ANNOTATIONS INCLUDE 181 N. C.

# NORTH CAROLINA REPORTS

VOL. 124

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

FEBRUARY TERM, 1899

REPORTED BY
RALPH P. BUXTON

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BY
WALTER CLARK

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| 1 " Eq. | " | 36 | " |
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| 3 " " | " | 38 | " |
| 4 " " | " | 39 | " |
| 5 " " | " | 40 | " |
| 6 " " | " | 41 | " |
| 7 " " | " | 42 | " |
| 8 " " | " | 43 | " |
| Busbee Law | " | 44 | " |
| " Eq. | " | 45 | " |
| 1 Jones Law | " | 46 | " |
| 2 " " | " | 47 | " |
| 3 " " | " | 48 | " |
| 4 " " | " | 49 | " |
| 5 " " | " | 50 | " |
| 6 " " | " | 51 | " |
| 7 " " | " | 52 | " |
| 8 " " | " | 53 | " |
| 1 " Eq. | " | 54 | " |
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# CASES REPORTED


A

PAGE

Agent v. Willis ..... 29
Alleghany County, Wilson v. ..... 7
Atkinson, Webb v. ..... 447

B

Balk v. Harris ..... 467
Bank v. Burlington ..... 251
Bank, Hodgin v. ..... 540
Bank v. Hunt ..... 171
Bank v. Nimocks ..... 352
Bank v. Riggins ..... 534
Bank v. Wilson ..... 561, 562
Banking Co. v. Burlington ..... 875
Banking Co. v. Morehead ..... 622
Barber v. Buffaloe ..... 875
Bear v. Comrs. ..... 204
Beard, S. v. ..... 811
Beckwith, *ex parte* ..... 111
Beddard v. Harrington ..... 51
Benton, Clark v. ..... 197, 200
Blackwell v. Blackwell ..... 269
Blake, Johnson v. ..... 106
Bland, Hobbs v. ..... 284
Boggan, Machine Co. v. ..... 876
Borders, Weathers v. ..... 610
Boyd, White v. ..... 177
Brafford v. Reed ..... 345
Bragaw v. Supreme Lodge ..... 154
Breedlove, McGhee v. ..... 876
Brinn, Wilkinson v. ..... 723
Broadfoot v. Fayetteville ..... 478
Brown v. Brown ..... 19
Brown v. Morisey ..... 292
Brown v. Nimocks ..... 417
Bryan, Collins v. ..... 738
Bryan v. Patrick ..... 651
Buffaloe, Barber v. ..... 875
Buffaloe v. Burgwyn ..... 875
Burden, Swain v. ..... 16
Burgwyn, Buffaloe v. ..... 875
Burgwyn, Stancell v. ..... 69
Burlington, Bank v. ..... 251
Burlington, Banking Co. v. ..... 875
Burns, Cherry v. ..... 761
Burrus, Capehart v. ..... 48
Burrus v. Ins. Co. ..... 9

C

Cagle, Douglas v. ..... 876
Capehart v. Burrus ..... 48

PAGE

Carroll, Cider Co. v. ..... 555
Cashion v. Telegraph Co. ..... 459
Cherry v. Burns ..... 761
Christian v. Yarborough ..... 72
Cider Co. v. Carroll ..... 555
Clark v. Benton ..... 197, 200
Cocke, Williamson v. ..... 585
Cogdell v. R. R. ..... 302
Collins v. Bryan ..... 738
Collins v. Pettttt ..... 726, 875
Comrs., Bear v. ..... 204
Corpening, Mitchell v. ..... 472
Cottingham, Hall v. ..... 402
Councill, Cowles v. ..... 876
Cowles v. Councill ..... 876
Cox v. Lumber Co. ..... 78
Craig, Huss v. ..... 743
Crampton v. Ivie Bros. ..... 591
Culbreth v. Smith ..... 289
Cummings v. Swepson ..... 579
Cunningham v. Sprinkle ..... 638
Cutler v. Cutler ..... 875

D

Darden, Lindsay v. ..... 307
Davis, Gore v. ..... 234
Davis v. Long ..... 876
Davidson, S. v. ..... 839
Day's case ..... 362
Dickey, Whitman v. ..... 741
Dickson, S. v. ..... 871
Dillon v. Raleigh ..... 184
Dixon, Jones v. ..... 875
Dortch, R. R. v. ..... 663
Douglas v. Cagle ..... 876
Dowdy v. Telegraph Co. ..... 522
Dula v. Tugman ..... 876
Dunn v. R. R. ..... 252

E

Edwards, Ins. Co. v. ..... 116
*Ex parte* Beckwith ..... 111

F

Fayetteville, Broadfoot v. ..... 478
Ferguson v. Robinson ..... 876
Fertilizer Co. v. Rippy ..... 643
Finishing Co., Motley v. ..... 232
Fulford, S. v. ..... 798

| G | PAGE |
|---|---|
| Gidney, Wittkowsky v. | 437 |
| Gilmer, Sibley v. | 631 |
| Gore v. Davis | 234 |
| Gorrell v. Water Co. | 328 |
| Gray, Mfg. Co. v. | 322 |
| Greensboro, Jones v. | 310 |
| Greensboro, Stratford v. | 127 |
| Greensboro v. Williams | 167 |
| **H** | |
| Hall v. Cottingham | 402 |
| Hall, Harbison v. | 626 |
| Hall, Slingluff v. | 397 |
| Hancock v. R. R. | 222 |
| Harbison v. Hall | 626 |
| Harrington, Beddard v. | 51 |
| Harris, Balk v. | 467 |
| Harris v. Russell | 547 |
| Hicks, S. v. | 829 |
| Hight, S. v. | 845 |
| Hobbs v. Bland | 284 |
| Hocutt v. R. R. | 214 |
| Hodgin v. Bank | 540 |
| Hoey, Printing Co. v. | 767 |
| Horner School v. Wescott | 518 |
| Howell v. R. R. | 24 |
| Hughes, Williams v. | 3 |
| Hunt, Bank v. | 171 |
| Hurtt, Moore v. | 27 |
| Hutton v. Webb | 749 |
| Huss v. Craig | 743 |
| **I** | |
| Indemnity Co., Sprinkle v. | 405 |
| Ingram, McDonald v. | 272 |
| Ins. Co., Burrus v. | 9 |
| Ins. Co. v. Edwards | 116 |
| Ins. Co., Kendrick v. | 315 |
| Ins. Co., Proctor v. | 265 |
| Ins. Co., Ross v. | 395 |
| Ins. Co., Temple v. | 66 |
| Ivie Bros., Crampton v. | 591 |
| **J** | |
| Jones v. Dixon | 875 |
| Jones v. Greensboro | 310 |
| Johnson v. Blake | 106 |
| Jordan, Wilson v. | 683 |
| Joyner, Shelburn v. | 875 |
| **K** | |
| Kale, S. v. | 816 |
| Keith v. Scales | 497 |
| Kendrick v. Ins. Co. | 315 |
| Knott, S. v. | 814 |
| Kornegay v. Morris | 424 |
| **L** | |
| Laney, Winebarger v. | 876 |
| Laudie v. Telegraph Co. | 528 |
| Leak v. R. R. | 455 |
| LeDuc v. Slocomb | 347 |
| Lehman v. Tise | 443 |
| Lindsay v. Darden | 307 |
| Loane, Sharpe v. | 1 |
| Long, Davis v. | 876 |
| Lucas, S. v. | 804 |
| Lucas, S. v. | 825 |
| Lumber Co., Cox v. | 78 |
| Lumber Co., Roscoe v. | 42 |
| Lyman, Merrimon v. | 434 |
| **M** | |
| Machine Co. v. Boggan | 876 |
| Mfg. Co. v. Gray | 322 |
| Mfg. Co., Redditt v. | 100 |
| Markham v. McCown | 163 |
| McAllister v. Purcell | 262 |
| McCown, Markham v. | 163 |
| McDonald v. Ingram | 272 |
| McGhee v. Breedlove | 876 |
| Means v. R. R. | 574 |
| Merrimon v. Lyman | 434 |
| Mitchell v. Corpening | 472 |
| Mitchell v. R. R. | 236 |
| Mitchell v. Sims | 411 |
| Moore v. Hurtt | 27 |
| Moore v. R. R. | 338 |
| Morehead, Banking Co. v. | 622 |
| Morisey, Brown v. | 292 |
| Morris, Kornegay v. | 424 |
| Motley v. Finishing Co. | 232 |
| **N** | |
| Nicholson, S. v. | 820 |
| Nimocks, Bank v. | 352 |
| Nimocks, Brown v. | 417 |
| Norwood v. Pratt | 745 |
| **O** | |
| Orrell, S. v. | 875 |
| **P** | |
| Parks v. R. R. | 136 |
| Patrick, Bryan v. | 651 |
| Perdue v. Perdue | 161 |

| | PAGE |
|---|---|
| Pettitt, Collins v. | 726, 875 |
| Phillips v. R. R. | 123 |
| Pierce v. R. R. | 83 |
| Powell v. Weatherington | 40 |
| Pratt, Norwood v. | 745 |
| Printing Co. v. Hoey | 767 |
| Proctor v. Ins. Co. | 265 |
| Pugh, S. v. | 876 |
| Purcell, McAllister v. | 262 |
| Puryear v. Sanford | 276 |

R

| | |
|---|---|
| R. R., Cogdell v. | 302 |
| R. R. v. Dortch | 663 |
| R. R., Dunn v. | 252 |
| R. R., Hancock v. | 222 |
| R. R., Hocutt v. | 214 |
| R. R., Howell v. | 24 |
| R. R., Leak v. | 455 |
| R. R., Means v. | 574 |
| R. R., Mitchell v. | 236 |
| R. R., Moore v. | 338 |
| R. R., Phillips v. | 123 |
| R. R., Parks v. | 136 |
| R. R., Pierce v. | 83 |
| R. R., Ridley v. | 34, 37 |
| R. R., Tedder v. | 342 |
| R. R., Trollinger v. | 876 |
| R. R., Troxler v. | 189 |
| R. R., Whitford v. | 875 |
| Raleigh, Dillon v. | 184 |
| Redditt v. Mfg. Co. | 100 |
| Reed, Brafford v. | 345 |
| Rhyne, S. v. | 847 |
| Ridley v. R. R. | 34, 37 |
| Riggins, Bank v. | 534 |
| Rippy, Fertilizer Co. v. | 643 |
| Robinson, Ferguson v. | 876 |
| Robinson, S. v. | 801 |
| Rogers, Taylor v. | 875 |
| Roscoe v. Lumber Co. | 42 |
| Ross v. Ins. Co. | 395 |
| Royster v. Stallings | 55 |
| Russell, Harris v. | 547 |

S

| | |
|---|---|
| Sanford, Puryear v. | 276 |
| Scales, Keith v. | 497 |
| Scott, Williams v. | 875 |
| Sharpe v. Loane | 1 |
| Shelburn v. Joyner | 875 |
| Sibley v. Gilmer | 631 |
| Sims, Mitchell v. | 411 |
| Slingluff v. Hall | 397 |
| Slocomb, LeDuc v. | 347 |
| Slocomb v. Williams | 876 |
| Smathers, Stevens v. | 571 |
| Smith, Culbreth v. | 289 |
| Sprinkle, Cunningham v. | 638 |
| Sprinkle v. Indemnity Co. | 405 |
| Stallings, Royster v. | 55 |
| Stancell v. Burgwyn | 69 |
| S. v. Beard | 811 |
| S. v. Davidson | 839 |
| S. v. Dickson | 871 |
| S. v. Fulford | 798 |
| S. v. Hicks | 829 |
| S. v. Hight | 845 |
| S. v. Kale | 816 |
| S. v. Knott | 814 |
| S. v. Lucas | 804 |
| S. v. Lucas | 825 |
| S. v. Nicholson | 820 |
| S. v. Orrell | 875 |
| S. v. Pugh | 876 |
| S. v. Rhyne | 847 |
| S. v. Robinson | 801 |
| S. v. Taylor | 803 |
| S. v. Warren | 807 |
| S. v. Whidbee | 796 |
| Stevens v. Smathers | 571 |
| Stratford v. Greensboro | 127 |
| Straughan v. Tysor | 229 |
| Supreme Lodge, Bragaw v. | 154 |
| Swain v. Burden | 16 |
| Swepson, Cummings v. | 579 |

T

| | |
|---|---|
| Taylor v. Rogers | 875 |
| Taylor, S. v. | 803 |
| Taylor, Wymann v. | 426 |
| Tedder v. R. R. | 342 |
| Telegraph Co., Cashion v. | 459 |
| Telegraph Co., Dowdy v. | 522 |
| Telegraph Co., Laudie v. | 528 |
| Temple v. Ins. Co. | 66 |
| Tise, Lehman v. | 443 |
| Trollinger v. R. R. | 876 |
| Troxler v. R. R. | 189 |
| Tugman, Dula v. | 876 |
| Tysor, Straughan v. | 229 |

W

| | |
|---|---|
| Warren, S. v. | 807 |
| Water Co., Gorrell v. | 328 |
| Weathers v. Borders | 610 |
| Weatherington, Powell v. | 40 |
| Webb v. Atkinson | 447 |

| | PAGE |
|---|---|
| Webb, Hutton v. | 749 |
| Wescott, Horner School v. | 518 |
| Whidbee, S. v. | 796 |
| White v. Boyd | 177 |
| Whitford v. R. R. | 875 |
| Whitman v. Dickey | 741 |
| Wilkinson v. Brinn | 723 |
| Williams, Greensboro v. | 167 |
| Williams v. Hughes | 3 |
| Williams v. Scott | 875 |
| Williams, Slocomb v. | 876 |
| Williamson v. Cocke | 585 |
| Willis, Agent v. | 29 |
| Wilson v. Alleghany County | 7 |
| Wilson, Bank v. | 561, 562 |
| Wilson v. Jordan | 683 |
| Wilson v. Wilson | 876 |
| Winebarger v. Laney | 876 |
| Wittkowsky v. Gidney | 437 |
| Wyman v. Taylor | 426 |

Y

| | |
|---|---|
| Yancey's case | 151 |
| Yarborough, Christian v. | 72 |

# CASES CITED


A

Accident Asso., Follett v. ..... 110 N. C., 377 ..... 409
Achenbach, Boyden v. ..... 79 N. C., 539 ..... 806
Adams v. Bank ..... 113 N. C., 332 ..... 543
Adams, Hamilton v. ..... 6 N. C., 161 ..... 715
Adams v. Hayes ..... 120 N. C., 383 ..... 736
Aikin, Lyon v. ..... 78 N. C., 258 ..... 709
Albertson, S. v. ..... 113 N. C., 633 ..... 846
Albertson v. Terry ..... 109 N. C., 8 ..... 117
Alexander v. Gibbons ..... 118 N. C., 796 ..... 80, 296
Alexander, McNamee v. ..... 109 N. C., 246 ..... 709
Alexander, Miller v. ..... 122 N. C., 721 ..... 709
Alexander, S. v. ..... 74 N. C., 232 ..... 800
Allen v. Chambers ..... 39 N. C., 125 ..... 283
Allen v. Baskerville ..... 123 N. C., 126 ..... 510
Allen, Parker v. ..... 84 N. C., 466 ..... 274
Allen v. Peden ..... 4 N. C., 638 ..... 715
Allison, Simmons v. ..... 118 N. C., 763 ..... 508, 736
Allsbrook, R. R. v. ..... 110 N. C., 137 ..... 389
Allston v. Davis ..... 118 N. C., 202 ..... 514
Alpha Mills v. Engine Co. ..... 116 N. C., 797 ..... 326
Arrington v. Arrington ..... 114 N. C., 151 ..... 282
Asbury v. Fair ..... 111 N. C., 251 ..... 117
Ashe v. DeRosset ..... 50 N. C., 301 ..... 326
Asheville v. Aston ..... 92 N. C., 578 ..... 508
Ashford, S. v. ..... 120 N. C., 588 ..... 99
Aston, Asheville v. ..... 92 N. C., 578 ..... 508
Armstrong, Bank v. ..... 15 N. C., 519 ..... 542
Atkinson, Miller v. ..... 63 N. C., 537 ..... 511
Austin v. King ..... 97 N. C., 339 ..... 39
Aycock v. R. R. ..... 89 N. C., 330 ..... 93

B

Bacon, Guthrie v. ..... 107 N. C., 337 ..... 117
Badger v. Johnson ..... 68 N. C., 471 ..... 377
Bagg v. R. R. ..... 109 N. C., 281 ..... 753
Bagley, Winfree v. ..... 102 N. C., 515 ..... 468
Bailey v. Caldwell ..... 68 N. C., 472 ..... 392
Baird, Stanley v. ..... 118 N. C., 75 ..... 729, 734, 737
Baker, Horner & Graves v. ..... 74 N. C., 65 ..... 520
Baker v. Robinson ..... 119 N. C., 289 ..... 613
Bank, Adams v. ..... 113 N. C., 332 ..... 543
Bank v. Armstrong ..... 15 N. C., 519 ..... 542
Bank v. Bank ..... 119 N. C., 307 ..... 568
Bank, Boykin v. ..... 118 N. C., 566 ..... 568
Bank v. Gilmer ..... 116 N. C., 684 ..... 419
Bank v. Gilmer ..... 117 N. C., 416 ..... 419
Bank, Jordan v. ..... 74 N. C., 467 ..... 546

Bank, Kruger v. ..... 123 N. C., 16 ..... 121
Bank v. Mfg. Co. ..... 108 N. C., 282 ..... 400
Bank, Newton Academy v. ..... 101 N. C., 488 ..... 511
Bank v. Pinkers ..... 82 N. C., 377 ..... 630
Barbee v. Barbee ..... 108 N. C., 584 ..... 318
Barber v. Buffaloe ..... 122 N. C., 129 ..... 65, 66
Barbee v. Scroggins ..... 121 N. C., 135 ..... 235
Barfield, Robinson v. ..... 6 N. C., 391 ..... 715
Barnes v. Barnes ..... 53 N. C., 366 ..... 709
Barnes v. Barnes ..... 104 N. C., 613 ..... 736
Barnhard v. Brown ..... 122 N. C., 587 ..... 39, 430
Barrett v. Barrett ..... 120 N. C., 127 ..... 264
Baskerville, Allen v. ..... 123 N. C., 126 ..... 510
Basnight v. Meekins ..... 121 N. C., 23 ..... 5
Basnight v. Smith ..... 112 N. C., 229 ..... 729
Battle v. McIver ..... 68 N. C., 467 ..... 377
Baxley, McMillan v. ..... 112 N. C., 578 ..... 216
Baxter, S. v. ..... 82 N. C., 602 ..... 827
Bazemore v. Mountain ..... 121 N. C., 59 ..... 45
Beach v. R. R. ..... 120 N. C., 498 ..... 219
Beaman, Jones v. ..... 117 N. C., 259 ..... 584
Bell v. Howerton ..... 111 N. C., 69 ..... 361
Bell, Lockhart v. ..... 90 N. C., 499 ..... 611
Bell, S. v. ..... 25 N. C., 506 ..... 688
Bellamy, Wood v. ..... 120 N. C., 212 ..... 366, 375, 377, 380, 381, 661, 664, 679, 699, 709, 765
Bennett, S. v. ..... 75 N. C., 305 ..... 809
Benton v. Collins ..... 118 N. C., 196 ..... 288
Benton v. R. R. ..... 122 N. C., 1007 ..... 93
Bergeron v. Ins. Co. ..... 111 N. C., 45 ..... 409
Bird, Moore v. ..... 118 N. C., 688 ..... 734
Biddle, Stanley v. ..... 57 N. C., 383 ..... 428
Bingham v. Richardson ..... 60 N. C., 215 ..... 520
Black, Loan Asso. v. ..... 119 N. C., 323 ..... 61
Blalock, Strayhorn v. ..... 92 N. C., 292 ..... 589
Bland, S. v. ..... 123 N. C., 739 ..... 431
Bledsoe, Welker v. ..... 68 N. C., 457 ..... 377, 764
Blue v. Ritter ..... 118 N. C., 580 ..... 83
Board of Education v. Kenan ..... 112 N. C., 568 ..... 709
Bogle, Houston v. ..... 32 N. C., 496 ..... 709
Bolden v. R. R. ..... 123 N. C., 614 ..... 304
Bond, Pipkin v. ..... 40 N. C., 91 ..... 361
Boyden v. Achenbach ..... 79 N. C., 539 ..... 806
Boyden v. Williams ..... 80 N. C., 95 ..... 584
Boykin v. Bank ..... 118 N. C., 566 ..... 568
Boyle, S. v. ..... 104 N. C., 800 ..... 813
Boushee v. Surles ..... 77 N. C., 51 ..... 585
Bradburn, S. v. ..... 104 N. C., 881 ..... 824
Branch, Page v. ..... 97 N. C., 97 ..... 48
Brannock v. Brannock ..... 32 N. C., 428 ..... 422
Braswell v. Ins. Co. ..... 75 N. C., 8 ..... 13
Brawley v. Colling ..... 88 N. C., 608 ..... 49
Bray, Wilkey v. ..... 71 N. C., 206 ..... 613
Bray v. Creekmore ..... 109 N. C., 49 ..... 269

Bridgers v. Pleasants ..... 39 N. C., 26 ..... 516
Brinson v. Wharton ..... 43 N. C., 80 ..... 554
Britt, S. v. ..... 78 N. C., 439 ..... 809
Brittain v. Payne ..... 118 N. C., 989 ..... 178
Broadfoot v. Fayetteville ..... 121 N. C., 418 ..... 418
Brodnax v. Groom ..... 64 N. C., 244 ..... 132
Brown, Barnhard v. ..... 122 N. C., 587 ..... 39, 430
Brown, Collingwood v. ..... 106 N. C., 362 ..... 282
Brown v. Davis ..... 109 N. C., 23 ..... 77
Brown v. House ..... 119 N. C., 1622 ..... 747
Brown v. Keener ..... 74 N. C., 712 ..... 757
Brown v. Turner ..... 70 N. C., 93 ..... 709
Buchanan v. Buchanan ..... 97 N. C., 308 ..... 425
Buffaloe, Barber v. ..... 122 N. C., 129 ..... 65, 66
Buffkins v. Eason ..... 112 N. C., 162 ..... 29
Bullinger v. Marshall ..... 70 N. C., 520 ..... 287
Bunch v. Edenton ..... 90 N. C., 431 ..... 188, 312
Bunting v. Gales ..... 77 N. C., 282 ..... 366, 663, 709
Bunting v. Ricks ..... 22 N. C., 130 ..... 442
Burrell v. Haun ..... 119 N. C., 544 ..... 334
Burrell v. Hughes ..... 120 N. C., 277 ..... 746, 747
Butler, S. v. ..... 65 N. C., 309 ..... 800
Buxton, Jones v. ..... 121 N. C., 285 ..... 282
Bynum, S. v. ..... 117 N. C., 749 ..... 844
Byrd, Moore v. ..... 118 N. C., 688 ..... 729


C


Cable v. R. R. ..... 122 N. C., 892 ..... 255, 304, 360, 453, 567
Caldwell, Bailey v. ..... 68 N. C., 472 ..... 392
Caldwell v. Neely ..... 81 N. C., 114 ..... 47
Caldwell v. Wilson ..... 121 N. C., 423 ..... 346
Caldwell v. Wilson ..... 121 N. C., 425 ..... 393, 676, 709, 723
Call v. Wilkesboro ..... 115 N. C., 337 ..... 133
Cameron, Jones v. ..... 81 N. C., 154 ..... 41
Campbell v. Murphy ..... 55 N. C., 357 ..... 294, 300
Capehart v. Dettrick ..... 91 N. C., 344 ..... 235
Carver, Range Co. v. ..... 118 N. C., 328 ..... 170
Cashion v. Telegraph Co. ..... 123 N. C., 267 ..... 532
Castleberry v. Maynard ..... 95 N. C., 281 ..... 441
Chambers, Allen v. ..... 39 N. C., 125 ..... 283
Chandley, Redmond v. ..... 119 N. C., 575 ..... 453
Charlotte v. Sheppard ..... 120 N. C., 411 ..... 212
Clark v. Edwards ..... 119 N. C., 115 ..... 613
Clark, German v. ..... 71 N. C., 420 ..... 281
Clark, Irvin v. ..... 98 N. C., 437 ..... 153
Clark v. Stanly ..... 66 N. C., 59 ..... 366, 368, 667, 709, 765
Clements v. State ..... 77 N. C., 143 ..... 795
Clerk's Office v. Comrs. ..... 121 N. C., 30 ..... 838
Cobb, Weisel v. ..... 122 N. C., 67 ..... 50
Coleman, Eliason v. ..... 86 N. C., 235 ..... 667
Cohen, Smaw v. ..... 95 N. C., 85 ..... 611
Collins, Benton v. ..... 118 N. C., 196 ..... 288
Colling, Brawley v. ..... 88 N. C., 608 ..... 49

