affirmed 15 November.

DOWD *v.* MCDONALD, from Moore. Motion for new trial for newly discovered evidence. *Per Curiam.* Allowed 15 November.

TREACY, MORRIS & Co. *v.* SMITH ET AL., from Moore. *Per Curiam.* This case is governed by *Cooper v. McKinnon,* 122 N. C., 447. Judgment of court below reversed.

HALL *v.* CAIN, from Cumberland. Motion to docket and dismiss defendant's appeal under Rule 17 allowed 11 November.

BURRAGE *v.* WHITE, from Cabarrus. *Per Curiam.* Affirmed 22 November.

KLUTTZ *v.* BINGHAM, from Rowan. *Per Curiam.* Affirmed 22 November. *Furches, J.,* did not sit on the argument of this appeal.

STATE *v.* VENABLE, from Surry. *Per Curiam.* Affirmed 29 November.

SHOEMAKER *v.* HAMBY, from Wilkes. *Per Curiam.* Affirmed 29 November.

HAMILTON *v.* WAUGH, from Ashe. *Per Curiam.* Affirmed 6 December.

BANDY *v.* WILSON, from Catawba. *Per Curiam.* Affirmed 6 December.

WINKLER *v.* WINKLER, from Burke. *Per Curiam.* Affirmed 6 December.

BYNUM *v.* SMITH, from Gaston. *Per Curiam.* Affirmed 13 December.

BRANER CATTLE CO. *v.* RAILWAY CO., from Jackson. *Per Curiam.* Affirmed 20 December.

(772) ROBERTS *v.* COCKE, from Buncombe. Dismissed 17 December for failure to file appeal bond.

WILLIAMSON *v.* COCKE, from Buncombe. Motion of plaintiff for new trial on the ground that the trial judge died before making out the case on appeal, allowed 17 December.

APPENDIX

J. W. MULLEN AND T. S. COOPER v. J. M. MORROW, J. W. COBB AND P. M. BROWN.

Election Law—Appointment of Registrars.

(Proceeding before Associate Justice FURCHES.)

(Election Case from Mecklenburg.)

1. Under the provisions of chapter 185, Laws of 1897, the county board of elections is not required in all cases to appoint three registrars for each voting precinct, but to appoint one qualified voter of the precinct from each one of the political parties, and such board has no right or authority to appoint a member of one party for another party.
2. That said board has no authority to appoint two registrars from the same party in the same voting precinct.

Under chapter 185, acts of 1897, amending chapter 159, acts 1895, and upon the application of J. W. Mullen, chairman of the Republican Party of Mecklenburg County, and T. S. Cooper, chairman of the Populist Party of said county, I issued a rule upon the defendants on 20 September, 1898, returnable before me at Raleigh on 27 September, in which they are required to show cause why the prayer of the petitioners should not be granted. At the time and place designated the defendants appeared and answered, being represented by P. D. Walker and F. M. Shannonhouse, Esquires, as their attorneys, while the petitioners were represented by J. W. Graham and D. K. Pope, Esquires, as their attorneys.

This statute, being of recent date, has received no construction from the courts, so far as I know, and it becomes my duty to put a construction upon it for the first time.

The board in making the appointments of registrars for Meck- (774) lenburg County have acted upon the idea that it was their duty to appoint three registrars for each voting precinct. This is so, if there is any one in the precinct filling the requirements of the law, to appoint; but not if there is not.

The act, chapter 185, section 7, says they "shall appoint one citizen and qualified voter for each of the political parties of and for each election precinct, who shall be able to read and write the English language, and who shall be known, for the duties required of them under this act, as registrars of election in their respective precincts." Thus it appears that the board are not required to appoint three registrars for each voting precinct, but to appoint one qualified voter of the precinct from each one of the political parties, Democrat, Populist, and

Republican; and that the board has no right or authority to appoint a member of one party for another party; that the board had no authority to appoint two registrars from the same party in the same voting precinct.

And it being admitted by defendants that J. A. Blackney, J. R. Porter and Banks Potts are Democrats, but were appointed in the place of Populists, there being no Populists to appoint, thus making two Democratic registrars and one Republican in the precinct, was not authorized by the law, and they are hereby removed.

W. S. Liddell was appointed in the place of a Populist for the reason that there was no Populist in the precinct to appoint. The defendants say he is a Republican and the petitioners say he is a Democrat. I shall not decide this question, as it makes no difference which he is. If he is a Republican, as defendants allege, the Republicans have two, and if he is a Democrat, as petitioners allege, the Democrats have two. Let
(775) it be the one way or the other, the appointment is unauthorized, and he is hereby removed.