Collins v. Faribault ..... 92 N. C., 310 ..... 747
Collingwood v. Brown ..... 106 N. C., 362 ..... 282
Comrs., Clerk's Office v. ..... 121 N. C., 30 ..... 838
Comrs., Guilford v. ..... 120 N. C., 23 ..... 838
Comrs., Long v. ..... 76 N. C., 280 ..... 756
Comrs. v. Lumber Co. ..... 116 N. C., 731 ..... 754
Comrs., Lutterloh v. ..... 65 N. C., 403 ..... 212
Comrs., Merrimon v. ..... 106 N. C., 372 ..... 838
Comrs., United Brethren v. ..... 115 N. C., 489 ..... 508
Comrs., Vaughan v. ..... 117 N. C., 434 ..... 132, 212
Connelly, Turner v. ..... 105 N. C., 72 ..... 264
Connelly, White v. ..... 105 N. C., 65 ..... 264
Cooper v. McKinnon ..... 122 N. C., 447 ..... 419
Cooper v. Security Co. ..... 122 N. C., 463 ..... 468
Cooper v. Wilcox ..... 22 N. C., 90 ..... 361
Cotton v. Ellis ..... 52 N. C., 545 ..... 366, 372, 392, 709
Covington, S. v. ..... 117 N. C., 862 ..... 858
Covington v. Stuart ..... 77 N. C., 150 ..... 47
Covington, Leak v. ..... 99 N. C., 559 ..... 454
Coward, Haynes v. ..... 116 N. C., 840 ..... 747
Cox v. R. R. ..... 123 N. C., 604 ..... 255, 304, 360, 567
Cozart, Meadows v. ..... 76 N. C., 450 ..... 317
Crapon, McDougald v. ..... 95 N. C., 292 ..... 344
Craven, Morrison v. ..... 120 N. C., 327 ..... 747
Creekmore, Bray v. ..... 109 N. C., 49 ..... 269
Crews, Long v. ..... 113 N. C., 256 ..... 264
Critz v. Sparger ..... 121 N. C., 283 ..... 747
Cromwell, Norfleet v. ..... 70 N. C., 634 ..... 757
Culbreth v. Downing ..... 121 N. C., 205 ..... 37
Cushing, Govan v. ..... 111 N. C., 458 ..... 242
Cutshall, S. v. ..... 110 N. C., 545 ..... 709


D


Dail, Harper v. ..... 92 N. C., 394 ..... 318
Daniels v. Fowler ..... 123 N. C., 35 ..... 39
Daniels v. R. R. ..... 117 N. C., 592 ..... 103
Davis, Allston v. ..... 118 N. C., 202 ..... 514
Davis, Brown v. ..... 109 N. C., 23 ..... 77
Davis v. Davis ..... 83 N. C., 71 ..... 274
Daves, Haywood v. ..... 81 N. C., 8 ..... 611
Denmark v. R. R. ..... 107 N. C., 185 ..... 93
DeRosset, Ashe v. ..... 50 N. C., 301 ..... 326
Derr, Wilson v. ..... 69 N. C., 137 ..... 318
Dettrick, Capehart v. ..... 91 N. C., 344 ..... 235
DeVane v. Larkins ..... 56 N. C., 377 ..... 554
DeVane v. Royal ..... 52 N. C., 426 ..... 309
Devereux v. Devereux ..... 81 N. C., 12 ..... 611
Dixon, Herring v. ..... 122 N. C., 420 ..... 757
Dobbin v. Rex ..... 106 N. C., 444 ..... 41
Dodd, Watson v. ..... 72 N. C., 240 ..... 50, 611
Dowden, S. v. ..... 118 N. C., 1145 ..... 856, 857, 869
Downing, Culbreth v. ..... 121 N. C., 205 ..... 37

Dougherty v. Sprinkle..... 88 N. C., 300..... 612
Driver, S. v..... 78 N. C., 423..... 662
Dugger v. McKesson.....100 N. C., 1..... 431
Duncan, Meares v.....123 N. C., 203..... 536
Dupree v. Insurance Co..... 93 N. C., 237..... 611
Durham v. R. R.....108 N. C., 399..... 225, 228
Durham v. R. R.....113 N. C., 240..... 252

E

Earp v. Richardson..... 75 N. C., 84..... 585
Earp, Saunders v. .....118 N. C., 275..... 729
Eason, Buffkins v.....112 N. C., 162..... 29
Edenton, Bunch v..... 90 N. C., 431..... 188, 312
Edgerton, Littlejohn v..... 76 N. C., 468..... 493
Edwards, Clark v.....119 N. C., 115..... 613
Edwards, Graham v.....114 N. C., 228..... 747
Edwards, Iron Co. v.....110 N. C., 353..... 430
Edwards v. Love..... 94 N. C., 365..... 309
Eliason v. Coleman..... 86 N. C., 235..... 667
Ellington, Stanford v.....117 N. C., 158..... 383, 766
Ellis, Cotton v..... 52 N. C., 545..... 366, 372, 392, 709
Ellis, Tilley v.....119 N. C., 233..... 508
Elizabeth City, Ward v.....121 N. C., 1.....366, 374, 380, 697, 709
Electric Co. v. Williams.....123 N. C., 51..... 538, 570
Emory, Jones v.....115 N. C., 158..... 650
Engine Co., Alpha Mills v.....116 N. C., 797..... 326
Everett, Kornegay v..... 99 N. C., 30..... 624
Everton, Pool v. ..... 50 N. C., 241..... 636
Ewart v. Jones.....116 N. C., 570..... 367, 393, 394, 669, 702, 765
*Ex parte*, Miller..... 90 N. C., 625..... 153

F

Fair, Asbury v.....111 N. C., 251..... 117
Falls, Rudasill v. ..... 92 N. C., 222..... 76
Faribault, Collins v..... 92 N. C., 310..... 747
Farmer, Ward v. ..... 92 N. C., 93..... 47
Farrar, Sugg v.....107 N. C., 123..... 178
Farthing v. Shields.....106 N. C., 289..... 611, 614
Fayetteville, Broadfoot v.....121 N. C., 418..... 418
Fertilizer Co. v. Rippy.....123 N. C., 656..... 82
Ferguson v. Wright.....113 N. C., 537..... 48
Finley v. Hayes..... 81 N. C., 368..... 216
Floyd, Thompson v..... 47 N. C., 313..... 709
Follett v. Accident Asso.....110 N. C., 377..... 409
Fore, Plemmons v..... 37 N. C., 312..... 428
Fowler, Daniels v.....123 N. C., 35..... 39
Fox v. Horah..... 36 N. C., 358..... 485
Fox v. Stafford..... 90 N. C., 296..... 728
Foy, University v..... 5 N. C., 58..... 660
Frank v. Himer.....117 N. C., 79..... 419
Frederick, Straus v..... 91 N. C., 121..... 543, 546
Freeman v. Person.....106 N. C., 253..... 264

Freeman v. Sprague..... 82 N. C., 366..... 117
Frizzele, Rives v..... 43 N. C., 237..... 554
Fuller, S. v.....114 N. C., 885..... 857

G

Gadberry, S. v.....117 N. C., 811..... 862
Gales, Bunting v..... 77 N. C., 282.....366, 663, 709
Galloway v. R. R..... 63 N. C., 147..... 709
Gambill, McMillan v.....106 N. C., 359..... 432, 433
Garner v. Worth.....122 N. C., 250..... 392, 795
Gause v. Perkins..... 56 N. C., 177..... 2
Gay, Stancell v. ..... 92 N. C., 155..... 351
German v. Clark..... 71 N. C., 420..... 281
Gerard, S. v..... 37 N. C., 210..... 511
Gibbons, Alexander v.....118 N. C., 796..... 80, 296
Gidney, Mauney v..... 88 N. C., 200..... 351
Gilliam, McKay v..... 65 N. C., 130..... 401
Gilmer, Bank v.....116 N. C., 684..... 419
Gilmer, Bank v.....117 N. C., 416..... 419
Glauton v. Jacobs.....117 N. C., 427..... 419
Glenn, S. v. ..... 52 N. C., 321..... 709, 754
Godwin v. Rich..... 23 N. C., 553..... 449
Govan v. Cushing.....111 N. C., 458..... 242
Gragg, S. v.....122 N. C., 1082..... 852
Graham v. Edwards.....114 N. C., 228..... 747
Graham, Griffin v..... 8 N. C., 96..... 510
Grangers' Ex., Vance v..... 1 N. C., 204..... 494
Grandy, Kitchin v.....101 N. C., 86..... 235
Gray v. West..... 93 N. C., 442..... 163
Gregg, S. v.....122 N. C., 1082..... 453
Greenlee v. R. R.....122 N. C., 977..... 191
Greenwood, Stealman v.....113 N. C., 355..... 18
Grier v. Rhyne..... 69 N. C., 346..... 283
Griffin v. Graham..... 8 N. C., 96..... 510
Griffin v. Water Co.....122 N. C., 206..... 334
Griffis, Livey v..... 65 N. C., 136..... 109
Groom, Brodnax v. ..... 64 N. C., 244..... 132
Gross, S. v.....119 N. C., 868..... 806
Gudger v. Hensley..... 82 N. C., 481..... 430
Guest, S. v. .....100 N. C., 410..... 814
Guilford v. Comrs.....120 N. C., 23..... 838
Guion, Justice v..... 76 N. C., 442..... 153
Guthrie v. Bacon.....107 N. C., 337..... 117
Gwyn v. Patterson..... 72 N. C., 189..... 175

H

Hafner v. Irwin..... 23 N. C., 490..... 65
Hall, Kesler v..... 64 N. C., 60..... 209
Hall v. Turner.....110 N. C., 292..... 514
Hall v. Turner.....111 N. C., 180..... 216
Hamilton v. Adams..... 6 N. C., 161..... 715
Hamilton v. Shepperd..... 7 N. C., 115..... 494

Hampton v. R. R. ..... 120 N. C., 538 ..... 99
Harmon, Kiger v. ..... 113 N. C., 406 ..... 216, 235
Harper v. Dail ..... 92 N. C., 394 ..... 318
Harrell v. R. R. ..... 110 N. C., 215 ..... 256
Harrell v. R. R. ..... 122 N. C., 822 ..... 37
Harris v. Sneeden ..... 104 N. C., 369 ..... 736
Harris, S. v. ..... 119 N. C., 811 ..... 844
Harrison, University v. ..... 93 N. C., 84 ..... 611
Hassell, Williams v. ..... 74 N. C., 434 ..... 153
Hatch, S. v. ..... 116 N. C., 1003 ..... 874
Haun v. Burrell ..... 119 N. C., 544 ..... 334
Hayes, Adams v. ..... 120 N. C., 383 ..... 736
Hayes, Finley v. ..... 81 N. C., 368 ..... 216
Haynes v. Coward ..... 116 N. C., 840 ..... 747
Haywood v. Daves ..... 81 N. C., 8 ..... 611
Heath v. Morgan ..... 117 N. C., 504 ..... 29
Henderson, Hoke v. ..... 15 N. C., 1 ..... 366, 374, 380, 393, 660, 664, 669, 679, 707, 710, 758
Henderson, Young v. ..... 76 N. C., 420 ..... 211
Herring v. Dixon ..... 122 N. C., 420 ..... 757
Hensley, Gudger v. ..... 82 N. C., 481 ..... 430
Hensley, Horton v. ..... 23 N. C., 163 ..... 573
Hicks, Markham v. ..... 90 N. C., 204 ..... 441
Hicks v. Skinner ..... 71 N. C., 539 ..... 681
Hilliard v. Kearney ..... 45 N. C., 229 ..... 424
Himer, Frank v. ..... 117 N. C., 79 ..... 419
Hinnant, Moore v. ..... 89 N. C., 455 ..... 65
Hinson v. Smith ..... 118 N. C., 503 ..... 28
Hinson, S. v. ..... 123 N. C., 755 ..... 844
Hobbs v. R. R. ..... 107 N. C., 1 ..... 226
Hobson, Rich v. ..... 112 N. C., 79 ..... 29
Hodges, McNeill v. ..... 105 N. C., 52 ..... 736
Hodges, Hughes v. ..... 102 N. C., 236 ..... 614
Hodges, Williams v. ..... 101 N. C., 300 ..... 32
Hoffner v. Irwin ..... 20 N. C., 433 ..... 271
Hoke v. Henderson ..... 15 N. C., 1 ..... 366, 374, 380, 393, 660, 664, 669, 679, 707, 710, 758
Holland v. Peck ..... 37 N. C., 255 ..... 515
Holmes v. Holmes ..... 86 N. C., 205 ..... 109
Holmes v. Johnson ..... 33 N. C., 55 ..... 115
Horah, Fox v. ..... 36 N. C., 358 ..... 485
Horne, S. v. ..... 119 N. C., 853 ..... 838
Horner & Graves v. Baker ..... 74 N. C., 65 ..... 520
Horton v. Hensley ..... 23 N. C., 163 ..... 573
Horton v. Insurance Co. ..... 122 N. C., 498 ..... 122, 319, 498
Houghtalling, Knight v. ..... 85 N. C., 17 ..... 736
Houston, Simonton v. ..... 78 N. C., 418 ..... 299
House, Brown v. ..... 119 N. C., 1622 ..... 747
Houston v. Bogle ..... 32 N. C., 496 ..... 709
Howerton, Bell v. ..... 111 N. C., 69 ..... 361
Howerton v. Tate ..... 68 N. C., 547 ..... 662, 667
Hughes, Burrell v. ..... 120 N. C., 277 ..... 746, 747
Hughes v. Hodges ..... 102 N. C., 236 ..... 614
Hunt v. Sneed ..... 64 N. C., 176 ..... 8

Hunter, Lyman v. ..... 123 N. C., 508 ..... 729
Hunter, King v. ..... 65 N. C., 603 ..... 366, 709
Hussey v. R. R. ..... 98 N. C., 34 ..... 103, 104
Hutchinson, Sprinkle v. ..... 66 N. C., 450 ..... 8

I

Improvement Co., Plemmons v. ..... 108 N. C., 614 ..... 269
*In re* Smith ..... 105 N. C., 170 ..... 838
Institution v. Norwood ..... 45 N. C., 65 ..... 509
Institution, School v. ..... 117 N. C., 164 ..... 511
Ins. Co., Braswell v. ..... 75 N. C., 8 ..... 13
Ins. Co., Bergeron v. ..... 111 N. C., 45 ..... 409
Ins. Co., Dupree v. ..... 93 N. C., 237 ..... 611
Ins. Co., Horton v. ..... 122 N. C., 498 ..... 122, 319, 498
Ins. Co., Ormond v. ..... 96 N. C., 158 ..... 396
Ins. Co., Pretzfelder v. ..... 123 N. C., 164 ..... 321
Ins. Co., Spruill v. ..... 120 N. C., 141 ..... 255, 304, 453, 568, 853
Ins. Co., Whitley v. ..... 71 N. C., 480 ..... 320, 396
Iron Co. v. Edwards ..... 110 N. C., 353 ..... 430
Irvin v. Clark ..... 98 N. C., 437 ..... 153
Irwin, Hoffner v. ..... 20 N. C., 433 ..... 271
Irwin, Hafner v. ..... 23 N. C., 490 ..... 65

J

Jacobs, Glauton v. ..... 117 N. C., 427 ..... 419
James v. R. R. ..... 121 N. C., 528 ..... 93
James, S. v. ..... 108 N. C., 792 ..... 747
Jenkins v. R. R. ..... 110 N. C., 438 ..... 219
Johnson, Badger v. ..... 68 N. C., 471 ..... 377
Johnson, Holmes v. ..... 33 N. C., 55 ..... 115
Johnson v. Loftin ..... 111 N. C., 319 ..... 736
Johnson, S. v. ..... 94 N. C., 863 ..... 803, 846
Johnson, S. v. ..... 33 N. C., 647 ..... 806
Johnson, Williams v. ..... 82 N. C., 288 ..... 650
Jonson v. R. R. ..... 81 N. C., 453 ..... 458
Jones v. Beamon ..... 117 N. C., 259 ..... 584
Jones v. Buxton ..... 121 N. C., 285 ..... 282
Jones v. Cameron ..... 81 N. C., 154 ..... 41
Jones v. Emory ..... 115 N. C., 158 ..... 650
Jones, Ewart v. ..... 116 N. C., 570 ..... 367, 393, 394, 669, 702, 765
Jones v. Mial ..... 79 N. C., 168 ..... 736
Jones, S. v. ..... 65 N. C., 395 ..... 800
Jones v. Ward ..... 77 N. C., 337 ..... 413
Jones, White v. ..... 92 N. C., 388 ..... 611
Jordan v. Bank ..... 74 N. C., 467 ..... 546
Jordan, Wellons v. ..... 83 N. C., 371 ..... 163
Justice v. Guion ..... 76 N. C., 442 ..... 153

K

Kahn v. R. R. ..... 115 N. C., 638 ..... 260
Kearney, Hilliard v. ..... 45 N. C., 229 ..... 424

Kearney, S. v. ... 8 N. C., 53 ... 803
Keath, S. v. ... 83 N. C., 626 ... 819
Keener, Brown v. ... 74 N. C., 712 ... 757
Kenan, Board of Education v. ... 112 N. C., 568 ... 709
Kennery, Lambeth v. ... 74 N. C., 348 ... 614
Kennedy v. Williams ... 87 N. C., 6 ... 806
Kerr, Williams v. ... 113 N. C., 306 ... 264
Kesler v. Hall ... 64 N. C., 60 ... 209
Kiger v. Harmon ... 113 N. C., 406 ... 216, 235
King, Austin v. ... 97 N. C., 339 ... 39
King v. Hunter ... 65 N. C., 603 ... 366, 709
Kinnie v. R. R. ... 122 N. C., 961 ... 225
Kitchin v. Grandy ... 101 N. C., 86 ... 235
Knight v. Houghtalling ... 85 N. C., 17 ... 736
Kornegay v. Everett ... 99 N. C., 30 ... 624
Kruger v. Bank ... 123 N. C., 16 ... 121


L


Lambeth v. Kennery ... 74 N. C., 348 ... 614
Lanier, Simonton v. ... 71 N. C., 498 ... 234, 688
Lanier, Taylor v. ... 7 N. C., 98 ... 163
La Roque, Thurber v. ... 105 N. C., 301 ... 614
Larkins, DeVane v. ... 56 N. C., 377 ... 554
Laws, Webster v. ... 89 N. C., 224 ... 635
Leach, Wilcox v. ... 123 N. C., 74 ... 729, 736, 740, 742, 744
Leak v. Covington ... 99 N. C., 559 ... 454
Leary, Wilson v. ... 121 N. C., 90 ... 485
Ledbetter v. Pinner ... 120 N. C., 455 ... 114
Lenoir v. Mining Co. ... 113 N. C., 513 ... 200
Lewis v. Lumber Co. ... 99 N. C., 11 ... 2
Lewis, Rhodes v. ... 80 N. C., 136 ... 688
Lewis v. Rountree ... 81 N. C., 20 ... 611
Lewis, S. v. ... 73 N. C., 138 ... 175
Life Assn., Lovic v. ... 110 N. C., 93 ... 13
Ligon v. Simmons ... 18 N. C., 13 ... 298
Lilly v. Taylor ... 88 N. C., 489 ... 493
Lines, Thomas v. ... 83 N. C., 191 ... 624
Lipscomb, Rhyne v. ... 122 N. C., 650 ... 690
Littlejohn v. Edgerton ... 76 N. C., 468 ... 493
Livey v. Griffis ... 65 N. C., 136 ... 109
Loan Asso. v. Black ... 119 N. C., 323 ... 61
Lockhart v. Bell ... 90 N. C., 499 ... 611
Loftin, Johnson v. ... 111 N. C., 319 ... 736
Logan v. R. R. ... 116 N. C., 940 ... 93
Logan, Twitty v. ... 86 N. C., 712 ... 584
Long v. Comrs. ... 76 N. C., 280 ... 756
Long v. Crews ... 113 N. C., 256 ... 264
Long, Mortgage Co. v. ... 113 N. C., 123 ... 282
Love, Edwards v. ... 94 N. C., 365 ... 309
Lovic v. Life Assn. ... 110 N. C., 93 ... 13
Lumber Co., Comrs. v. ... 116 N. C., 731 ... 754
Lumber Co., Lewis v. ... 99 N. C., 11 ... 2
Lumber Co. v. Wallace ... 93 N. C., 22 ... 2

Lutterloh v. Comrs. 65 N. C., 403 212
Lyerly v. Wheeler 34 N. C., 290 317
Lyman v. Hunter 123 N. C., 508 729
Lyon v. Aikin 78 N. C., 258 709
Lyon v. Pender 118 N. C., 150 650
Lyon, Smith v. 82 N. C., 2 611
Lyne v. Telegraph Co. 123 N. C., 129 464, 853
Lynch, Puryear v. 121 N. C., 255 252

M

Markham v. Hicks 90 N. C., 204 441
Martin, Ryan v. 91 N. C., 464 508
Martin, S. v. 24 N. C., 101 827
Marshall, Bullinger v. 70 N. C., 520 287
Massey, S. v. 97 N. C., 465 21
Massey, S. v. 104 N. C., 877 837
Mason v. R. R. 111 N. C., 482 191, 457
Mauney v. Gidney 88 N. C., 200 351
Mayo v. Washington 122 N. C., 5 212
Maynard, Castleberry v. 95 N. C., 281 441
McAuley v. Wilson 16 N. C., 276 515
McCormick v. Monroe 46 N. C., 13 294
McCormac, S. v. 116 N. C., 1033 854, 858
McCurrie v. McCurrie 82 N. C., 296 400
McDaniel, S. v. 53 N. C., 284 806
McDaniel, S. v. 115 N. C., 807 819
McDonald v. Morrow 119 N. C., 666 374, 381, 709, 758
McDougald v. Crapon 95 N. C., 292 344
McDuffie, S. v. 107 N. C., 885 242
McElwee, Tobacco Co. v. 96 N. C., 71 454
McGowan, S. v. 39 N. C., 1 511
McIver, Battle v. 68 N. C., 467 377
McIver, People v. 68 N. C., 467 373
McIver, University v. 72 N. C., 76 642, 765
McKay v. Gilliam 65 N. C., 130 401
McKee v. Nichols 68 N. C., 429 367, 394
McKee, Nichols v. 68 N. C., 429 377, 765
McKesson, Dugger v. 100 N. C., 1 431
McKinnon, Cooper v. 122 N. C., 447 419
McKinnon, Woolen Co. v. 114 N. C., 661 29
McLamb v. R. R. 122 N. C., 873 191
McLeod v. Nimocks 122 N. C., 437 291
McLeod v. Oates 30 N. C., 387 414
McMillan v. Baxley 112 N. C., 578 216
McMillan v. Gambill 106 N. C., 359 432, 433
McMillan v. McMillan 122 N. C., 410 747
McNamee v. Alexander 109 N. C., 246 709
McNeill v. Hodges 105 N. C., 52 736
McNichol, Rothchild v. 121 N. C., 284 747
McQueen v. Smith 118 N. C., 450 29
Mfg. Co. v. R. R. 121 N. C., 514 249
Mfg. Co., Bank v. 108 N. C., 282 400
Meadows v. Cozart 76 N. C., 450 317

Meares v. Duncan....123 N. C., 203.... 536
Mebane, Turner v....110 N. C., 413.... 573
Meekins, Basnight v....121 N. C., 23.... 5
Merrill v. Whitman....110 N. C., 367.... 454
Merrimon v. Comrs....106 N. C., 372.... 838
Merrimon, Woodcock v. ....122 N. C., 731.... 77
Mial, Jones v.... 79 N. C., 168.... 736
Miller v. Alexander....122 N. C., 721.... 709
Miller v. Atkinson.... 63 N. C., 537.... 511
Miller, *ex parte*.... 90 N. C., 625.... 153
Miller v. Powers....117 N. C., 218.... 589
Miller, S. v....112 N. C., 886.... 852
Mining Co., Lenoir v....113 N. C., 513.... 200
Mining Co. v. R. R....122 N. C., 881.... 45
Mining Co. v. Smelting Co.... 99 N. C., 445.... 216
Mining Co. v. Smelting Co....119 N. C., 415.... 228
Misenheimer v. Sifford.... 94 N. C., 592.... 163
Mitchell, Trotter v....115 N. C., 193.... 709
Mobley v. Watts.... 98 N. C., 284.... 81
Monroe, McCormick v.... 46 N. C., 13.... 294
Moore v. Bird....118 N. C., 688.... 734
Moore v. Byrd....118 N. C., 688.... 729
Moore v. Hinnant.... 89 N. C., 455.... 65
Moore, S. v....104 N. C., 714.... 757, 758
Moore, S. v....120 N. C., 571.... 99
Moore v. Wolfe....122 N. C., 711.... 615
Morgan, Heath v....117 N. C., 504.... 29
Morrison v. Craven....120 N. C., 327.... 747
Morrill, Whitehead v....108 N. C., 65.... 235
Morrow, Norwood v.... 20 N. C., 442....294, 298, 477
Morrow, McDonald v....119 N. C., 666.... 374, 381, 709, 758
Moss, S. v.... 47 N. C., 66.... 709
Mortgage Co. v. Long....113 N. C., 123.... 282
Mountain, Bazemore v....121 N. C., 59.... 45
Murphy, Campbell v.... 55 N. C., 357.... 294, 300
Myers v. R. R.... 87 N. C., 345.... 256