The act of 1897, amending the act of 1895, makes a material change in regard to the appointment of registrars and judges of election. Under the act of 1895 the chairman of the different political parties had the right to designate the registrars and judges to be appointed for their respective parties, and the clerk was only their agent and had no discretionary powers, if the wishes of the chairmen were made known, on or before the first Monday in September. *Harkins v. Cathey,* 119 N. C., 649. But under the act of 1897 neither the State chairmen nor the county chairmen have any legal right to designate the parties to be appointed. This is left with the board within prescribed limits. The board now occupy much the same position the clerk did under the act of 1895, where the chairman of a party did not file his lists in time. *Harkins v. Cathey, supra.*

R. W. Smith swears that he is a Republican, has always voted that ticket, and expects to do so now. As the presumption is with defendants, the burden is on the petitioners to show the error, and that they are entitled to the relief asked. I will give Mr. Smith credit for knowing what he is, and that he correctly states the same. His appointment is sustained. *Harkins v. Cathey, supra.*

No. 2 is withdrawn, as Wood refused to act, and another registrar has been appointed in his place that seems not to be objected to.

No. 4, J. P. Wilson, says he is a Republican in National politics, but in State and county politics he votes the Democratic ticket. This, in my opinion, disqualifies him as a Republican registrar. It is like
(776) a juror when two parties are on trial in the same case, though he may be favorably disposed as to one of them if he has formed and expressed an opinion adverse to the other, he would be disqualified.

No. 5, T. B. Guthrie, stands on the same footing as J. P. Wilson, and my opinion as to him is the same as in the Wilson case.

No. 6, Fred Oliver, has refused to serve, and John C. Davidson has been appointed in his place by the board. It seems this should have been done by the clerk. But as there seems to be no objection to him, this appointment is ratified by me.

No. 7, Walter Donaldson, is asked to be removed on account of inebriety. The burden is on the petitioners. They have one affidavit to that effect, but the defendant has several affidavits going to show that, while he does become intoxicated, he is usually not so; that he is industrious, supports his family, and is qualified to act as registrar. This is an important appointment he has, and if he has any pride of character he will not get drunk while he is acting as registrar. I think the petitioners have failed, and I decline to remove him.

No. 8, R. J. Ferguson, seems to me to be a Republican. Petitioners have failed to show that he is not, and I decline to remove him.

No. 9, S. W. Stewart, says that he cannot read and write sufficiently to discharge the duties of registrar; that he can write his name, but this is done mechanically. I must take what he says to be true. (*Harkins v. Cathey, supra*). And it does not seem to me that a man that can only write his own name is qualified to register the names of others. I must remove him.

No. 10, J. O. Turbefill: Respondents offer no affidavit to sustain their allegation that he is a Republican. The only evidence they offer of this is an exhibit showing that he was appointed as a (777) Republican registrar in 1896; when the petitioners show, by the affidavit of W. B. Williamson, that Turbefill on 15 September, 1898, told him that he was a Democrat. He may not have been a Republican in 1896, or, if he was, he seems to have changed since that time, and is a Democrat now. (*Harkins v. Cathey, supra.*) He is removed.

No. 11, G. A. Morrow: This allegation in the petition must have been made under a mistake as to what party he was appointed for. It seems he was appointed as a Populist, and that he is a Populist. I decline to remove him.

Nos. 12 and 13 withdrawn, as to Osborne White and W. R. Barnett, and these appointments stand.

POPULIST DEMANDS.

1. J. W. Moore, appointed as a Populist, having declined to serve, and J. H. Wilson having been appointed in his place, this objection is withdrawn, and I approve and ratify this appointment.

2. J. F. Woodsides, objected to as being a Democrat: Respondents offer no evidence tending to show that he is not a Democrat, while petitioners offer the affidavit of T. A. Austin that Woodsides told him that

he was not a Populist; that he had been a Prohibitionist, "but was now a Democrat, and one of the managers in the late Democratic primaries." He must be removed.

3. J. H. Hutchinson, appointed as a Populist: Respondents offer no evidence tending to show that he is a Populist, while petitioners offer the affidavits of W. S. Clanton, that he saw said Hutchinson in the Democratic county convention, representing his township as a delegate. He is removed.

No. 7, J. C. Dennis, appointed as a Populist: There is no direct evidence as to what he is now, and as the burden is on the peti-
(778) tioners, I think they fail to make good their allegation. (*Harkins v. Cathey, supra.*)

8. H. H. Hoover, appointed as a Populist: Defendants offer the affidavit of E. O. Johnson that Hoover had voted and acted with the Populist Party, and the petitioners offer the affidavit of E. R. Spirris that he was present when E. O. Johnson served the notice on Hoover that he had been appointed a registrar for the Populist Party, on 12 September, when Hoover then and there declared that "he was a Democrat, and that he could not stand the Populists." From this evidence, I do not think him a Populist, and that he must be removed.

As to those removed for the reason that they were appointed in the place of Populists, where were no Populists in the precinct, there will be no one appointed in their stead. As to the others removed under the rulings in this proceeding, there should be others appointed in their stead. This is the most difficult part of my duty, as I know very few persons in the precincts from which they have been removed.