N

Nash, S. v....109 N. C., 837.... 846
Neal, Ousby v.... 99 N. C., 146.... 2
Neally, Williamson v....119 N. C., 339.... 415
Neely, Caldwell v.... 81 N. C., 114.... 47
Neely v. Neely.... 79 N. C., 478.... 47
Nelson v. Williams.... 22 N. C., 118.... 361
Newton Academy v. Bank....101 N. C., 488.... 511
Nichols, McKee v.... 68 N. C., 429.... 367, 394
Nichols v. McKee.... 68 N. C., 429.... 377, 765
Nichols v. R. R....120 N. C., 495.... 36, 218
Nimocks, McLeod v....122 N. C., 437.... 291
Nimocks v. Woody.... 97 N. C., 1.... 13, 166
Norfleet v. Cromwell.... 70 N. C., 634.... 757
Norton v. R. R....122 N. C., 936.... 93
Norton v. R. R....122 N. C., 911.... 191

Norwood, Institution v. ..... 45 N. C., 65 ..... 509
Norwood v. Morrow ..... 20 N. C., 442 ..... 294, 298, 477
Norwood, S. v. ..... 115 N. C., 789 ..... 854, 857

O

Oates, McLeod v. ..... 30 N. C., 387 ..... 414
Ormond v. Ins. Co. ..... 96 N. C., 158 ..... 396
Ousby v. Neal ..... 99 N. C., 146 ..... 2
Outland v. Outland ..... 118 N. C., 138 ..... 163

P

Page v. Branch ..... 97 N. C., 97 ..... 48
Parker v. Allen ..... 84 N. C., 466 ..... 274
Parker v. R. R. ..... 119 N. C., 677 ..... 36, 38, 218
Parker v. R. R. ..... 121 N. C., 501 ..... 747
Parker v. R. R. ..... 123 N. C., 71 ..... 219
Parker, Sykes v. ..... 95 N. C., 232 ..... 82
Parrish, S. v. ..... 83 N. C., 613 ..... 809
Pasley v. Richardson ..... 119 N. C., 449 ..... 39
Patrick v. R. R. ..... 93 N. C., 422 ..... 736
Patterson, Gwyn v. ..... 72 N. C., 189 ..... 175
Patterson, S. v. ..... 74 N. C., 157 ..... 808
Payne, Brittain v. ..... 118 N. C., 989 ..... 178
Peck, Holland v. ..... 37 N. C., 255 ..... 515
Peden, Allen v. ..... 4 N. C., 638 ..... 715
People v. McIver ..... 68 N. C., 467 ..... 373
Peebles v. Taylor ..... 118 N. C., 165 ..... 729
Pender, Lyon v. ..... 118 N. C., 150 ..... 650
Perkins, Gause v. ..... 56 N. C., 177 ..... 2
Perkins, S. v. ..... 117 N. C., 698 ..... 808, 809
Perkins, S. v. ..... 104 N. C., 710 ..... 800
Perry v. Scott ..... 109 N. C., 374 ..... 284
Person, Freeman v. ..... 106 N. C., 253 ..... 264
Phifer, S. v. ..... 65 N. C., 325 ..... 815
Phillips, Ward v. ..... 89 N. C., 215 ..... 77
Phillips, Sutton v. ..... 116 N. C., 502 ..... 394, 758
Pinkers, Bank v. ..... 82 N. C., 377 ..... 630
Pinner, Ledbetter v. ..... 120 N. C., 455 ..... 114
Pipkin v. Bond ..... 40 N. C., 91 ..... 361
Pipkin, Vann v. ..... 77 N. C., 408 ..... 709
Pleasants, Bridgers v. ..... 39 N. C., 26 ..... 516
Pleasants v. R. R. ..... 121 N. C., 492 ..... 224
Plemmons v. Fore ..... 37 N. C., 312 ..... 428
Plemmons v. Improvement Co. ..... 108 N. C., 614 ..... 269
Pretzfelder v. Ins. Co. ..... 123 N. C., 164 ..... 321
Ponton v. R. R. ..... 51 N. C., 245 ..... 224
Pool v. Everton ..... 50 N. C., 241 ..... 636
Pope, Vick v. ..... 81 N. C., 22 ..... 351
Potts, S. v. ..... 100 N. C., 457 ..... 819
Powell v. Sikes ..... 119 N. C., 231 ..... 729
Powell, Stanmere v. ..... 35 N. C., 312 ..... 428
Powers, Miller v. ..... 117 N. C., 218 ..... 589

Prairie v. Worth ..... 78 N. C., 167..... 709
Price, Sams v..... 119 N. C., 572..... 334
Puryear v. Lynch..... 121 N. C., 255..... 252

Q

Quinnerly v. Quinnerly ..... 114 N. C., 145..... 263

R

Randolph v. Randolph ..... 107 N. C., 506..... 117
Range Co. v. Carver ..... 118 N. C., 328..... 170
Ray, S. v..... 122 N. C., 1095..... 838
Ray, Slocomb v..... 123 N. C., 571..... 619
Redmond v. Chandley..... 119 N. C., 575..... 453
Rex, Dobbin v..... 106 N. C., 444..... 41
Rhodes v. Lewis..... 80 N. C., 136..... 688
Rhyne, Grier v..... 69 N. C., 346..... 283
Rhyne v. Lipscomb ..... 122 N. C., 650..... 690
Ricks, Bunting v..... 22 N. C., 130..... 442
Rich, Godwin v..... 23 N. C., 553..... 449
Rich v. Hobson..... 112 N. C., 79..... 29
Richardson, Bingham v..... 60 N. C., 215..... 520
Richardson, Earp v..... 75 N. C., 84..... 585
Richardson, Pasley v..... 119 N. C., 449..... 39
Richardson, Waugh v. ..... 30 N. C., 470..... 430
Ridley v. R. R..... 118 N. C., 996..... 219
Rippy, Fertilizer Co. v..... 123 N. C., 656..... 82
Ritter, Blue v..... 118 N. C., 580..... 83
Rives v. Frizzele ..... 43 N. C., 237..... 554
Roberts v. Sewald ..... 108 N. C., 405..... 228
Robinson v. Barfield..... 6 N. C., 391..... 715
Robinson, Baker v. ..... 119 N. C., 289..... 613
Robinson, Wooley v..... 52 N. C., 30..... 115
Rodman v. Town of Wash'gton..122 N. C., 39..... 213
Rollins, S. v..... 113 N. C., 722..... 857
Roper, Spencer v..... 35 N. C., 333..... 160
Rothchild v. McNichol ..... 121 N. C., 284..... 747
Rountree, Lewis v..... 81 N. C., 20..... 611
Royal, DeVane v..... 52 N. C., 426..... 309
Rudasill v. Falls..... 92 N. C., 222..... 76
Russell v. Town of Monroe..... 116 N. C., 720..... 189, 312
Ryan v. Martin..... 91 N. C., 464..... 508
R. R. v. Allsbrook..... 110 N. C., 137..... 389
R. R., Aycock v..... 89 N. C., 330..... 93
R. R., Bagg v..... 109 N. C., 281..... 753
R. R., Beach v..... 120 N. C., 498..... 219
R. R., Benton v..... 122 N. C., 1007..... 93
R. R., Bolden v. ..... 123 N. C., 614..... 304
R. R., Cable v..... 122 N. C., 892..... 255, 304, 360, 453, 567
R. R., Cox v..... 123 N. C., 604..... 255, 304, 360, 567
R. R., Daniels v..... 117 N. C., 592..... 103
R. R., Denmark v..... 107 N. C., 185..... 93
R. R., Durham v..... 113 N. C., 240..... 252

R. R., Durham v. ....108 N. C., 399 .... 225, 228
R. R., Galloway v. .... 63 N. C., 147 .... 709
R. R., Greenlee v. ....122 N. C., 977 .... 191
R. R., Hampton v. ....120 N. C., 538 .... 99
R. R., Harrell v. ....110 N. C., 215 .... 256
R. R., Harrell v. ....122 N. C., 822 .... 37
R. R., Hobbs v. ....107 N. C., 1 .... 226
R. R., Hussey v. .... 98 N. C., 34 .... 103, 104
R. R., James v. ....121 N. C., 528 .... 93
R. R., Jenkins v. ....110 N. C., 438 .... 219
R. R., Jonson v. .... 81 N. C., 453 .... 458
R. R., Kahn v. ....115 N. C., 638 .... 260
R. R., Kinnie v. ....122 N. C., 961 .... 225
R. R., Logan v. ....116 N. C., 940 .... 93
R. R., Mason v. ....111 N. C., 482 .... 191, 457
R. R., McLamb v. ....122 N. C., 873 .... 191
R. R., Mfg. Co. v. ....121 N. C., 514 .... 249
R. R., Mining Co. v. ....122 N. C., 881 .... 45
R. R., Myers v. .... 87 N. C., 345 .... 256
R. R., Nichols v. ....120 N. C., 495 .... 36, 218
R. R., Norton v. ....122 N. C., 936 .... 93
R. R., Norton v. ....122 N. C., 911 .... 191
R. R., Parker v. ....123 N. C., 71 .... 219
R. R., Parker v. ....119 N. C., 677 .... 36, 38, 218
R. R., Parker v. ....121 N. C., 501 .... 747
R. R., Patrick v. .... 93 N. C., 422 .... 736
R. R., Pleasants v. ....121 N. C., 492 .... 224
R. R., Ponton v. .... 51 N. C., 245 .... 224
R. R., Ridley v. ....118 N. C., 996 .... 219
R. R., Selby v. ....113 N. C., 588 .... 249, 251
R. R., Smith v. .... 64 N. C., 235 .... 248, 251
R. R., Staton v. ....111 N. C., 278 .... 234
R. R., Tillett v. ....118 N. C., 1043 .... 93
R. R., Troxler v. ....122 N. C., 902 .... 191
R. R., Vaughan v. .... 63 N. C., 11 .... 630
R. R., White v. ....115 N. C., 631 .... 104
R. R., Whitley v. ....122 N. C., 987 .... 45
R. R., Willis v. ....122 N. C., 905 .... 93
R. R., Witsell v. ....120 N. C., 557 .... 192, 194
R. R., Wright v. ....122 N. C., 959 .... 191
R. R., Wright v. ....122 N. C., 852 .... 224
R. R., Wright v. ....123 N. C., 280 .... 225

S

Sams v. Price ....119 N. C., 572 .... 334
Sanderlin v. Sanderlin ....123 N. C., 1 .... 619
Satterthwaite, Tucker v. ....120 N. C., 118 .... 245
Sanders v. Thompson ....114 N. C., 282 .... 747
Saunders v. Earp ....118 N. C., 275 .... 729
Saunders, Ward v. .... 23 N. C., 382 .... 454
Sawyer v. Wood .... 67 N. C., 277 .... 474
School v. Institution ....117 N. C., 164 .... 511
Scott, Perry v. ....109 N. C., 374 .... 284

Scroggins, Barbee v. ..... 121 N. C., 135 ..... 235
Security Co., Cooper v. ..... 122 N. C., 463 ..... 468
Selby v. R. R. ..... 113 N. C., 588 ..... 249, 251
Sewald, Roberts v. ..... 108 N. C., 405 ..... 228
Sheppard, Charlotte v. ..... 120 N. C., 411 ..... 212
Shepperd, Hamilton v. ..... 7 N. C., 115 ..... 494
Shields, Farthing v. ..... 106 N. C., 289 ..... 611, 614
Shooting Club, Thomas v. ..... 123 N. C., 288 ..... 853
Sifford, Misenheimer v. ..... 94 N. C., 592 ..... 163
Sikes, Powell v. ..... 119 N. C., 231 ..... 729
Simmons v. Allison ..... 118 N. C., 763 ..... 508, 736
Simmons, Ligon v. ..... 18 N. C., 13 ..... 298
Simmons, Worth v. ..... 121 N. C., 361 ..... 729
Simonton v. Houston ..... 78 N. C., 418 ..... 299
Simonton v. Lanier ..... 71 N. C., 498 ..... 234, 688
Skinner v. Terry ..... 107 N. C., 103 ..... 736
Skinner, Hicks v. ..... 71 N. C., 539 ..... 681
Slocomb v. Ray ..... 123 N. C., 571 ..... 619
Smallwood, S. v. ..... 75 N. C., 104 ..... 827
Smaw v. Cohen ..... 95 N. C., 85 ..... 611
Smelting Co., Mining Co. v. ..... 99 N. C., 445 ..... 216
Smelting Co., Mining Co. v. ..... 119 N. C., 415 ..... 228
Smith, Basnight v. ..... 112 N. C., 229 ..... 729
Surles, Boushee v. ..... 77 N. C., 51 ..... 585
Smith, Hinson v. ..... 118 N. C., 503 ..... 28
Smith, *In re* ..... 105 N. C., 170 ..... 838
Smith, McQueen v. ..... 118 N. C., 450 ..... 29
Smith v. Lyon ..... 82 N. C., 2 ..... 611
Smith v. R. R. ..... 64 N. C., 235 ..... 248, 251
Smith, S. v. ..... 65 N. C., 369 ..... 366, 709
Sneed, Hunt v. ..... 64 N. C., 176 ..... 8
Sneeden, Harris v. ..... 104 N. C., 369 ..... 736
Snow, White v. ..... 71 N. C., 232 ..... 590
Sparger, Critz v. ..... 121 N. C., 283 ..... 747
Spencer v. Roper ..... 35 N. C., 333 ..... 160
Spencer v. Watson ..... 18 N. C., 213 ..... 294
Spencer v. Weston ..... 18 N. C., 14 ..... 299
Sprague, Freeman v. ..... 82 N. C., 366 ..... 117
Sprinkle, Dougherty v. ..... 88 N. C., 300 ..... 612
Sprinkle v. Hutchinson ..... 66 N. C., 450 ..... 8
Spruill v. Ins. Co. ..... 120 N. C., 141 ..... 255, 304, 453, 568, 853
Stafford, Fox v. ..... 90 N. C., 296 ..... 728
S. v. Albertson ..... 113 N. C., 633 ..... 846
S. v. Alexander ..... 74 N. C., 232 ..... 800
S. v. Ashford ..... 120 N. C., 588 ..... 99
S. v. Baxter ..... 82 N. C., 602 ..... 827
S. v. Bell ..... 25 N. C., 506 ..... 688
S. v. Bennett ..... 75 N. C., 305 ..... 809
S. v. Bland ..... 123 N. C., 739 ..... 431
S. v. Boyle ..... 104 N. C., 800 ..... 813
S. v. Bradburn ..... 104 N. C., 881 ..... 824
S. v. Britt ..... 78 N. C., 439 ..... 809
S. v. Butler ..... 65 N. C., 309 ..... 800
S. v. Bynum ..... 117 N. C., 749 ..... 844

S., Clements v. ..... 77 N. C., 143 ..... 795
S. v. Covington ..... 117 N. C., 862 ..... 858
S. v. Cutshall ..... 110 N. C., 545 ..... 709
S. v. Dowden ..... 118 N. C., 1145 ..... 856, 857, 869
S. v. Driver ..... 78 N. C., 423 ..... 662
S. v. Fuller ..... 114 N. C., 885 ..... 857
S. v. Gadberry ..... 117 N. C., 811 ..... 862
S. v. Gerard ..... 37 N. C., 210 ..... 511
S. v. Glenn ..... 52 N. C., 321 ..... 709, 754
S. v. Gragg ..... 122 N. C., 1082 ..... 852
S. v. Gregg ..... 122 N. C., 1082 ..... 453
S. v. Gross ..... 119 N. C., 868 ..... 806
S. v. Guest ..... 100 N. C., 410 ..... 814
S. v. Harris ..... 119 N. C., 811 ..... 844
S. v. Hatch ..... 116 N. C., 1003 ..... 874
S. v. Hinson ..... 123 N. C., 755 ..... 844
S. v. Horne ..... 119 N. C., 853 ..... 838
S. v. James ..... 108 N. C., 792 ..... 747
S. v. Johnson ..... 33 N. C., 647 ..... 806
S. v. Johnson ..... 94 N. C., 863 ..... 803, 846
S. v. Jones ..... 65 N. C., 395 ..... 800
S. v. Kearney ..... 8 N. C., 53 ..... 803
S. v. Keath ..... 83 N. C., 626 ..... 819
S. v. Lewis ..... 73 N. C., 138 ..... 175
S. v. Martin ..... 24 N. C., 101 ..... 827
S. v. Massey ..... 97 N. C., 465 ..... 21
S. v. Massey ..... 104 N. C., 877 ..... 837
S. v. McCormac ..... 116 N. C., 1033 ..... 854, 858
S. v. McDaniel ..... 115 N. C., 807 ..... 819
S. v. McDaniel ..... 53 N. C., 284 ..... 806
S. v. McDuffie ..... 107 N. C., 885 ..... 242
S. v. McGowan ..... 39 N. C., 1 ..... 511
S. v. Miller ..... 112 N. C., 886 ..... 852
S. v. Moore ..... 104 N. C., 714 ..... 757, 758
S. v. Moore ..... 120 N. C., 571 ..... 99
S. v. Moss ..... 47 N. C., 66 ..... 709
S. v. Nash ..... 109 N. C., 837 ..... 846
S. v. Norwood ..... 115 N. C., 789 ..... 854, 857
S. v. Parrish ..... 83 N. C., 613 ..... 809
S. v. Patterson ..... 74 N. C., 157 ..... 808
S. v. Perkins ..... 104 N. C., 710 ..... 800
S. v. Perkins ..... 117 N. C., 698 ..... 808, 809
S. v. Phifer ..... 65 N. C., 325 ..... 815
S. v. Potts ..... 100 N. C., 457 ..... 819
S. v. Ray ..... 122 N. C., 1095 ..... 838
S. v. Rollins ..... 113 N. C., 722 ..... 857
S. v. Smallwood ..... 75 N. C., 104 ..... 827
S. v. Smith ..... 65 N. C., 369 ..... 366, 709
S. v. Stanly ..... 66 N. C., 59 ..... 662
S. v. Sugg ..... 89 N. C., 527 ..... 454
S. v. Thomas ..... 118 N. C., 1113 ..... 852, 854, 857
S. v. Walker ..... 65 N. C., 461 ..... 379
S. v. Walters ..... 97 N. C., 489 ..... 803
S. v. Webster ..... 121 N. C., 586 ..... 99, 800

S. v. Wilcox ..... 118 N. C., 1181 ..... 852
S. v. Wilson ..... 104 N. C., 868 ..... 819
S. v. Wilson ..... 121 N. C., 654 ..... 844
S. v. Woodruff ..... 67 N. C., 89 ..... 810
S. v. Womble ..... 112 N. C., 867 ..... 709
Staton v. R. R. ..... 111 N. C., 278 ..... 234
Stealman v. Greenwood ..... 113 N. C., 355 ..... 18
Straus v. Frederick ..... 91 N. C., 121 ..... 543, 546
Stanly, Clark v. ..... 66 N. C., 59 ..... 366, 368, 667, 709, 765
Stanly, S. v. ..... 66 N. C., 59 ..... 662
Stancell v. Gay ..... 92 N. C., 155 ..... 351
Stanford v. Ellington ..... 117 N. C., 158 ..... 383, 766
Stanley v. Baird ..... 118 N. C., 75 ..... 729, 734, 737
Stanley v. Biddle ..... 57 N. C., 383 ..... 428
Stanmere v. Powell ..... 35 N. C., 312 ..... 428
Strayhorn v. Blalock ..... 92 N. C., 292 ..... 589
Stuart, Covington v. ..... 77 N. C., 150 ..... 47
Sugg v. Farrar ..... 107 N. C., 123 ..... 178
Sugg, S. v. ..... 89 N. C., 527 ..... 454
Sutton v. Phillips ..... 116 N. C., 502 ..... 394, 758
Sykes v. Parker ..... 95 N. C., 232 ..... 82

T

Tate, Howerton v. ..... 68 N. C., 547 ..... 662, 667
Taylor v. Lanier ..... 7 N. C., 98 ..... 163
Taylor, Peebles v. ..... 118 N. C., 165 ..... 729
Taylor, Lilly v. ..... 88 N. C., 489 ..... 493
Telegraph Co., Cashion v. ..... 123 N. C., 267 ..... 532
Telegraph Co., Lyne v. ..... 123 N. C., 129 ..... 464, 853
Terry, Albertson v. ..... 109 N. C., 8 ..... 117
Terry, Skinner v. ..... 107 N. C., 103 ..... 736
Thomas v. Lines ..... 83 N. C., 191 ..... 624
Thomas v. Shooting Club ..... 123 N. C., 288 ..... 853
Thomas, S. v. ..... 118 N. C., 1113 ..... 852, 854, 857
Thompson v. Floyd ..... 47 N. C., 313 ..... 709
Thompson, Sanders v. ..... 114 N. C., 282 ..... 747
Thurber v. La Roque ..... 105 N. C., 301 ..... 614
Tilley v. Ellis ..... 119 N. C., 233 ..... 508
Tillett v. R. R. ..... 118 N. C., 1043 ..... 93
Tobacco Co. v. McElwee ..... 96 N. C., 71 ..... 454
Town of Monroe, Russell v. ..... 116 N. C., 720 ..... 189, 312
Town of Wash'gton, Rodman v. ..... 122 N. C., 39 ..... 213
Trotter v. Mitchell ..... 115 N. C., 193 ..... 709
Troxler v. R. R. ..... 122 N. C., 902 ..... 191
Tucker v. Satterthwaite ..... 120 N. C., 118 ..... 245
Turner v. Connelly ..... 105 N. C., 72 ..... 264
Turner, Brown v. ..... 70 N. C., 93 ..... 709
Turner, Hall v. ..... 110 N. C., 292 ..... 514
Turner, Hall v. ..... 111 N. C., 180 ..... 216
Turner v. Mebane ..... 110 N. C., 413 ..... 573
Twitty v. Logan ..... 86 N. C., 712 ..... 584

U

United Brethren v. Comrs. 115 N. C., 489 ... 508
University v. Foy 5 N. C., 58 ... 660
University v. Harrison 93 N. C., 84 ... 611
University v. McIver 72 N. C., 76 ... 642, 765
University, White v. 39 N. C., 19 ... 510, 516

V

Vance v. Grangers' Ex. 1 N. C., 204 ... 494
Vann v. Pipkin 77 N. C., 408 ... 709
Vaughan v. Comrs. 117 N. C., 434 ... 212, 132
Vaughan v. R. R. 63 N. C., 11 ... 630
Vick v. Pope 81 N. C., 22 ... 351

W

Walker, S. v. 65 N. C., 461 ... 379
Wallace, Lumber Co. v. 93 N. C., 22 ... 2
Walters, S. v. 97 N. C., 489 ... 803
Ward v. Elizabeth City 121 N. C., 1 ... 366, 374, 380, 697, 709
Ward v. Farmer 92 N. C., 93 ... 47
Ward, Jones v. 77 N. C., 337 ... 413
Ward v. Phillips 89 N. C., 215 ... 77
Ward v. Saunders 23 N. C., 382 ... 454
Warlick v. White 76 N. C., 175 ... 810
Washington, Mayo v. 122 N. C., 5 ... 212
Wasson, Wittkowsky v. 71 N. C., 451 ... 260, 453, 853
Water Co., Griffin v. 122 N. C., 206 ... 334
Watts, Mobley v. 98 N. C., 284 ... 81
Watson, Spencer v. 18 N. C., 213 ... 294
Watson v. Dodd 72 N. C., 240 ... 50, 611
Watson v. Watson 56 N. C., 400 ... 153
Waugh v. Richardson 30 N. C., 470 ... 430
Webster v. Laws 89 N. C., 224 ... 635
Webster, S. v. 121 N. C., 586 ... 99, 800
Weisel v. Cobb 122 N. C., 67 ... 50
Welker v. Bledsoe 68 N. C., 457 ... 377, 764
Wellons v. Jordan 83 N. C., 371 ... 163
West, Gray v. 93 N. C., 442 ... 163
Weston, Spencer v. 18 N. C., 14 ... 299
Wharton, Brinson v. 43 N. C., 80 ... 554
Wheeler, Lyerly v. 34 N. C., 290 ... 317
White v. Connelly 105 N. C., 65 ... 264
White v. Jones 92 N. C., 388 ... 611
White v. R. R. 115 N. C., 631 ... 104
White v. Snow 71 N. C., 232 ... 590
White v. University 39 N. C., 19 ... 510, 516
White, Warlick v. 76 N. C., 175 ... 810
Whitehead v. Morrill 108 N. C., 65 ... 235
Whitley v. Ins. Co. 71 N. C., 480 ... 320, 396
Whitley v. R. R. 122 N. C., 987 ... 45
Whitman, Merrill v. 110 N. C., 367 ... 454

Wilkey v. Bray ..... 71 N. C., 206 ..... 613
Wilkesboro, Call v. ..... 115 N. C., 337 ..... 133
Wilcox, Cooper v. ..... 22 N. C., 90 ..... 361
Wilcox v. Leach ..... 123 N. C., 74 ..... 729, 736, 740, 742, 744
Wilcox, S. v. ..... 118 N. C., 1181 ..... 852
Williams, Boyden v. ..... 80 N. C., 95 ..... 584
Williams, Electric Co. v. ..... 123 N. C., 51 ..... 538, 570
Williams v. Hassell ..... 74 N. C., 434 ..... 153
Williams v. Hodges ..... 101 N. C., 300 ..... 32
Williams v. Johnson ..... 82 N. C., 288 ..... 650
Williams, Kennedy v. ..... 87 N. C., 6 ..... 806
Williams v. Kerr ..... 113 N. C., 306 ..... 264
Williams, Nelson v. ..... 22 N. C., 118 ..... 361
Williamson v. Neally ..... 119 N. C., 339 ..... 415
Willis v. R. R. ..... 122 N. C., 905 ..... 93
Wilson, Caldwell v. ..... 121 N. C., 425 ..... 393, 676, 709, 723
Wilson, Caldwell v. ..... 121 N. C., 423 ..... 346
Wilson v. Derr ..... 69 N. C., 137 ..... 318
Wilson v. Leary ..... 121 N. C., 90 ..... 485
Wilson, McAuley v. ..... 16 N. C., 276 ..... 515
Wilson, S. v. ..... 121 N. C., 654 ..... 844
Wilson, S. v. ..... 104 N. C., 868 ..... 819
Winfree v. Bagley ..... 102 N. C., 515 ..... 468
Wittkowsky v. Wasson ..... 71 N. C., 451 ..... 260, 453, 853
Witsell v. R. R. ..... 120 N. C., 557 ..... 192, 194
Wood v. Bellamy ..... 120 N. C., 212 ..... 366, 375, 377, 380, 381, 661, 664, 679, 699, 709, 765
Wood, Sawyer v. ..... 67 N. C., 277 ..... 474
Woodcock v. Merrimon ..... 122 N. C., 731 ..... 77
Woodruff, S. v. ..... 67 N. C., 89 ..... 810
Woody, Nimocks v. ..... 97 N. C., 1 ..... 13, 166
Woolen Co. v. McKinnon ..... 114 N. C., 661 ..... 29
Wooley v. Robinson ..... 52 N. C., 30 ..... 115
Wolfe, Moore v. ..... 122 N. C., 711 ..... 615
Womble, S. v. ..... 112 N. C., 867 ..... 709
Worth v. Simmons ..... 121 N. C., 361 ..... 729
Worth, Garner v. ..... 122 N. C., 250 ..... 392, 795
Worth, Prairie v. ..... 78 N. C., 167 ..... 709
Wright v. R. R. ..... 122 N. C., 959 ..... 191
Wright v. R. R. ..... 122 N. C., 852 ..... 224
Wright v. R. R. ..... 123 N. C., 280 ..... 225
Wright, Ferguson v. ..... 113 N. C., 537 ..... 48

Y

Young v. Henderson ..... 76 N. C., 420 ..... 211

# CASES

ARGUED AND DETERMINED
IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT RALEIGH

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## FEBRUARY TERM, 1899

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MILLIE SHARPE ET AL. v. C. D. LOANE & CO.

(Decided 21 February, 1899.)

*Injunction—Trespass.*

A Court of Equity will not enjoin an ordinary trespass, unless it is shown that the injury will be irreparable and incapable of compensation in money value.

APPLICATION FOR INJUNCTION, in suit pending in HERTFORD, to enjoin the commission of trespass by the defendants, heard before *Brown, J.*, at chambers. The trespass complained of was the cutting of timber trees and hauling them off to be sawed at defendants' mill. The parties appeared in obedience to the order to show cause, and both sides were heard upon affidavits.

His Honor refused the injunction, but required the defendants to file a bond of indemnity.

The plaintiffs excepted and appealed.

*Winborne & Lawrence for plaintiffs.*
*Francis D. Winston for defendants.*

FAIRCLOTH, C. J. The plaintiffs and defendants claim to be ( 2 ) the owners of certain lands in Hertford County, called "Cow Island," and in this action the plaintiffs ask for an injunction against the defendants to prevent trespassing on said lands. The alleged trespass consists in cutting timber trees and removing them to defendants' mill, and converting them into lumber for marketable purposes.

It is conceded that defendants are solvent and able to respond in damages for any injury the plaintiffs may sustain.

After reading affidavits and hearing the arguments, his Honor required the defendants to enter into sufficient bond to protect the plaintiffs, and to render and file a statement of the trees, etc., removed, with the clerk at stated periods, and dissolved the restraining order theretofore granted, from which the plaintiffs appealed.

No special or irreparable damage is alleged, only such as above stated. Will a Court of Equity enjoin an ordinary trespass? The rule has ever been that it will not, unless it is shown that the injury will be irreparable and incapable of a just compensation in money value. *Ousby v. Neal,* 99 N. C., 146.

The plaintiffs admit that the authorities are against them, and cite *Gause v. Perkins,* 56 N. C., 177; *Lumber Co. v. Wallace,* 93 N. C., 22, and *Lewis v. Lumber Co.,* 99 N. C., 11, but insist that the principles announced in those cases are unjust and inequitable. They cite no authority in support of their view, and the argument fails to satisfy us that their proposition is true. The case of *Gause v. Perkins, supra,* is an exhaustive review of the subject, referring to many decided cases prior thereto, and the decisions since have simply repeated the principle of that case. While this Court is always ready to correct any error, it would hesitate to overrule a long and uniform list of decided
( 3 ) cases, in harmony with all the text-writers, unless it should feel a strong and clear conviction that an unjust rule had prevailed. The present case fails to produce such a conviction.

AFFIRMED.

*Cited: Kistler v. Weaver,* 135 N. C., 389; *Stewart v. Munger,* 174 N. C., 405.

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LEROY P. WILLIAMS v. JOSEPH G. HUGHES.

(Decided 21 February, 1899.)

*Boundary, Proceeding to Establish—Possession—Title—Issue—Judgment.*

1. Laws 1893, ch. 22, providing a mode for establishing the boundary lines between adjacent landowners, is a substitute for, and supersedes, the mode of processioning land contained in Code, ch. 48.

2. Possession is sufficient evidence of ownership to entitle the petitioner to relief under the act; where he is not in possession, and his ownership is denied, it becomes necessary for him, incidentally, to show title, not for the purpose of enabling him to recover the land in this proceeding, but to entitle him to have the dividing line between him and the defendant located and established.

3. An issue sufficiently broad should be submitted, allowing the jury to locate the boundary line according to the evidence, whether in accordance with the contentions of the parties or not.

4. Title not being an *issue* in proceedings under this act, the judgment should leave out all reference to the title, and only provide for locating the dividing line between the parties, as provided for by the statute.

PROCESSIONING PROCEEDING, to establish the boundary line between the plaintiff and defendant, filed before the clerk of the Superior Court of CAMDEN, and transferred for trial of issues at term, tried before *Norwood, J.*, at Spring Term, 1898. ( 4 )

The petition alleged ownership and possession in the plaintiffs. The answer denied both allegations of the petition. The evidence was conflicting. The issues were found in favor of the plaintiff. The charge of his Honor, as excepted to by defendant, and also the issues are stated in the opinion.

Judgment in favor of plaintiff. Appeal by defendant.

*G. W. Ward for plaintiff.*
*E. F. Aydlett for defendant.*

FURCHES, J. This is a proceeding under chapter 22, Laws 1893, for the purpose of locating and establishing the boundary lines between plaintiff and defendant.

The plaintiff filed his petition with the clerk of the Superior Court, in which he alleges that he is the owner of certain lands adjoining the lands of the defendant—names the lines in dispute, and locates the same, as he claims them to be.

The defendant answers and denies the plaintiff's allegations and specially denies that plaintiff is the owner of any lands adjoining his lands, and the trial seems to have proceeded upon the allegations of the plaintiff and the denials of the defendant.

This is a new statute and has been before this Court for consideration in but one case that we remember. In that case it is said that it was intended to take the place of chapter 48, Vol. 1 of The Code, which it expressly repealed. And we do not think it was intended to try title to land under this statute, but to procession, locate and establish the lines between adjacent landowners. It gives the right to the *owners*

( 5 ) of land, and provides that the *occupancy* of land by the petitioner shall be sufficient evidence of *ownership* to entitle the petitioner to relief under this act. Therefore, where the petitioner is not occupying the land, or is not in possession of the same, as was said in *Basnight v. Meekins,* 121 N. C., 23, and the defendant denies the title of the petitioner, it becomes necessary for him to show title, not for the purpose of enabling him to recover the land, but to entitle him to have the dividing line between him and the defendant located and established.

Whether this title should be such as would entitle the petitioner to recover in an action of ejectment, or only such title as would entitle him to possession against defendant, need not be decided in this case, because, if the plaintiff had any title, it seems to have been derived from defendant.

Under the pleadings, the court submitted two issues:

1. "Is plaintiff the owner of the land described in section 1 of his complaint?"

2. "Are the true boundary lines between plaintiff and defendant those set out in section 3 of the complaint?" Both of these issues were answered in the affirmative.

It seems to us that it was not necessary to submit the first issue as a distinct proposition, as the title was only incidentally in question, but that it would have been sufficient if the court had charged the jury that, if they found from the evidence that the petitioner was the owner of the land mentioned in his petition or was in possession of the same, they would proceed to locate the boundary lines between the plaintiff and defendant. And for this purpose it seems to us that it would be better to broaden the second issue by allowing the jury to locate the boundary line, whether it was where the petitioner alleged it was or not. But this seems to have been sufficient in this case as it was not objected to, and as the jury found that the dividing line was where the petitioner alleged it to be.

( 6 ) Where we do not think it was necessary to submit the first issue, we do not say that it was erroneous in the court to have done so.

There are three exceptions taken by the defendant, neither one of which can be sustained:

The first is, "The defendant asked the court to charge the jury that, if they believed all of the evidence, the land described in the allotment of the homestead covers the land described in the petition of plaintiff, and they should answer the first issue, 'No.'" This prayer was refused and the defendant excepted. This prayer could not have been given as the evidence was conflicting as to whether it did or not.

The court, among other things, charged the jury, "That it was only necessary to show possession, and if they found that the plaintiff was in possession of the land described in the petition, they would answer the first issue, 'Yes.'" To this the defendant excepted. It seems to us that this was in effect telling the jury that if they found that the petitioner was in possession of the land described in the petition, that was sufficient evidence of ownership to entitle the plaintiff to have the dividing line located. This is within the express provisions of the statute.

The court also charged the jury that "upon all the evidence they could say where the line was." To this the defendant excepted. This exception cannot be sustained.

While we find no error for which a new trial should be granted, we are of the opinion that as title is not an *issue* in proceedings under this statute, the judgment should be so reformed as to leave out of it all reference to the title to the lands described in the petition, and should only provide for locating the dividing line between plaintiff and defendant, as provided for by the statute. The judgment thus reformed will be affirmed.

MODIFIED AND AFFIRMED.

*Cited: Wilson v. Alleghany Co., post,* 8; *Van Dyke v. Farris,* 126 N. C., 746; *Midgett v. Midgett,* 129 N. C., 21; *Parker v. Taylor,* 133 N. C., 105; *Smith v. Johnson,* 137 N. C., 45; *Highson v. Ins. Co.,* 152 N. C., 205; *Whitaker v. Garren,* 167 N. C., 660; *Hilliard v. Abernethy,* 171 N. C., 645.

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( 7 )

ELIZA T. WILSON v. ALLEGHANY COMPANY ET AL.

(Decided 21 February, 1899.)

*Injunction in Special Proceedings, When Authorized.*

1. The relief sought by the injunction must be subsidiary to the relief asked in the special proceeding.

2. In a special proceeding to establish lines, under act of 1893, ch. 22, no substantive relief can be given, and therefore, injunction, as an auxiliary remedy, is inapplicable.

APPLICATION FOR INJUNCTION, made in a special proceeding to establish boundary lines under Laws 1893, ch. 22, pending before the clerk of the Superior Court of HYDE.

A temporary order of restraint had been obtained from his Honor, *Judge Norwood,* restraining the defendants from commissions of trespasses, with order to show cause before his Honor, *Judge Brown,* why the injunction should not be permanent.

Upon the hearing, *Judge Brown* denied the injunction and dismissed the motion, on the ground that the remedy by injunction was inapplicable in a proceeding for establishing boundary lines under Laws 1893, ch. 22.

Plaintiff excepted and appealed.

*Charles F. Warren for plaintiff.*

*John H. Small and W. B. Rodman for defendants.*

( 8 ) FURCHES, J. In July, 1898, the plaintiff commenced a special proceeding against the defendant Alleghany Company and others, to have her lands processioned and lines established, under chapter 22, Laws 1893.

In August, 1898, and while the above mentioned proceeding was still pending, the plaintiff applied to *Brown, J.,* for an injunction, based upon affidavit made in said proceeding, in which she alleged that the defendant company was committing trespasses upon her lands by cutting and carrying timber therefrom. This prayer for injunction was denied and the plaintiff appealed.

We must sustain the action of the judge in refusing to grant the injunction prayed for, and for the reasons assigned by him. A judge in some cases of special proceedings, pending before the clerk, may grant injunctive relief, as is held in *Hunt v. Sneed,* 64 N. C., 176, cited and approved in *Sprinkle v. Hutchinson,* 66 N. C., 450. But to authorize the judge to issue injunctions in cases of special proceedings, the relief sought by the injunction must be subsidiary to the relief asked in the special proceedings. *Hunt v. Sneed, supra.* That could not be so in this proceeding, which gives no substantive relief—settles no rights, or titles to property—but only locates the dividing lines between the parties. *Williams v. Hughes,* at this term. So the injunction could not be in aid of any relief demanded or attainable in the special proceedings to locate the dividing line between the parties, under chapter 22, Laws 1893, and *Hunt v. Sneed* does not aid the plaintiff.

The judgment of the court refusing the injunction is

AFFIRMED.

*Cited: Van Dyke v. Farris,* 126 N. C., 746; *Midgett v. Midgett,* 129 N. C., 21; *Whitaker v. Garren,* 167 N. C., 660.

( 9 )

WALTER P. BURRUS AND WIFE, MAGGIE L. BURRUS, v. THE LIFE INSURANCE COMPANY OF VIRGINIA.

(Decided 21 February, 1899.)

*Policy—Premium Drafts—Cancellation—Damages.*

1. Where by arrangement between the insured and the company, the premiums, as they matured, were to be paid by sight drafts on the insured; and for the premium due on 25 November, 1894 ($16.90), a sight draft was drawn through a Richmond bank, as usual, and forwarded to New Bern for collection on 23 November, upon the back of which were written the words, "Accepted. Payable at the Farmers and Merchants Bank, New Bern, N. C.," presentation for acceptance was due before default in payment was incurred.
2. Sight drafts are entitled to grace—maturity occurring three days thereafter.
3. Where the bank collector failed to make due presentment, and the draft was returned, uncollected, the insurance company ought to have accepted payment tendered by the plaintiff on 1 December, and not to have canceled his policy.
4. Where a policy is wrongfully canceled, the insured may recover premiums paid with interest, as "money had and received to his use"; or upon the implied promise to save him harmless, the measure of damages being the amount necessary to enable him to obtain another policy.

ACTION for wrongfully canceling a policy on plaintiff's life, which he had taken out for the benefit of his wife, tried before *Brown, J.*, at May Term, 1898, of CRAVEN. The complaint claimed a return of all premiums paid, with interest.

The answer sets up as a defense the nonpayment of a bimonthly premium, due 25 November, 1894, for the sum of $16.90. The policy was a five-year policy, with privilege of renewal, at increased premium—premiums payable bimonthly. In settlement of these premiums, it was arranged that the company should draw sight drafts on the ( 10 ) plaintiff through a Richmond bank, which transmitted it to New Bern, where he resided, for collection. This course had been pursued for years, the collecting bank at New Bern being the National Bank of New Bern up to November, 1894. The draft for the premium then payable was transmitted to Farmers and Merchants Bank of New Bern. Upon it was written the words, "Accepted. Payable at the Farmers and Merchants Bank of New Bern, N. C."

The plaintiff testified that he received no notice of this draft until after it was returned uncollected, and that upon receiving information of it, he forwarded his check to the company, on 1 December, 1894; but they refused to receive it and sent it back.

The evidence was conflicting as to whether the bank collector made proper effort for presentment of the draft to the plaintiff. His Honor ruled that it was incumbent on the defendant to prove this, and that the presentment, under the circumstances, should have been, in the first instance, for acceptance. Defendant excepted.

His Honor instructed the jury that in event of recovery, the plaintiff would be entitled as compensation to a return of the premiums paid, with interest. The defendant excepted. Verdict for plaintiff; judgment accordingly. Defendant appealed.

*Simmons, Pou and Ward for plaintiff.*
*MacRae & Day, W. W. Clark and O. H. Guion for defendant.*

(11) MONTGOMERY, J. The plaintiff's (husband's) life was insured in the defendant company for the benefit of the *feme* plaintiff, and a premium became due on 25 November, 1894. The same was not paid at that day, and the defendant refused to reinstate the plaintiff's policy unless he would submit to a reëxamination and be found to be in good health, although he had sent the amount of the premium to the company on the first of December following. The plaintiff refused to be reëxamined and insisted that the company had unlawfully canceled the policy. The plaintiff alleged that the defendant, after the issuing of the policy, agreed with him that the company would draw on him sight drafts for the premiums necessary to keep the policy in force, and to have the drafts presented to him in New Bern, N. C., for payment, and that in pursuance of that agreement, the defendant, for years, prior to 25 November, 1894, did draw the drafts and they were paid. That agreement was admitted by the defendant, but with the statement that it was made entirely for the plaintiff's convenience and with a denial that the drafts were to be presented to the plaintiff in New Bern for payment; the defendant further said that the defendant was to draw through its bank in Richmond, Va., and that bank was to send the drafts to New Bern for collection. For the payment which was to fall due on 25 November, 1894, the defendant drew in Richmond, Va., a draft on the plaintiff, payable at sight to the order of the Merchants National Bank of Richmond, Va. The draft was sent by that bank to the Farmers and Merchants Bank, New Bern, N. C., for collection, and on the back of the draft there was written, "Accepted. Payable at the Farmers and Merchants Bank, New Bern, N. C." The collector of the last mentioned bank went where he thought the plaintiff could be found on 23 November, but did not see him nor any person authorized to act for him.

His Honor instructed the jury fully on the law upon the evi- ( 12 )
dence in respect to the agreement concerning the change of place of payment of premiums, the custom of the defendant in respect to the collections of premiums in New Bern through the bank there, and as to the effect in law of such collections. To these instructions there was no exception by the defendant. In reference to the right of the company to cancel the policy of the plaintiff, his Honor charged the jury that "If the Merchants and Farmers Bank used due diligence in presenting such draft and complied with the law in that respect, then the insurance company, when the draft was returned unpaid, had a right to cancel the policy of insurance and such cancellation would have been rightful and not wrongful, and, if you so find, you will answer the first issue, 'No.' If, on the contrary, you find that the Merchants and Farmers Bank was not diligent with the requirements of the law in presenting the premium draft, then the defendant had no right to cancel the policy and it was the duty of the company to accept the premium afterwards from Burrus." There was no exception to this instruction.

His Honor, on the question of the nature of the draft and the duty of the New Bern bank in reference to its presentation to the plaintiff, said to the jury: "The presentment of a bill of exchange or draft must be made to the drawee or acceptor, or to an authorized agent. A personal demand is not always necessary, and it is sufficient to make the demand at the residence or usual place of business of the drawee, where the presentment is for payment. This draft had not been accepted, and, therefore, the presentment first to be made by the bank was a presentment for acceptance. It was the duty of the bank collector to be careful, not only to present the draft at the usual place of business, but, if the plaintiff was not in, to assure himself that the person to whom he presented the draft for acceptance was the authorized agent of the plain- ( 13 )
tiff." The defendant excepted to this instruction. We find no error in it. By the terms of the policy of insurance, the premium was not due when the bank collector, with the draft, on the 23d, sought the plaintiff. It could not, therefore, have been a demand for payment which the collector intended to make on the plaintiff. If the collector had found the plaintiff on the 23d, he could not have made any legal demand for payment; he could only have requested that he sign the instrument, "Accepted. Payable at the Farmers and Merchants Bank, New Bern, N. C." The defendant, in carrying out the agreement to draw on the plaintiff at New Bern, through the Richmond bank, as the defendant contends, put the draft in the form of a sight draft. It was not due when the effort was made to present it to the plaintiff, and the paper was to every legal intent a draft for acceptance. The three days of grace were to be allowed after presentment and acceptance, and time of pay-

ment could not be known until acceptance. It is not only so in law, but on its back the intention of the drawer to make it a draft for acceptance was manifest. His Honor was right in his instruction that the draft had not been accepted and that the presentment first to be made was a presentment for acceptance. *Nimocks v. Woody,* 97 N. C., 1.

It was agreed that the court should answer the second issue, which was as to the damage the plaintiff had sustained by reason of the cancellation of his policy by the company. The court followed the rule laid down in *Braswell v. Ins. Co.,* 75 N. C., 8, and *Lovic v. Life Asso.,* 110 N. C., 93. In the first mentioned case the Court said: "If the defendant was in default by canceling the policy positively and peremptorily, the plaintiff has a right to recover back the amount paid as premium and interest thereon, as money had and received for his use, or upon
(14) a promise of the defendant to indemnify and save harmless, which the law implies from the wrongful act of the defendant in the cancellation of the policy, in which case the measure of damage would be the amount necessary to enable the plaintiff to obtain another policy, if so minded, which, of course, would be much higher in respect to the premium, inasmuch as he is several years older than he was when he first obtained the policy; but the case need not be complicated by this consideration, as the plaintiff is content to take back his money with interest, and he quits of all further connection with the defendant." In the present case, the plaintiff has adopted the same course, and we are not disposed to change the rule adopted in *Braswell's case.*

The defendant, however, contended that the policy in this case was different in kind from the policy in the other cases referred to, and that the same rule ought not to apply. The policy was of the following kind: "The policy of insurance is for a term of five years, the said term ending five years from the date of this policy, at noon, and all benefits arising under it to the insured or any other person, or persons, will then terminate; but the policy, with all its benefits, provisions and requirements named therein, will be renewed by the company for the term of five years at the completion of the period above named, upon the payment to it of the premium therefor on or before the date of termination; and of the bimonthly payment of the same sum every year for five years at the dates mentioned in this policy, which sum shall be at the present published rates of the company for the actual age, and all provisions, requirements, specifications and benefits, referred to in this policy, including the right of renewal for subsequent five-year periods, will be continued in force during the life of the insured as in the original contract, except that when the renewal is at age of sixty or over, the premium thereafter paid shall be at the uniform rate as at age of such
(15) renewal."

We are of the opinion that those features of the policy ought not to change the rule. To be sure, they provide that the benefits from the policy terminate at the end of periods of five years, but it permits continuous renewals for other periods of five years during the life of the insured, the only condition or limitation being the increased premiums at each successive period. No reëxamination of the insured is required and the defendant company has no option to cancel the policy, provided the insured shall pay the increased premiums at the beginning of each period of five years, as required under the terms of the policy. The only possible effect, as we see it, of the feature of the periods of five years, provided for in the policy, upon the meaning and intent of the policy, is to increase the premiums at the several stages of five years instead of having fixed them at a certain sum in the beginning, and, therefore, the measure of damages which the Court applied in *Braswell's case* is the proper rule.

No ERROR.

*Cited: Hollowell v. Ins. Co.,* 126 N. C., 404; *Strauss v. Life Assn., ib.,* 976; *Gwaltney v. Assurance Society,* 132 N. C., 930; *Scott v. Life Assn.,* 137 N. C., 521, 527; *Green v. Ins. Co.,* 139 N. C., 313; *Brockenbrough v. Ins. Co.,* 145 N. C., 355; *Garland v. Ins. Co.,* 179 N. C., 72.