These remarks have been made without intending to reflect upon the honor or integrity of the parties removed. It is probable that they would all have done their duty as registrars. But the law provides who may and who may not be registrars, and this we must all observe and obey. The learned counsel for defendants in his argument stated that in election times party feeling ran high, and when questions came up to be decided they were most likely to decide them in favor of their side. This should not be so, but unfortunately it is often too true. And for this reason, as I suppose, the Legislature balanced the matter as best it could, by providing each party a representative on the board, if it be possible to have one.

(779) In filling the vacancies made by this order, I shall have to rely principally upon the recommendations made by the chairmen of the Populist and Republican parties. I am not bound by this, but it may serve as some evidence of fitness. (*Harkins v. Cathey, supra.*)

Order of the Court: In addition to those removed where there will be no appointments to fill their places, to wit: W. S. Liddell, J. A. Blackney, J. R. Porter, and Banks Potts, the following other persons appointed registrars are removed, to wit: J. P. Wilson, Charlotte Town-

ship, Ward 2, Precinct 2, and J. S. Leary is appointed in his stead. In Ward 2, Precinct 3, Charlotte Township, T. B. Guthrie is removed and R. E. McDonald is appointed in his stead.

In Providence Township, Precinct 1, S. W. Stewart is removed and W. M. Kiser appointed in his stead.

In Deweese Township, Precinct 2, J. O. Turbefill is removed and W. B. Sims appointed in his stead.

In Charlotte Township, Ward 1, Precinct 2, J. F. Woodsides is removed and J. P. Sossaman is appointed in his stead. In Ward 4, Precinct 3, Charlotte Township, J. W. Hutchinson is removed and J. W. Meacham is appointed in his stead.

In Paw Creek Township, Precinct 2, H. H. Hoover is removed and M. L. Kistler appointed in his stead.

All the appointments made in this order are appointments of the parties named to be and act as registrars of election for the fall election in 1898, county, State, and national.

The sheriff of Mecklenburg County will serve this order upon the defendants and the parties herein appointed registrars immediately upon the receipt of the same, and make due return to me as (780) to the manner and time of serving the same.

The clerk of the Supreme Court will at once issue this order to said sheriff.

The defendants are adjudged to pay the costs of this proceeding, to be taxed by the clerk of the Supreme Court of North Carolina.

This 28 September, 1898.

D. M. FURCHES,

Associate Justice of the Supreme Court of North Carolina.

It is accordingly so ordered.

ANALYTICAL INDEX

COLLATERAL SECURITIES.

The proceeds of collateral securities deposited to secure a note at bank must be applied to the payment of the note in exoneration of the endorsers, and not diverted to the payment of other debts of the maker. *Bank v. Scott*, 538.

COMMISSIONS.

The phrase *et cetera*—"*etc.*" in a contract to pay a commissioner appointed to sell land for payment of a debt "*and the cost and charges of advertising, etc.,*" will not include commissions where no sale is made. The commissioner will be entitled to a just allowance for his time, labor, services, and expenses in the matter. *Whitaker v. Guano Co.*, 368.

COMPLAINT, Substituted—when allowable.

An amended or substituted complaint filed by leave of court may be different from or even antagonistic to the original complaint, *provided* the effect of the change is not to confer jurisdiction, or evade defenses (as statute of limitations) which could have been pleaded to the original complaint. *Pender v. Mallett*, 57.

CONDEMNATION OF LAND FOR PUBLIC USE.

1. Where proceedings are instituted, under Private Acts of 1883, ch. 111, by a city to condemn and appropriate for a public street a portion of a city lot, notice to the equitable owner in actual possession is sufficient where the legal title is in a nonresident trustee under deed of trust. *Harkins v. Asheville*, 636.
2. Where such proceedings are *infra vires* the condemnation and appropriation to the public use must stand, the question as to who is entitled to the damages awarded cannot be raised in an action for the land itself. *Ibid.*

CONDITIONAL SALE, Mortgage.

Where, upon the face of a transaction, it is doubtful whether the parties intended to make a mortgage or a conditional sale, courts or equity incline to consider it a mortgage, because by means of conditional sale, oppression is frequently exercised over the needy. *Watkins v. Williams*, 170.

CONDITIONAL SALE.

While parties acting in good faith may make a valid contract of lease with the option of purchase, yet where it is obvious that the contract is put into the form of a lease for the purpose of evading the registration laws, or with other unlawful intention—it will not be upheld as such, to the prejudice of innocent purchasers. *Wilcox v. Cherry*, 79.

CONTEMPT, Advice of counsel no excuse.

1. The advice of counsel is no protection to an intentional violation of the orders of the court placing property in possession of a receiver—and may subject counsel themselves giving such advice to proceedings for contempt. *Delozier v. Bird*, 689.
2. While the court may not punish a contempt already committed by indefinite imprisonment, it may enforce, obedience to its order of restitution by imprisonment until complied with. *Ibid.*

CONTRACT.

1. What is a contract and its effect, when the terms are clear, whether written or oral, is a question of law. *Russell v. Comrs.*, 264.
2. Whether there has been substantial compliance is a question of fact for the jury under proper instructions from the court. *Ibid.*