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( 16 )

JOSEPH SWAIN v. WILLIAM J. BURDEN, SHERIFF.

(Decided 21 February, 1899.)

*Amendment—False Return—The Code, sec. 2079.*

The power of the judges to allow amendments in process, etc., is broad, both by statute and the inherent powers of the court, and is to be exercised, in meritorious cases, in the sound discretion of the presiding judge, for the public good and private interest of the people.

ACTION for the penalty of $500, under section 2079 of The Code, instituted against the defendant as sheriff of BERTIE for making a false return in the suit of Joseph Swain, plaintiff, v. F. A. Phelps, executrix of Asa Phelps, John Johnson and John Johnson, Jr., defendants, returnable to February Term, 1898. The original return upon the summons was as follows:

Received 13 November, 1897; served 10 February 1898, by reading to each defendant.

W. G. BURDEN,
*Sheriff of Bertie County,*
*By* W. J. BURDEN.

The defendants appeared at February Term, 1898, and obtained time to file pleadings.

At Spring Term, 1898, which commenced on 2 May, the sheriff, W. G. Burden, had entered a motion to amend the return upon the summons, and substitute therefor the following:

( 17 ) Served 4 December, 1897, on John Johnson, and served 13 December, 1897, on John Johnson, Jr., and on 11 February, 1898, the said summons was read to Mrs. Frusie A. Phelps, executrix of Asa Phelps, by Robert J. Shields, to whom my deputy, W. J. Burden, had sent the same.

W. G. BURDEN, *Sheriff.*
*By* W. J. BURDEN, *D. S.*

The motion to amend was supported by the affidavits of Sheriff Burden and his deputy, W. J. Burden, and was continued until November Term, 1898, when it was heard before *Norwood, J.*

On 3 May, 1898, the plaintiff, Joseph Swain, issued the summons against the sheriff, which was served 11 May, 1898, returnable to September Term following:

His Honor, *Judge Norwood,* upon consideration, allowed the motion. The plaintiff excepted and appealed.

*Martin & Peebles for plaintiff.*
*Francis D. Winston for defendant.*

FAIRCLOTH, C. J. This is an action againt the defendant as sheriff for the penalty of $500 for a false return, as provided in The Code, sec. 2079. After the action was begun, the defendant, on affidavits, moved the court to be allowed to amend his return so as to speak the truth. The motion was allowed and the plaintiff appealed.

The only matter for this Court is the power of the Superior Court judge to allow the amendment to be made. The power of the judges to allow amendments in process, etc., is broad, both by statute and the inherent power of the court. The experience of every lawyer demonstrates the propriety and policy of the exercise of such power in many cases.

Without it, justice would often suffer and the rights of litigants ( 18 ) would be sacrificed. The necessity of such power grows out of

business transactions of men and their liability to make mistakes and oversights. The public good and private interest of the people justify and require the lodgment of such power in the court, and experience has so demonstrated.

All will agree that in meritorious cases the power should be exercised. We must assume that the power will be used only in proper cases, and in all others it will be withheld. Who can better discriminate than the presiding judge? We think from the authorities and the reason of the matter, that the discretionary power must always be present with the presiding judge. Judges, like all other citizens, are amenable for any abuse of their powers or misconduct, and we like to assume that their duties will be performed faithfully and honestly.

This question has been so often under a review, as appears from the citations under section 2079 of The Code, that we find nothing new to add to what has been said. In the recent case of *Stealman v. Greenwood,* 113 N. C., 355, and the cases noted therein, the question is well considered and decided.

AFFIRMED.

*Cited: Swain v. Phelps,* 125 N. C., 44; *S. v. Lewis,* 177 N. C., 558.

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( 19 )

LIZZIE BROWN v. JESSE R. BROWN.

(Decided 21 February, 1899.)

*Husband and Wife—Parent and Child—Malice, in a Legal Sense—Judge's Charge.*

1. Whilst the law carefully guards the marriage relation and protects it from unwarranted outside interference, at the same time, the law cannot disregard the tender relation of parent and child, with its natural affection and duties, still remaining after the marriage of the child.

2. In the case of unhappy matrimonial disagreements, the child naturally turns to the parent for comfort and advice—and the law recognizes the right of the parent, in such cases, to advise the child. When such advice is given in good faith, which will be presumed until the contrary appears, and results in a separation of the married parties—such result of itself, gives no right of action to the injured party against the parent.

3. To sustain such action, the complaint must in substance aver that the separation was maliciously caused by the defendant, and the evidence must support the averment. The defendant, upon request, is entitled to

the charge, "If the jury find that the defendant caused the separation, yet you shall not render a verdict for the plaintiff unless you find the defendant maliciously caused the separation."

4. The malice, necessary to be alleged and proved, is not alone such malice as must proceed from a malignant and revengeful disposition, but that it would be sufficient to prove to the satisfaction of the jury that the parent's action was taken without proper investigation of the facts, or where the advice was given from recklessness or dishonesty of purpose—the law presuming malice from such conduct in actions of this nature.

ACTION for damages, tried before *Norwood, J.,* and a jury, at Spring Term, 1898, of PASQUOTANK. The plaintiff was the daughter-in-law of defendant. The complaint substantially charged that the defendant maliciously alienated the affections of her husband from her and
( 20 ) caused him to abandon her. The answer denied the charge. The evidence was voluminous and conflicting.

Among other things, his Honor instructed the jury that: "If the jury find that the defendant *wilfully* caused the plaintiff's husband to forsake and abandon her, the plaintiff is entitled to recover." And as to the measure of damages, that if they should find that the defendant caused the plaintiff's husband to wilfully forsake and abandon her, and that it was not done with malice, they should give only such actual damages as the plaintiff had sustained. Defendant excepted.

There was a verdict for plaintiff for $800. Judgment accordingly, and defendant appealed.

*E. F. Aydlett for plaintiff.*
*G. W. Ward and Pruden & Pruden for defendant.*

MONTGOMERY, J. The only question (raised by demurrer to the complaint) for decision when this case was here before (121 N. C., 8), was whether a married woman, abandoned by her husband, could maintain, without the joinder of her husband, an action in tort. The Court held that such an action could be maintained. The present appeal is before us on exceptions to the charge of his Honor.

The complaint contains three alleged causes of action; the first, that the defendant unlawfully, wrongfully and wickedly intended to injure the plaintiff and to deprive her of the society and aid of her husband, destroyed the affection of her husband toward her and caused him to leave and abandon her; second, that he commenced against her a false and malicious prosecution for an alleged assault and battery upon her husband; and third, for the false arrest and imprisonment of the
( 21 ) plaintiff, based upon such charge.

The defendant is the father of the plaintiff's husband, and in his answer there is a denial of the material allegations of the complaint.

The issues arising on the pleadings as to the last two causes of action were found in favor of the defendant, and, therefore, do not concern the appeal. The first issue was in these words: "Did defendant alienate the affection of the plaintiff's husband and cause him to abandon her, as alleged in the complaint?" The second issue was: "If so, what damage has plaintiff sustained?" His Honor, in substance, instructed the jury that if they should find that the defendant *wilfully* caused the defendant's husband to forsake and abandon her, the plaintiff would be entitled to recover, and the jury should answer the first issue, "Yes." And as to the measure of damages, the court charged the jury that if they should find that the defendant caused the plaintiff's husband to wilfully forsake and abandon her and that it was not done with malice, they should give only such actual damages as the plaintiff had sustained.

There was error in those instructions. The complaint in substance, alleged, that the conduct of the defendant was malicious. The charge of his Honor was that, "if the jury should find that the defendant *wilfully* caused the husband to abandon the wife, then the first issue (which raised the question of malice in the defendant) should be answered in the affirmative. The word 'wilfully' does not mean maliciously. 'Wilfully' implies that an act done in that spirit is done knowingly and obstinately and persistently but not necessarily maliciously." *S. v. Massey,* 97 N. C., 465.

It cannot be that the law disregards the tender relations of kinship and natural affection between parent and child and the duties which such relations impose, even though the child is married. In case of unhappiness and disagreements between the married couple, it ( 22 ) is almost impossible to conceive of the indifference on the part of the parent to such conditions, and certain it is that the child naturally turns to the parent for comfort and advice under such circumstances. There are laws of natural affection and of natural duty, and municipal law will not obstruct their free operation as long as they are not abused. The presumption in fact and in law in all such cases must be, and is, that the parent will act only for the best interest of the child and for the honor of the family. In *Reed v. Reed* (Appellate Court of Indiana), 33 N. E., 638, where the defendant was the father of the plaintiff's husband, and the cause of action the same as that in the case before this Court, it was said: "The law recognizes the right of the parent in such cases to advise the son or daughter; and when such advice is given in good faith and results in a separation, the act does not give the injured party a right of action. In such a case, the motives of the parent are presumed good until the contrary is made to appear." It was further

said in that case that, "These rules have been generally applied in cases where the suit was brought by the husband for the alienation of his wife, and we see no reason why they should not, with proper modifications, prevail when the wife is the plaintiff." In *Westlake v. Westlake,* 34 Ohio, 621, the plaintiff was, as is the case in this action, the wife of the defendant's son, and the cause of action like the one alleged in the present case. The defendant there requested the court to charge the jury that, "If you find that the defendant caused the separation, yet you shall not render a verdict for the plaintiff unless you find the defendant maliciously caused the separation." The court refused to give the instruction, and upon the appeal of the defendant the appellate
( 23 ) court said: "This charge ought to have been given." The term "malice," as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. 11 Serg. & R., 39, 40. If the conduct of the defendant was unjustifiable and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged."

We are of the opinion, after having given the matter the serious consideration which it deserves, that, before a parent can be held liable in damages for advising his married child to abandon his wife, or her husband, the conduct of the parent should be alleged and proved to be malicious; that the willful advice and action of the parent in such a case may not be necessarily malicious, for the parent may be determined and persistent and obstinate in his purpose to cause the separation, and yet be entirely free from malice—in fact, have in view the highest good of his child. Our opinion, however, is that the malice necessary to be alleged and proved is not alone such malice as must proceed from a malignant and revengeful disposition, but that it would be sufficient to prove to the satisfaction of the jury that the parent's action was taken without proper investigation of the facts, or where the advice was given from recklessness or dishonesty of purpose—the law presuming malice from such conduct in actions of this nature.

ERROR.

( 24 )

W. R. HOWELL AND WIFE, CARRIE D. HOWELL, v. THE NORFOLK AND CAROLINA RAILROAD COMPANY.

(Decided 21 February, 1899.)

*Nonsuit.*

In reviewing a judgment of nonsuit, the appellate court will consider every proposition as proved, which is necessary to be proved, when there is evidence tending to prove it.

ACTION for damages to plaintiffs' land by overflow and ponding water, caused by the alleged negligent and unskillful construction of defendant's road, tried before *Norwood, J.*, at Fall Term, 1898, of EDGECOMBE.

The complaint alleged the ownership in fee and possession by the plaintiffs of the land injuriously affected; the negligent and unskillful construction of the road by the defendant over said land, and the continuing damage to said land resulting therefrom.

The answer denied every allegation contained in the complaint, and set up the statute of limitations as a defense.

The plaintiffs introduced evidence tending to prove that prior to the building of defendant's road in 1889 the plaintiffs owned two-sixths interest in what was known as "the Knight land" in Edgecombe County, a tract of something over 400 acres—the *feme* plaintiff by inheritance and the male plaintiff by purchase—one-sixth each; that in 1890 there was an actual division among the tenants in common by a final decree of the court, and in 1891 the male plaintiff conveyed his portion to the female plaintiff, his wife—constituting her the owner of one-third of the Knight land, and that this is the land described in the complaint as injuriously affected by the wrongful conduct of the defendant. There was evidence tending to show that in constructing its road the defendant company, without cause or necessity, cut away for ( 25 ) the distance of 82½ yards an embankment four feet high, which had been thrown up and maintained for more than fifty years by the owners of said land as a protection against Mill Swamp, a natural water-course forming the eastern boundary of the property, and that at the same time the company had dug ditches along its right of way into the run of said swamp, and that, by reason of the removal of said embankment and the cutting of said ditches, a large part of the waters of said swamp was diverted from the natural run of same and turned upon the lands of plaintiff, thereby rendering valueless some ten or twelve acres, theretofore valuable for agricultural purposes, and had also dug a number of large pits, partly on and partly outside of the right of way, in close proximity to the dwelling of plaintiffs, which

were usually filled with water diverted from said swamp, and became stagnant and unhealthy, and during the summer months caused sickness in plaintiffs' family.

There was evidence tending to show the amount of damages which plaintiffs had sustained by reason of the wrongs complained of.

The defendants introduced no evidence.

The court intimated the opinion that the plaintiffs could not recover on the evidence offered, and thereupon they excepted to the ruling of the court, submitted to a judgment of nonsuit, and appealed to the Supreme Court.

*Gilliam & Gilliam for plaintiffs.*
*John L. Bridgers for defendant.*

FURCHES, J. This is an action for damages to plaintiffs' land by the overflow of water caused by the negligent and unskillful man-
( 26 ) ner in which the defendant constructed its road.

Upon the close of the plaintiffs' evidence, the court intimated the opinion that plaintiffs could not recover, and plaintiffs submitted to a judgment of nonsuit and appealed.

There are no grounds set out in the statement of the case why the court was of the opinion that plaintiffs could not recover. And we would have been at a loss to know upon what grounds the opinion of the court was founded if they had not been stated by defendant's counsel in his brief. We learn from this that there were two grounds that appeared to his Honor as defects, that influenced him to come to the judgment he did: First, that plaintiffs failed to allege and prove that they were the owners of the land alleged to be damaged, and secondly, that it appeared to his Honor that plaintiffs were tenants in common with other persons, and that this was alleged in the complaint.

It is not necessary that we should consider whether possession would not entitle the plaintiffs to at least nominal damages; nor is it necessary that we should consider whether one tenant in common could not maintain such an action, which is trespass or in the nature of trespass, as neither of these questions is presented by the record. Nor is it necessary that we should decide that any proposition, necessary to be proved by plaintiffs, was established. It is sufficient in such cases of nonsuit, where it is our duty, to take every proposition, when there is evidence tending to prove it, as proved.

The plaintiffs allege their ownership in fee simple. There was evidence tending to prove that one Knight owned the land before defendant constructed its road in 1889; that he died, and it descended to his heirs at law, six in number; that it had been divided between them

under proceedings in court; that embankment four feet high had ( 27 ) been made along the stream fifty years ago to prevent the overflow of water on plaintiffs' land, and that these embankments had been constantly kept up for fifty years; that the lands mentioned in the complaint were two of the shares of the Knight lands, one of them falling to the *feme* plaintiff in the division, and the other share she acquired by purchase from one of the other heirs of said Knight; that there was evidence tending to prove the negligent construction of the road by the defendant, the damage caused thereby, and the amount of said damage.

This being so, we can see no ground upon which the ruling of the court below can be sustained, and there must be a

NEW TRIAL.

*Cited: Printing Co. v. Raleigh,* 126 N. C., 521; *Coley v. R. R.,* 129 N. C., 413.

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JAMES W. MOORE AND WIFE, SARAH J. MOORE, v. STEPHEN F. HURTT.

(Decided 21 February, 1899.)

*Mortgage, Chattel—Demand.*

1. In the absence of an express stipulation to the contrary, demand by mortgagee before suit is not necessary.
2. Where it is obvious from the defense set up that a demand would have been futile, the courts do not hold that the omission to make demand is fatal.

CLAIM AND DELIVERY for personal property, tried before *Norwood, J.,* at Fall Term, 1898, of CRAVEN.

The plaintiffs claimed the possession of certain articles of personal property, under a chattel mortgage executed 30 November, 1896, by defendant to *feme* plaintiff, to secure a note executed by him to her for $300, due 30 November, 1897, with power of sale if debt not paid at maturity. There was no stipulation as to possession ( 28 ) in the meantime.

Suit for possession commenced 23 April, 1897. There was no demand before suit for possession.

The defendant demurred to plaintiffs' evidence and moved for nonsuit. His Honor, being of opinion that failure to prove demand was fatal, sustained the demurrer and dismissed the action.

Plaintiffs excepted and appealed.

*Simmons, Pou & Ward and J. L. Moore for plaintiffs.*
*No counsel contra.*

CLARK, J. This is an action to obtain possession of personal property embraced in a mortgage executed by the defendant to the plaintiffs. The action was begun before maturity of the debt secured by the mortgage. The answer denied the plaintiffs' right to have possession. The court below, being of opinion that failure to prove a demand before action brought was fatal, sustained a demurrer to the evidence and dismissed the action. In this there was error.

In the absence of an express stipulation to the contrary, the mortgagee is entitled to take possession of the mortgaged property at any time before or after maturity of the debt or breach of condition. *Hinson v. Smith,* 118 N. C., 503. Here there was no stipulation in the mortgage that the mortgagor should retain possession, and though a verbal agreement to that effect was set up in the answer, there was no evidence to sustain it. The sole purpose in requiring a demand before action is that the defendant shall not be taxed with costs when the plaintiff could have obtained the object of his action by simply making
( 29 ) demand. When, therefore, the defendant set up a defense to the action, it appearing that a demand would have been futile, the courts do not hold that the omission to make demand is fatal. In this case, the answer averred that the plaintiff was not entitled to the possession of the property by reason of an alleged verbal agreement to the contrary. The omission to make the demand (which when made and acceded to would avoid costs) was therefore immaterial. *Woolen Co. v. McKinnon,* 114 N. C., 661; *Buffkins v. Eason,* 112 N. C., 162; *Rich v. Hobson, ib.,* 79; *Heath v. Morgan,* 117 N. C., 504; *McQueen v. Smith,* 118 N. C., 450.

REVERSED.

*Cited: Satterthwaite v. Ellis,* 129 N. C., 71; *Smith v. French,* 141 N. C., 4; *Hamilton v. Hamilton,* 144 N. C., 287; *Modlin v. Ins. Co.,* 151 N. C., 41.

ROBERT B. AGENT v. JOHN B. WILLIS.

(Decided 21 February, 1899.)

*Marriage License—Register of Deeds—The Code, Sec. 1816.*

When application for marriage license is made to the register of deeds, he is to be cautious and to scrutinize the application, upon peril of incurring the penalty imposed by section 1816 of The Code, if improperly issued; and where he is without personal knowledge of the parties, it must appear probable to him, upon reasonable inquiry, that the license may and ought to issue.

ACTION for penalty of $200, under section 1816 of The Code, against the defendant, register of deeds of Craven County, for issuing without reasonable inquiry a marriage license for the marriage of Frank Parsons and Lizzie Agent, the said Lizzie Agent being under the age of eighteen years, without the written consent of her father, ( 30 ) the plaintiff, with whom she resided at the time, heard upon appeal from the justice's court before *Norwood, J.*, at Fall Term, 1898, of CRAVEN.

The case turned upon the issue whether the license had been issued without reasonable inquiry, and the issue was submitted to the decision of his Honor, upon the evidence of plaintiff, admitted to be true, and which is fully stated in the opinion. The defendant offered none.

His Honor, upon consideration, decided in favor of the defendant, and rendered judgment accordingly.

Plaintiff excepted and appealed.

*Simmons, Pou & Ward and L. J. Moore for plaintiff.*
*No counsel contra.*

MONTGOMERY, J. This action was commenced in the court of a justice of the peace for the recovery of the penalty imposed by section 1816 of The Code, for the issuing by defendant as register of deeds of Craven County, of a license for the marriage of the plaintiff's daughter, who was under eighteen years of age, the consent required by section 1814 of The Code not having been delivered to the defendant. On the trial in the Superior Court the defendant offered no evidence and admitted that that of the plaintiff was true. The substance of the evidence of the plaintiff was that he had lived in New Bern for nineteen years, and that he and the defendant knew each other; that the plaintiff's daughter was under eighteen years of age and that he had not given his consent to the issuing of the license, and was opposed to the

marriage; that the defendant knew nothing, of his own knowledge, of the age of the girl; that about 2 o'clock on the night of 5 Sep-
( 31 ) tember, 1898, one Prudie Harrison and one Parsons, who was probably the man afterwards married to the girl, went to the residence of the defendant for the license, and that he declined to issue it; that they returned two hours afterwards, and he still declined to issue the license and told them to come to his office later; that about two hours later he saw Harrison and Parsons and asked Harrison if he would swear to the girl's age, and that Harrison answered that he could not, but that the girl had told him three days before that she was eighteen years old, but that he did not know how old she was; that defendant told them that they would have to get some one to swear to her age, and it was then and there agreed that Parsons should go to the girl and find out what person to get to swear to her age; that the girl told him to get a man by name Tolar, and that Tolar came and swore that the girl had told him three days before that she was eighteen years old and that was all that he knew about it—the oath being made and accompanied by a statement as to his means of information. Prudie Harrison testified that he told the defendant that he thought the girl was about eighteen years old.

His Honor told the jury that upon the evidence the defendant had used reasonable diligence to ascertain the age of the plaintiff's daughter, and instructed them to answer the issue on that point in the affirmative.

The correctness of that instruction is the matter before us for decision. Did the defendant make reasonable inquiry about the age of the girl before he granted the license? To all persons who believe that the welfare of human society depends largely upon the family relation and that the contract of marriage should be defended by careful and just laws for the purpose of guarding against legal impediments and to prevent the marriage of those under a certain age when the
( 32 ) parties are presumed not to be able to contract, the duties of the register of deeds, the officer of our State charged with the duty of issuing marriage licenses, seem most important and most solemn. That officer must exercise his duties carefully and conscientiously and not as a mere matter of form. It was said by this Court in *Williams v. Hodges,* 101 N. C., p. 300, "The license shall not be issued, as of course, to any person who shall apply for it; the register is charged to be cautious and to scrutinize the application; it must appear probable to him upon reasonable inquiry, when he has not personal knowledge of the parties, that the license may and ought to be issued." There was no dispute about the evidence in this case, and applying what we have said above to the facts, were probable reasons given to the defend-

ant to authorize him to issue the license—to believe that the girl was eighteen years old? Did he make reasonable inquiry, according to the evidence, about that matter, before he acted? We are clearly of the opinion that he did not, and that the instruction of his Honor to that effect was erroneous. The contracting parties, the father, the register of deeds, the persons who made the application, were all residents of New Bern. At a dead hour of the night the persons who made the application go to the residence of the defendant for that purpose, and upon the application being refused they return at 4 o'clock in the night, and again they are put off to a later hour. The license was issued two hours later, or about three-quarters of an hour after sunrise. The father of the child is at home, ignorant of what is going on. Those were most suspicious circumstances and should have put the defendant on his guard, at every point, as to his duties. Instead of requiring information from friends or connections of the family, who might reasonably be supposed to know the age of the girl, he took her word as to her age, and that message brought through persons who were not shown to ( 33 ) be trustworthy. He knew nothing of her or of her age. Each person who was examined about the matter said that he got his information from the girl and from no one else. The defendant seemed to think that an oath on the part of anybody was all that was necessary to authorize him to issue the license. But the character of the witness and accuracy of information are the things that the register of deeds should look to when he issues a license for marriage, in cases where there is doubt about the age of the parties. The oath made by Tolar, at best, was only a statement of what the girl had told him as to her age, and he qualified his oath by stating the source of his information. We might say something on the moral aspect of this case, but we forbear. It is enough to say that there was error in the instruction of his Honor, for which there must be a

NEW TRIAL.

*Cited: Harcum v. Marsh,* 130 N. C., 159; *Trolinger v. Boroughs,* 133 N. C., 315; *Furr v. Johnston,* 140 N. C., 159; *Laney v. Mackey,* 144 N. C., 633; *Gray v. Lentz,* 173 N. C., 352; *Julian v. Daniels,* 175 N. C., 553; *Snipes v. Wood,* 179 N. C., 355.

( 34 )

N. T. RIDLEY v. SEABOARD AND ROANOKE RAILROAD COMPANY.

(Decided 21 February, 1899.)

DEFENDANT'S APPEAL.

*Damages—Act of 1895, Ch. 224—Statute of Limitations.*

1. Previous to the act of 1895, ch. 224, damages, both present and prospective, caused by the construction of a railroad, could be assessed on the demand of either party—and it might be done by a single issue covering both, or by two separate issues. *S. c.*, 118 N. C., 996.

2. Prior to that act, three years was the statutory limitation to such actions for recovery of damages to crops—but an action for permanent damages could only have been defeated by showing 20 years continuous occupation with acquiescence.

3. In actions brought in cases of this kind, since the passage of said act, only permanent damages, *i. e.*, damages once for all, can be recovered; and such actions are barred by the lapse of five years.

ACTION to recover damages for alleged injury to the lands and crops of plaintiff, caused by ponding of water by defendant's roadbed and bridge, tried before *Norwood, J.*, at Fall Term, 1898, of NORTHAMPTON. Defense: General denial and statute of limitations.

*Winborne & Lawrence and R. B. Peebles for plaintiff.*

( 36 ) *MacRae & Day for defendant.*

CLARK, J. The court submitted issues both as to the damages to the crops for three years preceding the beginning of the action, and as to permanent damages, *i. e.*, damages to the *corpus*. The recovery of these last will, of course, be a bar to future action for injury to the crops. The defendant excepted to the submission of an issue as to the past damages. The identical point was presented and decided in this same case on a former appeal (118 N. C., 996), where it is said (p. 1009), "And either party . . . may demand that both present and prospective damage may be assessed." This might be done by a single issue covering both, or by two separate issues, as in this case.

The defendant further excepted that the court did not sustain the plea of the statute of limitations. The court below properly admitted proof of damages to crops for three years prior to action brought, and the action as to permanent damages could only have been defeated by showing twenty years continuous occupation, with acquiescence. *Parker v. R. R.*, 119 N. C., 677.

Since Laws 1895, ch. 224, in all actions brought in cases of this kind, only permanent damages, *i. e.*, damages once for all, can be recovered, and such actions are barred by the lapse of five years; but that statute cannot apply to an action like the present, which was brought before the ratification of the statute (*Nichols v. R. R.*, 120 N. C., 495; *Harrell v. R. R.*, 122 N. C., 822), or in a reasonable time there- ( 37 ) after. *Culbreth v. Downing*, 121 N. C., 205.

NO ERROR.

*Cited: Campbell v. R. R.*, 159 N. C., 587.

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RIDLEY v. RAILROAD.

(Decided 28 February, 1899.)

PLAINTIFF'S APPEAL.

*Damages—Act of 1895, Ch. 224—Evidence—Tax Valuation.*

1. Previous to Laws 1885, ch. 224, in cases of this kind instituted against a railroad, permanent damages, if demanded in either the complaint or answer, might be assessed along with damages to the crops in the past three years, and ascertained in separate issues, and the judgment should embrace both, if that course was adopted.

2. Tax valuation of land placed without the intervention of the owner, is *res inter alios acta*, and upon objection, is incompetent evidence.

APPEAL from *Norwood, J.*, at Fall Term, 1898, of NORTHAMPTON.

The answer contained the allegation, "For further answer these defendants say that the bridge, embankments and abutments mentioned in the complaint are permanent in their character; that whatever damage (if any) said bridge, embankments and abutments caused to the lands of the plaintiff was permanent in its character"; and the jury so found.

*Winborne & Lawrence and R. B. Peebles for plaintiff.* ( 38 )
*MacRae & Day for defendant.*

CLARK, J. The plaintiff excepted to the submission of an issue as to the permanent damages, they not having been claimed by the complaint. But it was held in the same case when here on a former appeal

(118 N. C., 996, at p. 1008) that either the plaintiff or defendant could have the permanent damages assessed, if demanded, in either the complaint or answer. To same purpose is *Parker v. R. R.,* 119 N. C., 677.

The jury found the permanent damages to be $500 and the damages to the crops in the past three years to have been $300. The court rendered judgment for only $500. In this there was error. (See defendant's appeal in this case.) The finding of permanent damages bars all actions for damages to future crops, but not the simultaneous recovery of past damages to the crops (except in actions brought since chapter 224, Laws 1895), unless by the frame of the issue or the charge it is clear the past damages were considered in the ascertainment of permanent damages. Here the submission of separate issues shows
( 39 ) that they were not.

The plaintiff objected to evidence as to the valuation of the land upon the tax list. There have been several decisions that the listing of land was some, though slight, evidence of claim of title and of the character of possession by the party listing the same. *Austin v. King,* 97 N. C., 339; *Pasley v. Richardson,* 119 N. C., 449; *Barnhardt v. Brown,* 122 N. C., 587; 1 Greenleaf Ev., sec. 493.

Acquiescence in listing and payment of taxes by another is evidence against the party out of possession. But the tax valuation, being placed on the land by the tax assessors, without the intervention of the landowner, no inference that it is a correct valuation can be drawn from his failure to except that the valuation is too low. Such valuation was *res inter alios acta,* and is not competent against the plaintiff in this action. *Daniels v. Fowler,* 123 N. C., 35; *Flint v. Flint,* 6 Allen (Mass.), 34; *Kanarson v. Henry,* 101 Mass., 152.

On the issue as to permanent damages let there be a

NEW TRIAL.

*Cited: Gates v. Max,* 125 N. C., 144; *R. R. v. Land Co.,* 137 N. C., 333; *Beasley v. R. R.,* 147 N. C., 365; *Hamilton v. R. R.,* 150 N. C., 194; *Roberts v. Baldwin,* 155 N. C., 281; *Wyatt v. R. R.,* 156 N. C., 315; *Perry v. R. R.,* 181 N. C., 39.

( 40 )

FRANK POWELL AND WIFE, JOHN DUNN AND WIFE, SHADE EVANS AND WIFE, W. H. EVANS, SIDNEY EVANS, AND ELIZABETH PORTER BY HER NEXT FRIEND, W. H. EVANS, v. L. H. WEATHERINGTON AND WIFE.

(Decided 28 February, 1899.)

*Partition of Land—Owelty—The Code, Sec. 1900.*

1. In a proceeding for partition of land, the sum charged upon one share in favor of another share of less value, for equality in the division, is a charge *in rem*, and if not paid subjects the land charged to sale, whether in the hands of the owner or of his heirs, to whom it descends *cum onere*.

2. Section 1900 of The Code postpones the sale only in case where the parties to the proceeding are infants; it does not apply where the share, after division, descends to infant heirs of the owner.

ACTION for recovery of land, tried before *Brown, J.*, at December Term, 1898, of PITT.

Both sides claimed under Edmund Evans, deceased. Upon the evidence adduced his Honor intimated that the plaintiffs were not entitled to recover. In deference to the opinion of his Honor, the plaintiffs submitted to judgment of nonsuit and appealed.

The evidence fully appears in the opinion filed.

*L. J. Moore for plaintiffs.*
*Jarvis & Blow for defendants.*

FAIRCLOTH, C. J. Action for possession of land, both parties claiming under Edmund Evans, who died, and his lands were partitioned among his children in 1863. Lot No. 1 was assigned to Holland J. Evans and was charged with $75 in favor of Lot No. 2 for equality. Holland J. Evans died in September, 1878, leaving ( 41 ) minor children, and they are plaintiffs in this action, suing to recover Lot No. 1. Lot No. 2 was assigned to A. F. Porter and wife, in whose favor was the charge on Lot No. 1. On notice to the children, some being of age, and others minors and *femes covert*, a judgment was rendered and execution issued 11 November, 1878, against Lot No. 1 for the amount charged on it for owelty, in the partition proceedings. This lot, now the subject of controversy, was sold and the defendants claim by mesne conveyances from the purchasers at the sale. During the trial below these various records and proofs were put in evidence, and his Honor held that the plaintiffs could not recover, and they appealed.

The plaintiffs contend that the lot could not be sold to pay the charge on it, as they or some of them were still infants, according to The Code, sec. 1900, until they arrive at twenty-one years of age, and therefore the purchasers acquired no title.

This position is a misapplication of section 1900 of The Code. That section operates when the parties to the partition proceeding, or some of them, are infants; it does not apply to the facts in this case. The plaintiffs acquired no title by the decree for partition; they were not parties. Their father, Holland J. Evans, had the title, and plaintiffs acquired it by descent from him. *Jones v. Cameron,* 81 N. C., 154. When the plaintiffs inherited the lot, charged as above, they took it *cum onere. Dobbin v. Rex,* 106 N. C., 444.

This conclusion renders it unnecessary to consider some interesting questions presented in the argument.

AFFIRMED.

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( 42 )

JANE E. ROSCOE v. JOHN L. ROPER LUMBER COMPANY.

(Decided 28 February, 1899.)

*Demurrer, Under Laws 1897, Ch. 109—Probate of Will of Nonresident Devising Land Here—Tenancy in Common—Conveyance by One Tenant in Common of Entire Interest—Adverse Possession and Ouster.*

1. A motion to dismiss under Laws 1897, ch. 109, is substantially a demurrer to the evidence, which waives all objection to its competency, and admits as true all that the evidence tends to prove.

2. Where a nonresident testator devises land in this State, and the record of the foreign court of probate, duly certified, contains the certificate of probate, which refers to the certified examinations of the witnesses, in accordance with the requirements of The Code, sec. 2149, the whole forming one transaction, the exemplification of which and of the will being duly recorded in the county where the land lies, the will is sufficiently proved and passes the property.

3. Where a tenancy in common is shown, the possession of one is the possession of all—and the rule is the same, when one enters to whom a tenant in common has by deed attempted to convey the whole land.

4. The ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and appropriation of the profits, for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract.

ROSCOE *v.* LUMBER CO.

ACTION for recovery of an undivided half-interest in land, and for partition by sale, tried before *Norwood, J.*, at GATES, Spring Term, 1898.

The plaintiff claimed a half-interest in the land under the will of her husband, H. E. Roscoe, executed 13 January, 1882, at his home in Mississippi, which devised to her all his property. In 1853, J. R. Riddick conveyed the land to said H. E. Roscoe and S. W. Wor- ( 43 ) rell. In 1865, Worrell alone conveyed said land by deed, purporting to pass the entire interest to other parties, under whom, through mesne conveyances, in 1891, 1893 and 1896, the defendant derived title and was in adverse possession at the commencement of this suit, 16 March, 1897.

The defendant took a number of exceptions to the competency of plaintiff's evidence, which were overruled by his Honor. At the close of plaintiff's evidence, the defendant moved to dismiss under act of 1897. Motion allowed, and judgment in favor of defendant dismissing the action. Plaintiff excepted and appealed.

The evidence and points of contention are stated in the opinion.

*W. M. Bond and S. G. Ryan for plaintiff.*
*Pruden & Pruden, E. F. Aydlett and L. L. Smith for defendant.*

MONTGOMERY, J. In her complaint, the plaintiff alleges that she is the owner in common with the defendant in the lands described in the complaint, her alleged interest being one-half of the whole, and this action was commenced to have herself adjudged the owner of her one-half interest in common, and that the lands may be sold for a division by a commissioner appointed by the court.

In its answer the defendant denied the claim of the plaintiff and also pleaded the statute of limitations of twenty years adverse possession under known and visible lines and boundaries, and the seven years statute under color and adverse possession. In the trial in the Superior Court, upon the conclusion of the plaintiff's evidence, ( 44 ) the defendant moved to dismiss the action under chapter 109, Laws 1897. The motion was allowed, and from the order the plaintiff appealed to this Court. In support of her title, the plaintiff introduced a duly certified copy of a record from the Book of Wills in the office of the clerk of the Superior Court of Gates County, containing the will of H. E. Roscoe, who died in LaFayette County, Mississippi, and its probate, which will had been filed and recorded in the clerk's office of Gates County under section 2156 of The Code, as amended by chapter 393, Laws 1885. She also introduced a copy of the will and probate thereof, certified from the Chancery Court of LaFayette County, Mis-

sissippi. The plaintiff then introduced a deed from J. R. Riddick to H. E. Roscoe, her deceased husband, and S. W. Worrell, in fee simple, dated 1 January, 1853, to the land described in allegation III of the complaint; then a deed dated 7 October, 1865, from S. W. Worrell to Bond, Brady, Roberts and Wiley, purporting to convey the whole of the land in fee; and then successive deeds from these last grantees and their grantees to the defendant. The plaintiff further introduced in evidence sections 3, 4 and 5 of the complaint, which set out the ownership in common of the lands described therein between the plaintiff and defendant, in the proportion of one-half to the plaintiff and the other half to the defendant, and then the deeds under which the defendant claims the entire interest in the lands and the entry of the defendant thereon; and also section 8 of the answer is introduced, in which it is admitted that the defendant has entered upon the lands conveyed to it under the deeds set out in section 5 of the complaint.

Upon the argument here, the counsel of defendants insisted that the question of competency of a part of the evidence which his
( 45 ) Honor received was a matter for the consideration of this Court, objection having been made to its admission in the court below; but we think that the motion made by the defendant was, so far as the competency of the evidence is concerned, substantially a demurrer to the evidence, and that all objection to its competency was waived by the motion. A demurrer to the evidence admits as true all that the evidence tends to prove. *Mining Co. v. R. R.,* 122 N. C., 881; *Bazemore v. Mountain,* 121 N. C., 59; *Whitley v. R. R.,* 122 N. C., 987. But the defendant's counsel insisted that if they were in error as to that position, and that their motion to dismiss was a waiver of all objection to the evidence received by the court below, yet the certificate of probate of the will by the clerk of the Court of Chancery of LaFayette County, Mississippi, did not show affirmatively that the will was executed according to the laws of North Carolina, and therefore that the lands situated in North Carolina did not pass to the plaintiff under the will. To an understanding of this contention it becomes necessary to examine the proceedings of the Mississippi court in reference to the probate of the will. The record of that court was properly certified, and from it it appears that the will was subscribed by two witnesses; that the witnesses subscribed in the presence of the testator and at his request; that the testator, at the time of his signing the will, was of sound and disposing memory, and that he was over twenty-one years of age. The examination of the witnesses to the will, however, was signed and certified by the clerk separately from the certificate of probate made by the clerk, and on that account the defendants contend that our statute, 2149 of The Code, which provides that the certificate of

probate shall embody the substance of the proofs and examina- ( 46 ) tion, was not complied with. The examination of the witnesses containing the essentials, according to the laws of North Carolina, for the order of probate of the will, was of the same date and in the same proceeding as the certificate of probate, and the certificate of probate set forth that the will had been duly proved as required by law. We think that the certificate of the clerk was sufficient, for it referred to the proof of the will already made in the proceedings of the probate. But the defendants further insist that the certificate of the officer to the record of the proceedings did not refer to anything but the will and the certificate of probate; that it did not embrace the examination of the witnesses. That point is not directly presented by the appeal, for the record—the whole record—is in evidence, and without objection, so far as the appeal is concerned, and it embraces the examination of the witnesses to the will. However, we might as well say that we think the certificate of probate refers to the certified examinations of the witnesses, and that the whole forms one transaction. The exceptions were not by any means frivolous; they were urged by counsel learned in the law, with zeal, but we cannot concur in their view of the matter.

The probate of the will then being sufficient to pass the property, that part of the case being treated as upon demurrer to the evidence, we are brought to the consideration of the other branch of the case. The plaintiff's evidence showed that her devisor and S. W. Worrell had been tenants in common of the lands, and that the defendant, at the time of the trial, and before, were in possession of the same, claiming by deeds purporting to convey the whole from successive grantees of Worrell. Now the contention of the defendant is that, as the plaintiff proved on the trial that the defendant went into possession of the lands under deeds purporting to convey the whole interest, the presumption (section 146 of The Code) that she had been in possession within ( 47 ) twenty years before the bringing of this action, she having shown the legal title in her to her interest, had been rebutted; and further, that from the plaintiff's evidence the presumption arose that the defendant's possession became adverse and began from 1866, the date of the execution of the first deed, conveying the entire estate, and that it was incumbent on the plaintiff to show possession in herself or some one from whom she claimed, within twenty years before the commencement of the action. However plausible this contention may appear, it cannot be sustained upon reason or under the decisions of this Court. There had been a tenancy in common at one time between the plaintiff's devisor and Worrell, from whom, through successive conveyances, the defendant claims, and the plaintiff's evidence did not show any adverse possession on the part of the defendant. It only went to prove entry by the

defendant on the land (section 5 of the complaint, section 8 of the answer, put in evidence by the plaintiff). The possession of one tenant in common is in law the possession of all. *Covington v. Stuart,* 77 N. C., 150; *Neely v. Neely,* 79 N. C., 478. And the rule is the same when one enters to whom a tenant in common has by deed attempted to convey the whole land. In the case of *Ward v. Farmer,* 92 N. C., 93, the Court said: "In the more recent case of *Caldwell v. Neely,* 81 N. C., 114, where there were two tenants in common and one of them undertook to convey the whole tract and a full estate therein to the defendant, and he took possession immediately and claimed to be absolute owner, it was held that the ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and the appropriation of its profits to himself for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract." To
( 48 ) the same effect are the cases of *Page v. Branch,* 97 N. C., 97; *Ferguson v. Wright,* 113 N. C., 537.

There was error in the order dismissing the action.

REVERSED.

*Cited: Shannon v. Lamb,* 126 N. C., 47; *Hardee v. Weathington,* 130 N. C., 92; *Bullin v. Hancock,* 138 N. C., 202; *Lumber Co. v. Hudson,* 153 N. C., 99; *Lumber Co. v. Cedar Works,* 168 N. C., 350; *Roberts v. Dale,* 171 N. C., 467.

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

(Decided 28 February, 1899.)

*Rehearing—Stare Decisis, Interest Reipublicæ ut finis litium.*

No case ought to be reversed upon petition to rehear, unless it is clearly shown to have been incorrectly decided.

PETITION to rehear this cause, relating to the construction of the will of W. J. Capehart, decided at February Term, 1898 (122 N. C., 119).

*Simmons, Pou & Ward for petitioners.*

*F. D. Winston, contra.*

FURCHES, J. The purpose of this action was to obtain a judicial construction of the will of W. J. Capehart, and was decided by this Court at February Term, 1898 (122 N. C., 119).

This is a petition to rehear the cause for alleged errors in the decision then made.

This Court does not claim that it does not sometimes commit errors in its decisions. This is in fact admitted by its providing, by its own rules, how a hearing may be had. ( 49 )

But to entitle a party to a rehearing the error should be manifest. It is not sufficient that respectable authority may be found, from which a reasonable argument may be made, to prove that the decision was erroneous. Such authorities may be found, and such argument may be made in almost every case of importance, while the authorities and arguments sustaining the decision are as strong, or stronger, than those against it. This is manifested by every case that comes to this Court upon appeal. They have all been decided by the court below; they can only come to this Court upon questions of law; each side is represented by learned attorneys; they have different opinions as to the law involved in the case, and it comes here by appeal that this difference of opinion may be settled. Both sides sustain their contentions by authority and by argument. But they cannot both be right; they cannot both win; and one or the other must lose.

It is important to litigants that their cases should be properly decided, and this is not the only importance attaching to an opinion of this Court. If it is erroneous, it may be used as a precedent and lead to other erroneous decisions. But it is less likely to have this effect in cases construing wills than in almost any other case.

It is said by this Court in *Brawley v. Collins,* 88 N. C., 608: "It is seldom that we can derive any aid from an examination of adjudged cases, as we have had occasion before to remark, in consequence of the great diversity of terms in which a testator expresses himself, and hence each case must be determined by itself." Thus showing that such decisions are not considered of the same importance, as precedents, as are decisions upon other matters.

But while it is important that a case should be decided right, it is important that it should be decided, and that there should be an end to the litigation. ( 50 )

It was said in *Weisel v. Cobb,* 122 N. C., 67, which was a petition to rehear (decided at the same term that the decision in this case was rendered), that "every case coming before this Court is thoroughly investigated and carefully considered, and while we are liable to error—which we are always ready to correct—that error must be clearly pointed out to us before we can undertake to set aside a solemn adjudication

involving the rights of others. This is the clearly defined policy of this Court, and has been frequently enunciated in unmistakable terms. In *Watson v. Dodd,* 72 N. C., 240, *Chief Justice Pearson,* speaking for the Court, says: "The weightiest considerations make it the duty of the Court to adhere to their decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily, or some material point was overlooked, or some direct authority was not called to the attention of the Court." To support this position, the learned *Justice* who wrote the opinion of the Court cited more than a dozen cases.

This case was fully and carefully considered when the decision was made, and upon a careful reconsideration we see no satisfactory reason for reversing the decision heretofore made.

PETITION DISMISSED.

*Cited: Peebles v. Graham,* 130 N. C., 263; *Elmore v. R. R.,* 131 N. C., 576; *Junge v. MacKnight,* 137 N. C., 293.

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( 51 )

N. C. BEDDARD AND WIFE, FRANCES, v. W. HARRINGTON AND WIFE, PEARCY.

(Decided 28 February, 1899.)

*Wills—Devise.*

A devise to a wife during her life or widowhood, and after her death, remainder to a granddaughter in fee, terminates, so far as the widow is concerned, upon her remarriage; but the estate of the granddaughter does not commence until the death of the first taker—the intermediate interest vests in the heir of the testator.

CASE AGREED, submitted, under section 567 of The Code, to the decision of *Bryan, J.,* at March Term, 1898, of PITT, for construction of Frederick White's will.

The facts are as follows:

1. Frederick White died in Pitt County in 1892, leaving a last will and testament, duly probated in Pitt County Superior Court, the item of which, material to this case, is as follows:

"Item 2. I lend unto Frances White, my wife, twenty-five acres of land, including all my buildings, and the land to be laid off around the buildings, for and during her natural life or widowhood. And the twenty-five acres I have loaned my wife I give and bequeath unto my

granddaughter, Pearcy Jones, daughter of Joseph Jones, to her and her heirs in fee simple, after the death of my said wife."

2. That Pearcy Beddard, defendant, is the Pearcy Jones spoken of in said will.

3. That Frances Beddard is the Frances White, widow of Frederick White, spoken of in said will.

4. That after the death of Frederick White, his widow, Frances, married one Moye, who died, and she afterwards married H. C. Beddard, plaintiff, and she is still living.

5. That said Joseph Jones is guardian of said Pearcy Beddard ( 52 ) and claims that as soon as Frances Beddard married, after the death of Frederick White, said Pearcy Beddard became owner of said land in which she is given an interest by said will.

It is agreed, if the Court shall be of opinion that said Pearcy became entitled to possession of said land when said Frances Beddard married, after the death of Frederick White, then judgment shall be rendered so declaring; but if the court shall be of opinion that said Pearcy did not become entitled to possession of said land when Frances Beddard married, after the death of Frederick White, then the court shall adjudge that Frances Beddard is entitled to possession of said land for her natural life, and execution shall issue to carry into effect said judgment.

The party against whom judgment is rendered shall pay the cost of this proceeding. This 7 March, 1898.

*J. L. Fleming for plaintiffs.*
*Harding & Harding for defendants.* ( 54 )

CLARK, J. The devise to the wife "during her natural life or widowhood," by the settled rules of construction, was determinable either upon her death or remarriage, otherwise the words "or widowhood" would be meaningless. 2 Redf. Wills, 219. The widow, having remarried, cannot maintain the action to recover possession. The devise to the granddaughter, the defendant, "after the death of my said wife" cannot take effect till that event, but that cannot avail the plaintiff, who must recover on the strength of her own title, not upon defects in that of the defendant. If there is no provision in the will (the whole of which is not before us) devising the realty, after the remarriage of the widow, until the devise to the granddaughter is to take effect, *i. e.*, at the death of the widow, the realty would go to the heirs at law of the devisor for such interval, and the granddaughter would be entitled in that capacity as sole heir, unless there were others, in which event she would be tenant in common till the death of the widow, when she would become sole owner under the terms of the devise.

In any aspect, the plaintiff is not entitled to recover, and upon the case agreed, judgment should be entered in favor of the defendant.

REVERSED.

*Cited: Baptist University v. Borden,* 132 N. C., 485, 507.

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( 55 )

F. S. ROYSTER, TRUSTEE OF J. R. PENDER, v. W. L. STALLINGS, SHERIFF OF EDGECOMBE COUNTY.

(Decided 28 February, 1899.)

*Assignment, Deed of—Preferred Creditors—Badges of Fraud—False Promises.*

1. The debtor had the right (prior to the enactment of the Bankrupt Act, approved 1 July, 1898), by a voluntary assignment to prefer one creditor over another, provided it was done merely for the purpose of giving the preference, and not for the purpose of hindering, delaying or defeating other creditors.

2. It is not the effect of the preference, but the *intent* with which it is made, that renders it fraudulent and void.

3. False promises to pay are evidence of bad faith, but are not to be classed among the usual badges of fraud, such as continuation of possession, or a secret trust, or some provision for the ease and comfort or benefit of the assignor, or the insertion of a feigned debt.

4. Where there is no evidence upon an issue, it ought not to go to the jury.

ACTION by the plaintiff, trustee, against the defendant, sheriff, to recover possession of personal property described in the complaint and detained by the defendant by virtue of sundry executions in his hands upon judgments against John R. Pender, tried before *Norwood, J.,* at October Term, 1898, of EDGECOMBE.

The plaintiff offered in evidence a deed of trust from John R. Pender to F. S. Royster, trustee, dated 23 April, 1897, registered the same day at 4:15 p. m.

The answer specifies the executions in the defendant's hands against said Pender, levied the afternoon of the same day, but at a later hour than 4:15 p. m., on the property claimed by plaintiff under the assignment, and the answer alleges that the deed of assignment was

( 56 ) fraudulent and void as to creditors.

His Honor allowed the case to go to the jury upon the issue of fraud, over the objection of plaintiff; and the verdict being in favor of the defendant, judgment was rendered against the plaintiff, who excepted and appealed.

The issues, findings and evidence offered by defendant to invalidate the deed are stated in the opinion.

*John L. Bridgers and Staton & Johnson for plaintiff.*
*G. M. T. Fountain and Gilliam & Gilliam for defendant.*

FURCHES, J. Pender, an insolvent debtor, made an assignment of the property in controversy to the plaintiff, Royster, as trustee, for the benefit of creditors, in which he preferred a part of his creditors over others. The defendant is the sheriff of Edgecombe, who levied upon and took said property into his possession by virtue of executions in his hands against said Pender. And this action is brought by the assignee, Royster, to recover possession of this property.

There had been attempt to assign this property by Pender to the plaintiff a few days before the assignment, now under consideration, was made, which failed for the reason that the assignor did not file the schedule of debts within five days from the date of its execution, as required by law; and this assignment was then executed, being an exact copy of the first assignment, except as to date.

The plaintiff offered in evidence the deed of assignment from ( 57 ) Pender to him conveying the property in controversy, and the schedule of debts, and the defendant, having admitted the possession of the property, the plaintiff rested his case.

The defendant admitted that the execution and registration of the deed of assignment to the plaintiff antedated his levies on the property, but contended that the deed of assignment was fraudulent and void as to creditors. He contended, first, that it was fraudulent on its face and should be so declared as a matter of law, for the reason that plaintiff did not put in evidence the schedule of debts. But this exception seems not to be true in fact, as it appears from the record that the schedule was offered in evidence. But if it should be held that the assignment is not fraudulent in law, he alleges that it is fraudulent in fact, and offered the following evidence to show that it is:

C. B. Mehegan, witness for defendant, testified as follows: "I remember when I heard deed of assignment was executed by Pender. I know that before he returned from a trip that he took after executing the first deed, there were summonses issued against Pender. I searched for an officer to serve summonses. I found the township constable and took him to the depot. The train had not come. I saw Mr. Clarence John-

son, clerk of plaintiff, get on the train and go in the direction of Norfolk. Afterwards I saw Royster and Pender get off the train together; they came on the Norfolk and Carolina train. Johnson and Mr. Bridgers met Pender at the depot. They had a paper which Pender signed as soon as he got off the train. Hilliard Matthewson, constable, was there and had summonses. He was behind Johnson and Pender and I did not see what he did. Johnson was on a bicycle and passed me going down town rapidly. I carried the constable down to the courthouse. Just after this I went to carry my horse to the stable, and when I came back I saw Johnson coming from the direction of the register's
( 58 ) office. After this I asked Pender what he had gone off for. He said he had gone to wait until things had settled down and to avoid the annoyance of these summonses. I told him I had only inquired in reference to his not having filed his inventory. Hilliard Matthewson told me they had made him read all the summonses and in this way got ahead of him."

The following evidence was offered:

Record of a judgment, Bank of Tarboro v. Jno. R. Pender, docketed 23 April, 1897, for $2,000. Record of judgment, John F. Shackleford v. John R. Pender, for $165, docketed 23 April, 1897. Record of two judgments, Watkins, Cottrell & Co. v. John R. Pender, for $200 each, docketed 23 April, 1897. Record of judgment, C. Billups & Co. v. John R. Pender, for $56.86, docketed 23 April, 1897. Record of judgment of Kellogg Paint Co. v. John R. Pender, for $28, docketed 23 April, 1897. Record of five judgments, Bank of Tarboro v. John R. Pender, for $200 each, docketed 23 April, 1897. Record of judgment, C. B. Mehegan v. John R. Pender, for $84, docketed 23 April, 1897. Judgment Mitchell Mfg. Co. v. John R. Pender, for $8, docketed 23 April, 1897. Judgment of Shourting, Daily & Gates, for $38.75, docketed same date. Judgment Henry Walk v. John R. Pender, for $71.59, docketed same date. Judgment J. C. Mehegan, for $28.90, docketed same date. Judgment Duval & Reynolds, for $45.37, docketed same date. Two judgments Buck Stove and Range Co. v. John R. Pender, one for $197.22 and another for $190, docketed 3 May, 1887. Judgment John T. Lewis & Bro. Co. v. John R. Pender, for $110.59, docketed 9 June, 1897. Keen & Hagerty, judgment for $60.36, docketed 9 June, 1897.

It is admitted by the defendants that these judgments were docketed subsequently, but immediately after the deed was filed for registration.

Hilliard Matthewson testified for the defendant: "I am con-
( 59 ) stable. I remember the time of the execution of the deed, but cannot give the date. I had summonses against Pender in my hands. Mr. Mehegan put most of them in my hands. Most of them were in favor of the Bank of Tarboro. I went to the train that morning.

I saw Clarence Johnson there. I went again about 12 o'clock. I went back to meet the afternoon train—N. & C. train. I saw Pender; he came from Rocky Mount. I saw Mr. Bridgers and Johnson there also. Mr. Bridgers called Pender, and they went into the operator's office together; I followed them; they had a paper. I read my summonses to Pender. I don't know whether Pender signed any paper there. After I got back to town I saw Johnson in the courthouse yard. I had to read all the summonses. Mr. Bridgers said read them all. I told Mehegan this."

L. V. Hart testified for defendant: "I was teller in the Bank of Tarboro in 1897. I presented a note of $200 to J. R. Pender for payment Saturday morning, 17 April, 1897, before the registration of his first assignment. He told me that he would pay the note the first thing Monday morning. I had four other notes of $200 each against him, but this was the only one due at that time. (Letter examined by witness dated 4-3-97.) It is on Pender's letterhead. This letter and signature are in Pender's handwriting, to the best of my knowledge and belief. (Examined letter dated 10 February, 1897.) The signature to this letter is in Pender's handwriting, to the best of my knowledge and belief. Both these letters are written to C. Billups & Son. (Witness examined a contract between J. R. Pender and the Bank of Tarboro, dated 18 March, 1897.) The signature to this paper is Pender's to the best of my knowledge and belief."

J. F. Shackleford testified for the defendant: "I am president of the Bank of Tarboro. Bank had claims against Pender when he made deed of assignment. I had instructed Hart to collect the $200 note from Pender. He told me that he had seen Pender, and Pender ( 60 ) had promised to pay it on Monday morning. On Monday morning Pender was absent from town."

Clarence A. Johnson testified for the defendant: "I was in the employment of Mr. Royster, the plaintiff, at the time the deed of trust was made and am still in his employ. Pender went off and returned 23 April, the date of the second deed of trust. I went to the depot with Mr. Bridgers. I went to witness Pender's signature. Deed was executed at depot. I saw Matthewson, the constable, there. I went back to town on bicycle and had deed registered. I did these things by direction of Mr. Bridgers, attorney for Pender. I went down to N. & C. R. R. 50 miles to meet Pender, at the direction of Mr. Bridgers. I did not meet him."

CROSS-EXAMINATION BY PLAINTIFF

"I witnessed the deed at the depot. Mr. Bridgers told me that the first deed of trust was void because no schedule was filed, and that it was

necessary to execute another. Mr. Bridgers told me to have the papers recorded right away and for that reason I made haste. I saw the constable with papers for Pender at the depot, and after getting the second deed signed, I made haste for the register of deed's office."

Exhibits "A," "B" and "C" offered in evidence.

It is agreed that the value of the property, exclusive of the exemptions, is $2,400.

(Witness acknowledged his signature to the three letters heretofore exhibited to the witness Hart, and now marked respectively Exhibits "A," "B" and "C." Also acknowledged to another letter marked "D.")

"I was dealing with Billups & Co., buying from them. I wrote to Billups that I would pay in sixty days' time, and they charged me cash and we had a disagreement." (Acknowledged telegram dated 13
( 61 ) April, 1897, to Billups, Son & Co.)

The foregoing letters and telegrams were offered in evidence and read.

The plaintiff objected as being incompetent; objection overruled. Exception by plaintiff.

EXHIBIT "B."

NORTH CAROLINA—EDGECOMBE COUNTY.

Whereas, J. R. Pender is indebted to Bank of Tarboro in the sum of $1,000, carrying interest at 6 per centum from date, payable quarterly, for which he has this day executed and delivered to said bank his five notes of even date herewith, payable on demand; and whereas, said bank is willing to give time for the payment of said notes as follows, viz.:—The first note to be paid with interest thirty days from date, and each note to be paid thirty days after the payment of the one numbered just prior to it—in each case the interest to be paid in full with note. Nonpayment of any note when the thirty days expires voids the agreement and the notes to be due as on their face. It is also agreed that said Pender may pay these notes at any time before the times herein specified. By reason of the extending of the time of the payment of these notes said Pender hereby pledges his word that should any crisis arise in his affairs by which he would be pressed for money he will, in any and all events and under any circumstances, protect the Bank of Tarboro in the payment or securing the payment of these notes.

This 18 March, 1897.

J. R. PENDER,
G. M. T. FOUNTAIN,
*Attorney for Bank.*

EXHIBIT "A." ( 62 )

TARBORO, N. C., 2-10-97.

*Mr. C. Billups, Norfolk, Va.*

DEAR SIR:—We here enclose check asked for. We agree with you that our action seems rather arbitrary, but you must admit that we had every reason to suppose we were to get the goods on sixty days when we ordered them. Don't be so hard on a young fellow who is working to build himself up; be more liberal. We are not going to rob you, we assure you. We are doing a nice business for cash only and by getting a little time we can do more. I hope that when you were young you had more to start with than I did. However, our wants will be few, and we will always in future expect to pay for goods on receipt of invoice and will always send check. We much prefer sending check to having you draw. The bank seems to take a great delight in returning papers. We would have paid the draft when due, but when boy called we were out and never saw it. Yours truly,

J. R. PENDER.

EXHIBIT "C."

TARBORO, N. C., 4-3-97.

*C. Billups, Son & Co., Norfolk, Va.*

GENTS:—We are very sorry indeed you could not accept the note we sent you. We will send you check on the 10th for the entire amount. We trust this will be satisfactory. Yours truly,

J. R. PENDER.

Of course if this is not entirely satisfactory we will do as you demand. Next week being first, we will make good collections.

EXHIBIT "D." ( 63 )

TARBORO, N. C., 3-29-1897.

*C. Billups, Son & Co., Norfolk, Va.*

GENTS:—Please find enclosed note due in 25 days for $57.21. Kindly accept this and greatly oblige me. Should you be unwilling, we will, of course, do as you may require. Yours truly,

J. R. PENDER.

TELEGRAM

TARBORO, N. C., 13 April, 1897.

*C. Billups, Son & Co., Norfolk, Va.*

Check by tomorrow's mail.

J. R. PENDER.

"I left Monday morning about 7 o'clock, after making the first deed of assignment. One of my notes to the bank was presented to me on the evening of 17 April, 1897. I had executed the deed before this was presented to me, but had not recorded same.

REDIRECT EXAMINATION

"I could not make the collection that I expected in order to pay the Billups note. I thought I had sufficient assets to protect the bank and any debt that I preferred. I thought all of my creditors could be paid out of my stock of goods."

The following issues were submitted to the jury:

1. "Was the deed executed to defraud, hinder and delay the creditors of John R. Pender?" Ans.: "Yes."

2. "Is the plaintiff the owner of the property as alleged in the complaint?" Ans.: "No."

3. "What is the value of the property?" Ans.: "$2,400."

( 64 ) The burden of the first issue was upon the defendant, and according to the view we take of the case this is the only issue necessary to be considered. We have copied the whole of the defendant's evidence and do not think it proves, or tends to prove, in a legal sense, that said deed is a fraudulent one.

It is true that under this deed some of the creditors of the assignor, Pender, will be paid in full, while other creditors will get little or nothing on their debts. This is the result of all such assignments where the assignor is insolvent. But this does not make the assignment fraudulent, as understood in law, and make it void under the statute. The debtor has the right to prefer one creditor over another if he sees proper to do so, provided he does this for the purpose of giving a preference to a part of his creditors, and not for the purpose of hindering, delaying or defeating other creditors. It is not the effect that may result from the terms of the trust in preferring one creditor over another, but the *intent* with which it is made, that renders it fraudulent and void. It is the intent of the maker to hinder and delay his creditors that contains the virus of destruction.

It is true that courts and juries cannot see and know the intent of an assignor except from his words and acts. Where he expresses his intent —his purpose to be—to defraud his creditors, we need not look further. This will avoid the assignment. But if he has not so declared his purpose, then we have to look to his acts to ascertain the intention with which the assignment was made—to what are called the "badges of fraud."

We have many cases in our reports defining what are "badges of fraud" under the statute (Code, sec. 1545), and what are not. And as we are of the opinion that there is no evidence—no badges of fraud—it will be proper for us to state what are not badges of fraud, as well as to state what are the usual badges of fraud.

An assignor may prefer one creditor to another without com- ( 65 ) mitting fraud. *Moore v. Hinnant,* 89 N. C., 455; Bump on Fraudulent Con., 218; *Hafner v. Irwin,* 23 N. C., 490. To do so is not fraud. To avoid an assignment it is absolutely necessary that there should be evidence of a fraudulent *intent* on the part of the assignor, and the fact that some of the creditors are preferred to others is no evidence of such intent. The usual badges of fraud are continuation of possession, or a secret trust, or some provision for the ease and comfort or benefit of the assignor, or the insertion of some feigned debt not due by the assignor. This cause has none of these badges.

The latest expression of this Court on this subject is *Barber v. Buffaloe,* 122 N. C., 129. In that case it was held that there was sufficient evidence of fraud to take the case to the jury. But that was a much stronger case than this. There the party preferred was a relation of the assignor—went 16 miles on Sunday night with the attorney who drew the deed of assignment—bought in the property with the debt secured, and allowed the assignor to remain in possession free of rent. This was evidence of a secret trust and benefit to the assignor, and the turning point in the case, and distinguishes it from the same case when before this Court at a former term (*Barber v. Buffaloe,* 111 N. C., 206).

The facts in this last case (*Barber v. Buffaloe,* 111 N. C., 206), are very much the same as those in the case now being considered. They are strong, and in our opinion stronger, and they were held in that case not to be sufficient evidence of fraud to carry the case to the jury.

There is an abundance of evidence in this case of promises to pay on the part of Pender, that were not kept. Some of them may have been made to keep off his creditors as long as he could. But these false promises to pay are not badges of fraud, but of bad faith. ( 66 )

It is evident that there was quite a race between the plaintiff and the defendant as to the execution and registration of the deed of assignment and the levy of the executions, in which the plaintiff won. But this is no badge of fraud. *Barber v. Buffaloe,* 111 N. C., 206. There is no allegation but what the debts preferred in the assignment were just debts, due by the assignor, Pender.

We do not like to say that there was no evidence, after the matter has been submitted to a jury, and they have said by their verdict that there was sufficient evidence upon which to find a verdict, as we think cases

are sometimes taken from the jury when they should have been submitted to them. But when we find, as in this case, that the issue has been submitted to the jury without evidence, it is our duty to say so. *Trumbull v. Gibbons,* 22 N. J. Law, 149.

There were some exceptions as to evidence, but these are not tenable and are not sustained.

NEW TRIAL.

JAMES E. TEMPLE, ADMR. OF W. T. TEMPLE, v. MASSACHUSETTS BENEFIT LIFE ASSOCIATION.

(Decided 28 February, 1899.)

*Issues—Verdict—Contradictory Findings.*

The remedy for inconsistent and contradictory findings of the issues submitted to the jury is to set aside the verdict.

ACTION upon a life insurance policy, tried before *Timberlake, J.,* at July Special Term, 1898, of PASQUOTANK.

( 68 ) *G. W. Ward and E. F. Aydlett for plaintiff.*

*Shepherd & Busbee, J. W. Hinsdale and Pruden & Pruden for defendant.*

CLARK, J. The application for insurance was made 5 January, 1897; the policy was delivered to the assured 11 January, 1897, and he died 16 March, 1897. The defendant relies upon a clause on the back of the policy—"This policy shall not become operative so as to bind the association until the first annual premium is paid and the policy is actually delivered to the member herein named during his life and good health." The jury responded "No" in response to the fourth issue—"Did insured make false representations in his application and examination?" and there was no exception. There was no evidence of a change of health between the application, 5 January and the delivery of the policy and payment of premium, 11 January. On the contrary the evidence of defendant's witnesses concurred with plaintiff's, that the assured was at work as usual in his business of hauling logs up to eight or ten days of his death, and the attending physician says he died of gastralgia, a disease, which, from its nature, could not have possessed him on 11 January, at the delivery of the policy, if he worked hauling logs for nearly two months thereafter.

The jury find, "No" as to the sixth issue—"Was said policy delivered to W. T. Temple during his lifetime and while in good health?" There being not a scintilla of evidence as to change of health between the application on 5 January, when the response to the fourth issue finds that the applicant's representations as to his health were ( 69 ) true, and the delivery of the policy on 11 January, these findings are clearly inconsistent and contradictory. The brevity of time—six days— warranted no presumption of change of health, and upon identically the same evidence the jury have made contradictory findings. The court should have granted the plaintiff's motion to set aside the verdict upon that ground.

NEW TRIAL.

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M. F. STANCELL v. GEORGE P. BURGWYN.

(Decided 28 February, 1899.)

*Mutual Accounts—Statute of Limitations.*

Mutuality of accounts may be the result of direct agreement, or it may be inferred from the dealings of the parties—if established, it renders unavailable the defense of the statute of limitations to both parties.

ACTION for goods sold and delivered, tried before *Norwood, J.*, at Fall Term, 1898, of NORTHAMPTON.

*R. B. Peebles and Thomas W. Mason for plaintiff.* ( 70 )
*MacRae & Day for defendant.*

MONTGOMERY, J. This action was like the old one of assumpsit for goods and wares sold and delivered by the plaintiff to the defendant. The answer sets up for defense a counterclaim for goods and wares sold to the plaintiff. In the replication the plaintiff pleads the statute of limitations to the counterclaim. The issue joined on the statute of limitations is the only matter before this Court. In the judgment below for the defendant the account between the parties was referred to Thos. N. Hill, Esq., for investigation and report. In the trial the plaintiff and defendant were both examined as witnesses, each for himself, but we think it unnecessary to recite the evidence, for in our view of the case, whether or not the statute of limitations avails, the plaintiff depends upon the plain language and proper construction of a receipt which he gave to the defendant long after this action was commenced and the complaint and answer filed. The receipt is as follows:

JACKSON, N. C., 2 April, 1898.

Received of George P. Burgwyn the sum of $15, which, when the accounts between us and now unsettled are examined and correct balance found, if said Burgwyn is indebted to me, said sum is to go as a
( 71 ) credit on such sum as may be found to be due me, and if not indebted to me, the said sum of $15 is to be refunded by me to said Burgwyn, with interest from date.

M. F. STANCELL.

That receipt was in evidence and the court instructed the jury that if they believed the evidence they should answer the issue as to whether the defendant's claim was barred by the statute "No."

We think there was no error in the instruction. The receipt clearly recognized that there subsisted between the plaintiff and defendant transactions which were not disjointed and disconnected, but mutual ones. It recognized the fact that there had to be an adjustment between them as to these accounts against each other. The principle of mutuality of accounts is founded on the assent of the parties that the accounts shall be continuing and mutual. It is not, however, necessary that this assent must be the result of a direct agreement to that effect; it may be inferred.

NO ERROR.

*Cited: Alley v. Rogers,* 170 N. C., 539; *Lumber Co. v. Trust Co.,* 179 N. C., 215.

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( 72 )

R. S. CHRISTIAN, TRUSTEE, AND J. D. AND R. S. CHRISTIAN v. R. Y. YARBOROUGH AND J. R. WILLIAMS, ADMRS. OF JOHN W. ERWIN; J. W. PEARSALL AND WIFE, RUFFIN ERWIN, JAMES ERWIN AND S. A. JONES.

(Decided 28 February, 1899.)

*Agent and Principal—Attorney and Client—Cancellation of Mortgage—Ratification—Judgment, Non Obstante Veredicto.*

1. An attorney is the agent of his client. Where he does an act exceeding his authority, ratification by the client will render it valid and binding.

2. Ratification of the unauthorized act of the agent will be presumed, where the principal, after being informed, retains the benefit of the transaction in whole or in part. He may not share the benefit of a contract without bearing its burdens, and there is no distinction as to the question of ratification, between the action of an attorney at law and the action of an attorney in fact.

3. While an attorney at law has no power to cancel or discharge a deed of mortgage, without authority conferred by his client, yet where such attorney informs his client that he is unable to complete an arrangement agreed upon with the debtor for obtaining a new mortgage and the sale of a stock of goods, upon which the creditor has a lien, unless a cancellation of an old mortgage was made, and that he would cancel the old mortgage by a day named, unless directed not to do so; the attorney receiving no such direction, canceled the old mortgage, and forwarded to his client the new mortgage and power of sale, and the new mortgage was returned without objection to be registered: *Held*, to be a ratification by the client of the act of cancellation of the old mortgage.

4. A motion for judgment, *non obstante veredicto*, can only be entertained at the instance of a plaintiff.

ACTION to vacate the cancellation entered upon the margin of ( 73 ) registration of a mortgage from John W. Erwin, deceased, to the plaintiffs, on the ground that it was the unauthorized act of their attorney, tried before *Bynum, J.*, at April Term, 1898, of FRANKLIN.

*Shepherd & Busbee and F. S. Spruill for plaintiffs.*
*C. M. Cooke for defendants.*

MONTGOMERY, J. This action was brought to have declared null and void a release and satisfaction of the provisions of a certain mortgage from J. W. Erwin, now deceased, to J. D. and R. S. Christian, entered on the margin of the registry in Franklin County, North Carolina. John W. Erwin, the intestate of the defendants Yarborough and Wheelass, in his lifetime, and the plaintiffs before they were in- ( 74 ) corporated, had between them numerous contracts and agreements concerning the indebtedness of the intestate to them. Erwin, on 1 March, 1892, executed a deed of trust to R. S. Christian upon all the goods, wares and merchandise in the store of the intestate to secure a debt due to J. D. and R. S. Christian. On 5 March following he executed a deed of mortgage upon his interest in a certain tract of land in Franklin County to the same persons to secure to them the amount of $700.50, which they had paid for the intestate to Cohen, Sons & Co., and which amount had been secured by a deed of mortgage to the Cohens upon the same lands. The intestate in his lifetime was put in charge of the stock of goods conveyed in the deed of trust of 1 March, 1892, as the agent of the trustee for the sale and disposition of the stock of goods, the same having been replenished from time to time. It further appeared from the testimony of T. B. Wilder that in March, 1894, Christian employed him as his attorney at law in regard to the debt against Erwin; that he said the matter had been standing about two years and he wanted the trusteeship closed up; that Erwin would come to see him, Wilder, and

sign certain papers agreed upon; that it was not understood between him and Christian that the mortgage on the land especially was to be released; that Erwin did come to see Wilder on 4 April following and refused to execute the papers prepared for him until the mortgage on the land should be canceled; that Wilder wrote to the plaintiffs at Richmond on that day, informing them of Erwin's demand for the cancellation of the mortgage as a condition precedent to his execution of the papers prepared for him, and requested an answer by the 9th inst., as on that day Erwin would return for the purpose of completing the business. The letter to plaintiffs was sent by special delivery and was received by them in time to have been answered before the 9th; that no answer having been received, Wilder released and canceled the mortgage on
( 75 ) the registry on the 10th. That on the last named day Wilder sent to the plaintiff a new mortgage and the assent of Erwin to the conveyance by R. S. Christian, the trustee to the plaintiffs, of the property conveyed in the deed of trust of 1 March, 1892. That those papers, together with a bill of sale from R. S. Christian, trustee, to the plaintiffs, for the goods and merchandise conveyed in the deed of trust of 1 March, 1892, were returned to Wilder for registration in Franklin County, as they were satisfactory, and that he had them all registered in Franklin County. That at the time he, Wilder, sent these papers to the plaintiffs in Richmond he informed them by letter that he had canceled the mortgage upon the land, and they answered not a word until after Erwin's death.

There was evidence for the plaintiff offered, but none contradictory of Wilder's evidence as set out above. Upon the evidence the court instructed the jury to find the issue, "Has the mortgage from J. W. Erwin to J. D. and R. S. Christian, dated 5 March, 1892, been duly released and discharged?" in the negative.

We think there was error in that instruction. It is certainly true that an attorney at law has no power to cancel or discharge a deed of mortgage without the authority is conferred to do so by his client; and in this case, if nothing else appeared but the simple action of Mr. Wilder in canceling the mortgage, done, as it was, without authority of the plaintiffs, the act would be of no force, and would not, therefore, bind the plaintiffs. But from the evidence in the case there seems to be a ratification, in law, of the act of Mr. Wilder. Before he canceled the deed it is admitted by the plaintiffs themselves that they had received from him the knowledge of his purpose to do so, and although they had time to instruct him to the contrary, they were silent. But fur-
( 76 ) ther than this, when the new mortgage from the intestate and his assent to the sale and conveyance of the personal property, conveyed in the deed of assignment of 1 March, 1892, by R. S. Chris-

tian, the trustee, to the plaintiffs, were sent by Mr. Wilder to the plaintiff, they were informed of the cancellation of the mortgage on the land. The new mortgage and the assent by the intestate to the sale of the personal property as above mentioned were, in the eye of the law, substantial benefits accruing to the plaintiffs in the transaction, and they cannot be allowed to accept that part of the transaction which is for their benefit, and refuse to allow the intestate that which was favorable to him. Their conduct was a clear ratification of the action of Mr. Wilder, although he was not authorized to cancel the mortgage in the beginning. Where an agent goes beyond his authority his principal must ratify the whole transaction or repudiate the whole. He will not be allowed to ratify that portion of the contract which is for his benefit and repudiate the other because it is against his interest. "A person cannot take the benefit of it (contract) without bearing its burdens. The contract must be performed in its integrity." Ewell's Evans Agency (Ed. 1879), p. 95.

The principal cannot of his own mere authority ratify a transaction in part and repudiate as to the rest. He must either adopt the whole or none. Story on Agency, sec. 250. The same principle is announced in *Rudasill v. Falls,* 92 N. C., 222. And there is no distinction as to the question of ratification between the action of an attorney at law and the action of an attorney in fact. They are both agencies, and the same rule applies as to ratification. 3 A. & E., 374 (2 Ed.), and cases there cited. In *Tooker v. Sloane,* 30 N. J. Eq., 394, it was held that a release by an attorney in fact of a holder of a mortgage, the latter having accepted the consideration from the former with knowledge of the release, was held binding on the principal, though the attor- ( 77 ) ney exceeded his authority.

The new mortgage and the assent of the intestate to the sale of the goods by the trustee was the consideration of the cancellation of the old mortgage, and the plaintiffs accepted and received it. This case bears no resemblance to that of *Woodcock v. Merrimon,* 122 N. C., 731. There the trustee undertook to release and discharge on the registry from the operation of a deed of trust a portion of the land conveyed in the deed; and it was said that 1271 of The Code only empowers a trustee to acknowledge satisfaction of the provisions of such trusts. It was never contemplated, as was said in *Brown v. Davis,* 109 N. C., 23, that the trustee could by this means release from an unsatisfied trust specified parts of the land. And it was further said in that case, "We do not mean to say, however, that the creditor might not be estopped under certain circumstances from enforcing his claim against that part of the land undertaken to be released by the trustee if done with the creditor's consent and authority, properly shown."

The motion made in the present case by the defendants for judgment *non obstante veredicto* was properly overruled. "A judgment *non obstante veredicto* is granted in those cases where a plea or defense confesses a cause of action and the matter relied upon in avoidance is insufficient." *Ward v. Phillips,* 89 N. C., 215; Stephen on Pleading, p. 97.

There was error, for which there must be a

NEW TRIAL.

*Cited: Herndon v. R. R.,* 161 N. C., 655; *Publishing Co. v. Barber,* 165 N. C., 483.

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( 78 )

## ARCH. COX AND WIFE ET AL. v. BEAUFORT COUNTY LUMBER COMPANY ET AL.

(Decided 28 February, 1899.)

*Burnt Records—Wills and Probate—Parol Evidence—Witness, Competency of.*

1. Independent of the statute relating to burnt and lost records (Code, ch. 8, passed in aid of the common law), it is competent to prove by parol evidence the existence of a destroyed record.
2. The existence of a will, its probate and registration, where destroyed by a fire, and also the contents of the will and qualification of the executor, may all be established by parol evidence.
3. The executor, named in the will, is a competent witness to testify as to all these circumstances, notwithstanding he is a devisee, under whom some of the parties to the action claim. He is rendered competent by The Code, sec. 589, and is not disqualified by section 590, as to transactions occurring after the death of testator, as they can in no sense be considered as transactions between the witness and the testator.
4. Section 590 would not seem to apply to wills, which are governed by section 2147 of The Code, affecting the interest of devisees and legatees when attesting witnesses thereto.
5. Where a will has been proved and recorded, it will not be presumed that the testator died intestate as to any part of his estate—the presumption is the other way.

SPECIAL PROCEEDING for partition of land transferred from the clerk for trial, at term, of the issues joined, and heard before *Brown, J.,* at December Term, 1898, of PITT.

(79 ) *A. M. Moore for plaintiffs.*
*J. L. Fleming and Shepherd & Busbee for defendants.*

FURCHES, J. This proceeding was commenced before the clerk of the Superior Court of Pitt, for the partition of land, in which plaintiffs allege that they are tenants in common with the defendants. This is denied by defendants, who claim to be the sole owners of said ( 80 ) lands. This makes it substantially an action of ejectment, and subject to the law and rules governing in the trials of such cases. *Alexander v. Gibbons,* 118 N. C., 796.

It is admitted that James Wilson was the owner of the lands in controversy and that both parties claim under him—the plaintiffs by descent, as heirs at law of James, who they allege died intestate in 1856. The defendants deny that the said James died intestate, and allege that he left a last will and testament, in which he devised said lands to his son, Simon B. Wilson; that said will was, after the death of the testator, duly admitted to probate and recorded in the clerk's office of Pitt County, and that defendants now own and hold said lands under Simon B. Wilson by successive conveyances from him to them.

And it being admitted that plaintiffs were children and heirs at law of James, the plaintiffs had a *prima facie* case, and the burden was upon defendants.

Defendants then showed their chain of title from Simon B. Wilson to them and then proposed to prove by parol that James Wilson left his last will properly executed; that this will was duly probated and recorded in Pitt County in 1856; that the courthouse in Greenville, Pitt County, was burned in 1858, and that this will and all the records and entries, showing its probate and registration, were burned and destroyed at that time. Defendants also proposed to prove by parol that the lands now in controversy were willed to the said Simon B. Wilson. To prove the existence, probate and recording of said will, defendants introduced or read the deposition of the said Simon, under whom they hold.

All this was objected to by plaintiffs, but allowed by the court, and plaintiffs excepted. Defendants offered another witness, one Dancy, not a party nor interested, whose evidence tended to prove ( 81 ) the probate and recording of said will. But as the testimony of Simon B. Wilson was also offered and allowed for this purpose, it is only necessary to treat the case as presented by his evidence, for if his evidence was improperly admitted there must be a new trial.

The plaintiffs' first objection was that any parol evidence was incompetent on this trial to prove and establish the probate and recording of said will, and that this is an effort on the part of defendants to prove and establish a record by parol testimony, which is not allowable. To do this, plaintiffs allege that there should have been a direct proceeding for that purpose, under the statute. But this position of plaintiffs cannot be sustained. *Mobley v. Watts,* 98 N. C., 284, and authorities cited.

As we have seen that it is competent to show the existence of a will by parol, and that where the records of the court have been burned and destroyed, destroying the will and record of its probate and registration, that the same may be proved by parol, the question in this case is as to the competency of Simon B. Wilson to prove these facts. He is the assignor of the defendants and is therefore incompetent to testify as to transactions and communications between him and his father, James, under whom the plaintiffs claim. The facts testified to by him are that four days after the death of his father he found this will among his papers; that he carried it to court and had it probated and recorded, and that he qualified as executor (being named as such therein), and that he settled the estate of his father. Were these transactions or communications with his father?

They cannot be communications with his father, for his father was dead. The finding of the will among his father's papers four days after his death cannot be a transaction with his father. The taking
( 82 ) the will to court and having it proved and recorded cannot be a transaction with the father, who was dead. These propositions seem to be too plain to admit of doubt or discussion.

The last ground in support of plaintiffs' contention is that, as Simon was a devisee in said will, that this made it a transaction with the father. But it does not seem to us that this contention of plaintiffs can be sustained.

Suppose it had been a promissory note given to Simon by his father—he would have been incompetent to prove the execution—that he saw his father sign the note; but he would have been a competent witness to prove the signature of his father, and then the note proved the transaction.

In this case Simon did not prove the execution of the will; he was not a witness to it; it (the will) was proved by others, and when it was proved, like the note, it spoke for itself. It was then a matter of record, subject to the inspection of all persons, and not a transaction with any one. Simon was a competent witness under section 589 of The Code, and only incompetent under section 590, as to transactions and communications. *Fertilizer Co. v. Rippy,* 123 N. C., 656; *Sykes v. Parker,* 95 N. C., 232.

But to our minds there is quite a distinction between a note, or any transaction *inter partes,* where there is necessarily a contract or any agreement between the parties thereto, and a will, where there is no transaction between the parties. For this reason, it seems that section 590 of The Code does not apply to wills, but that they are governed by section 2147 of The Code.

The competency of Simon B. Wilson to testify to the finding of the will, to the probate and recording the same, being shown, and the jury having found that James Wilson did not die intestate, but left a last will and testament, which was admitted to probate and was recorded in Pitt County, the presumption is that he willed the land in controversy. *Blue v. Ritter,* 118 N. C., 580, and authorities there ( 83 ) cited.

This being so, and plaintiffs having offered no evidence in rebuttal of this presumption, they have failed to establish title to the lands sued for, and their action must fail. *Blue v. Ritter, supra.*

No ERROR.

*Cited: Aiken v. Lyon,* 127 N. C., 175; *Harper v. Harper,* 148 N. C., 457; *Hughes v. Pritchard,* 153 N. C., 25; *McKeel v. Holloman,* 163 N. C., 135; *McEwan v. Brown,* 176 N. C., 252; *In re Saunders,* 177 N. C., 157; *Barham v. Holland,* 178 N. C., 106.

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J. A. PIERCE, ADMR. OF FRANK H. PIERCE, v. NORTH CAROLINA RAILROAD COMPANY.

(Decided 7 March, 1899.)

*Lessor and Lessee—Negligence and Contributory Negligence—Conduct, Wanton and Malicious—Code Practice.*

1. A lessor railroad company is liable for the negligence of its lessee, in operating the road, unless expressly exempted from liability in such case by its charter, or by subsequent legislation.
2. A trespasser's wrongful act in getting on a car does not justify his being put off in a manner calculated to cripple or kill—neither will a town ordinance, which imposes a penalty upon such trespasser, warrant those in charge in subjecting him to such usage.
3. A railroad company is responsible for injury caused by the wrongful act of its employee, while acting in the scope of his employment, in the discharge of the duties assigned him—and that, whether such act is willful, wanton and malicious, or merely negligent.
4. A "broadside" exception, one which fails to specify alleged errors in a judge's charge, cannot be considered; it is against the established practice of the court and the enactment of The Code, sec. 550.
5. It is not necessary to recur to the finespun distinctions of special pleading, happily swept away, in order to discern a wrong, or to apply the remedy—the common-sense system, now in use, will suffice for both.

( 84 ) APPEAL from *Allen, J.*, at November Term, 1898, of ROWAN, for the recovery of damages for the death of the plaintiff's intestate, a boy of from twelve to thirteen years of age, who was run over and killed by the defendant's engine and tender while shifting cars in the town of Salisbury. There was no exception to evidence. At the close of plaintiff's evidence the defendant moved to dismiss the complaint and for judgment as of nonsuit. Motion overruled, and defendant excepted. The examination of other witnesses was then proceeded with, and at the close of the evidence the defendant asked for the following instruction in writing:

1. There is no evidence of any negligence as alleged in the complaint and the jury should find the first issue "No."

2. If the jury believe that the intestate of plaintiff was killed by the wanton, willful and malicious act of one of the employees of the railroad company, then the company would not be liable, and they should find the first issue in favor of the defendant, and answer the same "No."

3. If the jury find that the intestate's death was caused by the wanton and malicious act of the fireman, and that his act was not done in the furtherance of the business of the defendant, they should find the first issue in favor of the defendant, and answer the same "No."

4. It is incumbent upon plaintiff to show that the act of the defendant's servant was within the scope of his duties and authority, and there is no evidence that this was the fact.

5. The jury must find that the primary cause of the death of plaintiff's intestate was the act of the fireman in throwing coal or other missile at the intestate before they can answer the third issue "Yes."

6. There is no evidence that the fireman of the defendant's lessee struck the deceased and knocked him off the steps of the tender.

( 85 ) 7. The deceased was violating an ordinance of the town, and violating the law when he was killed, in swinging on the tender of the engine.

The court, after reading over the evidence to the jury, gave the following charge to the jury:

You have heard the evidence as taken down and read over. That is done for the purpose of refreshing your minds as well as that of the court, and for the purpose of aiding the court in instructing you. You are to remember the evidence as it came to you from the witnesses on the stand if there is any difference in the evidence as read over to you and the way you remember it from the witnesses.

Upon this evidence these issues are submitted to you:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged?

2. Did the plaintiff's intestate, by his own negligence, contribute to his death?

3. Could the defendant, by the exercise of reasonable care and prudence, have avoided the injury, notwithstanding the contributory negligence of the deceased?

4. What damage is plaintiff entitled to recover?

The burden is upon the plaintiff to show by a preponderance of evidence facts sufficient to enable him to recover. Upon the first, third and fourth issues it is upon plaintiff. Upon the second issue, that of contributory negligence, the burden is upon the defendant.

In this place the plaintiff contends, first, that the deceased was not negligent and that he was killed by reason of the negligence of the defendant, and that even if the deceased was negligent—if you find that he was negligent—that still defendant could have stopped the engine and put the boy off, and second, that his death was due to the throwing of coal or missiles at him, which caused him to jump ( 86 ) from the train or to fall from the train and he was thereby killed. Now the defendant denies this, and says that the engineer and fireman did not know that the deceased was on the tender, if he was on the tender, at the time he was killed, and that they were exercising reasonable care and prudence at the time of the killing. That the fireman did not knock him (they deny that) or frighten him off, or throw coal at him, or any other missile, and that the engine was so constructed that the fireman could not have thrown coal and struck him or frightened him from the train, owing to what was, the defendant contends, the peculiar construction of the tender, the defendant contending that it was so constructed that he could not have thrown it according to the way in which plaintiff says coal was thrown at him.

The plaintiff contends that it was constructed differently from the way the defendant contends, and was so constructed that he could have seen the boy, and could at least have thrown over at him and struck him or frightened him.

The defendant further contends that the deceased's negligence and his conduct were the sole cause of his death, and that the defendant is in no wise liable. A master—and for the purpose of this case, when I speak of master I mean the principal and the railroad or the corporation, would be a master in a case of this kind—is liable for the conduct of its agents or servants when acting in the course or scope of his employment or line of duty, and his wrongful acts are not in consequence of something outside of his duty. The defendant lessee would be liable for the violent or unlawful conduct of its employees on the shifting engine when they were acting in the scope or line of their duty, and it is incumbent on the plaintiff to show this and whether or not the lessees' servants

( 87 ) on the shifting engine were guilty of violent conduct causing the death of plaintiff's intestate, and also whether such violent conduct, if you find there was such violent conduct, was committed by the engineer or fireman, or either of them, while serving the lessee, and while acting in the scope or course of their employment, are facts for the jury, to be determined upon consideration of all the evidence.

In considering the first issue, as the issues are shaped in this case, you will not consider as to whether the negligence of the defendant was the proximate cause, but did the employees of the defendant kill the deceased, and were they guilty of negligence in doing so, is the inquiry. If you find that the defendant's lessee put an engineer and fireman in control of its shifting engine, and they were in control of it, and while they were in the discharge of their duty and acting in the scope and course of their employment, the fireman threw coal or other missiles at plaintiff's intestate, and you further find that the plaintiff's intestate was a boy between twelve and thirteen years of age, or about thirteen years of age, and that he was a trespasser, riding upon the tender, without consent and without paying fare, and you find that by reason of the violence so employed by the fireman the said boy fell from the tender, or was knocked off, or was caused to jump off the tender from fright while the engine was in motion, and was thereby run over and killed, you will answer the first issue, "Yes," provided the boy acted with reasonable care and prudence of a child of his age, if you find he jumped or fell from such fright.

If the jury find that the fireman, in the course of his employment, as aforesaid, used force for the eviction of the deceased from the tender in the manner just mentioned, and further, that the engineer, by keeping a prudent lookout and using usual appliances, could have caused the removal of the deceased without injury by slowing up or by
( 88 ) stopping the engine, it would be negligence, and you would answer the first issue, "Yes."

In dealing with a trespasser a party is not held to the highest degree of care, such as is due to a passenger, but he is required to exercise ordinary care, and if the servant or employee does not exercise ordinary care towards a trespasser while in the line of his employment, and injury result therefrom the master is liable, unless the act of the servant is something outside of his employment and for his own purpose.

If the deceased got upon the tender of the defendant while its engineer and fireman, in the course of their employment, were switching cars, without their knowledge or consent, and they could not, by the exercise of ordinary care and watchfulness, have seen him or known it, and whilst so upon it, or in attempting to get off of it, either from fright

or any other cause, not attributable to the negligence of the fireman or engineer, he jumped, or fell and was run over and killed, it would not be negligence, and you should answer the first issue, "No."

If the deceased was not upon the tender, but was along the track, and the engineer or fireman could not, by the exercise of ordinary care and watchfulness, have seen him, the first issue should be answered, "No."

After you have settled the first issue, if you answer it "No," you proceed no further; but if you answer the first issue "Yes," then you proceed to the second issue.

If the jury find that the deceased got upon the tender without the consent of the engineer or fireman, while it was running over the defendant's track, then he was not only violating a town ordinance, but would be a trespasser independently of that, and if the injury would not have occurred but for his having gotten on, then he contributed to his injury and death, either remotely or proximately, and your answer to the ( 89 ) second issue should be, "Yes."

If he was not on the tender at the time of the injury, but was negligently on the track and killed, the answer to the second issue should be, "Yes." The second issue is, Did the plaintiff's intestate, by his own negligence, contribute to his death?

Contributory negligence can only exist when the negligence of both parties have combined and concurred in producing the injury. A failure on the part of the deceased to exercise ordinary care to avoid the injury would constitute contributory negligence. Children who have not reached the age where they are wholly responsible are not required to use the same degree of care and prudence that a grown person similarly situated are, but a child can be guilty of contributory negligence, and the jury are the ones to say whether he is or not.

If you find the second issue "No," that he did not contribute to his injury and death, and you have answered the first issue "Yes," then you need not consider the third issue; but if you answer the first issue "Yes," and the second issue "Yes," then you proceed to the third issue—Could the defendant, by the exercise of reasonable care and prudence, have avoided the injury, notwithstanding the contributory negligence of the intestate? When I speak of the intestate and deceased you will understand who I mean by that—the boy—and when I speak of the defendant you will understand that I mean the defendant company, the lessee of the defendant.

So now, I instruct you as to the third issue, if you reach the third issue; that is, if you answer the first issue "Yes," and the second issue "Yes," then you come to consider the third issue—Could the defendant, by the exercise of reasonable care and prudence, have avoided the injury, notwithstanding the contributory negligence of the intestate? ( 90 )

By reasonable care and prudence, if you find the deceased was a trespasser, is meant ordinary care and prudence.

If, notwithstanding the defendant's negligence, and the deceased's negligence, if found to be so, the defendant could, by the exercise of due care and prudence, have avoided the injury, the failure to do so would be the proximate cause of the injury and death, and the defendant would be liable for damages.

If you find the deceased was negligent by getting on the tender, then could the defendant's lessee, the engineer or fireman, or both, have avoided the injury and death by the exercise of reasonable care and prudence, either by stopping the engine and putting him off, if you find he was on, and they knew it, or if you find he was forced or frightened off by having omitted the acts that frightened him off, and was this the proximate cause of his death, and if so you will answer the third issue, "Yes."

Could the defendant's engineer or fireman, by the exercise of ordinary watchfulness have seen the deceased in time to have avoided the injury, and if so, was the failure to do so the proximate cause of the injury? Did the fireman throw coal or other missiles at the deceased and cause him, in the exercise of ordinary care and prudence, commensurate with his age, in consequence to jump off or fall from the tender, and was that the proximate cause of the death; if so, the third issue should be answered, "Yes." If the defendant's servants or employees in charge of the engine, the engineer and fireman, could not, by the exercise of ordinary care and prudence, have avoided the injury, and if the defendant's employees' negligence, if you find them negligent, was not the proximate cause of the injury, then the third issue should be answered, "No."

( 91 ) The jury must find that the primary or proximate cause of the death was an act of negligence on the part of the engineer or fireman before they can answer the third issue "Yes."

Now, if you answer the third issue "No," then you need go no further, but if you answer the third issue "Yes," and have previously answered the first and second issues "Yes," or if you answer the first issue "Yes," and the second issue "No," then you are to consider the fourth issue; that is, the issue as to damages—What damage is the plaintiff entitled to recover? In estimating the damages it must necessarily be left in a great degree to the sound sense and discretion of the jury in view of all the facts and circumstances, to determine whether the deceased would have earned something or nothing to the pecuniary advantage of his next of kin, or if anything, then how much, and of what value, is a question for the jury.

The rule by which this estimate is to be made is decided to be the reasonable expectation of pecuniary advantage from the continuance of

the life of the deceased. As a basis on which to enable the jury to base their calculations or estimate, they may consider the age of the deceased, his prospects of life, his habits and character, his industry and skill, his means for making money, and his capacity for work or business, the end of it all being to ascertain the present value of the net income of the deceased which might be reasonably expected if death had not ensued.

If you reach this issue as to damages, you should seek to be fair and reasonable. You have no right to seek to punish the defendant by excessive damages, nor to give what you think would be an equivalent for life. You are not seeking to value a human life in the sense that we speak of when we say what would a man take for his life, nor should you seek to compensate the parent for his grief, nor allow anything for the suffering either of the parent or of the deceased; that is not the question at all, and you should divest yourselves of all sym- ( 92 ) pathy. It is a matter that appeals to our sympathies, but when you come to render your verdict you have to lay that aside, nor should you allow yourselves to be influenced by any prejudices, if you have any, but seek to render a fair and reasonable verdict, not only as to the issue on damages, but upon all the issues. You may retire and make up your verdict.

The defendant excepted to the court's refusal to charge the jury, as prayed for in its prayer, and also to the charge as given.

The findings by the jury were as follows: In answer to the first issue, response, "Yes"; in answer to the second issue, "Yes"; in answer to the third issue, "Yes"; in answer to the fourth issue, "$2,000."

Upon these findings, the defendant asked for judgment in its behalf, which was denied, and the court gave judgment for the plaintiff, from which defendant appealed.

The defendant assigns the following as errors committed by the court, to wit: The failure and refusal on the part of the court, to give judgment of nonsuit upon motion of defendant, after plaintiff rested his case; the failure and refusal of the court to give the instructions asked for by the defendant; the giving the charge to the jury, as set out in the court's written instructions; the refusal and denial of judgment for the defendant, upon the findings of the jury, upon the issues submitted.

*L. S. Overman, B. F. Long and R. L. Wright for plaintiff.*
*Chas. Price and G. F. Bason for defendant.*

CLARK, J. The motion to dismiss the complaint and for judg- ( 93 ) ment of nonsuit appears from brief of defendant's counsel to be intended to raise again the question whether the lessor company, the

North Carolina Railroad Company, the defendant herein, is liable "for all acts done by the lessee in the operation of the road," as was held in *Logan v. R. R.*, 116 N. C., 940; but why the counsel should feel "encouraged to believe" that "this Court will retire from the position it has taken upon the question" we are not advised. We have perceived no lack of "soundness of reasoning" therein. The decision in *Logan's case* was made after full deliberation, and with full appreciation and careful discussion of the important principle now again called in question—and it was held that "a railroad company cannot escape its responsibility for negligence by leasing its road to another company, unless its charter or a subsequent act of the Legislature specially exempts it from liability in such case"—and it was made in an action to which the appellant herein was the party raising the question. The same proposition had been theretofore laid down by *Smith, C. J.*, in *Aycock v. R. R.*, 89 N. C., at p. 330, with cases there cited; and *Logan's case* upon this point has been expressly cited and sustained in *Tillett v. R. R.*, 118 N. C., at p. 1043; *James v. R. R.*, 121 N. C., at p. 528; *Benton v. R. R.*, 122 N. C., 1007, and *Norton v. R. R., ib.*, 936, 937.

The issues excepted to are those suggested for cases of this nature in *Denmark v. R. R.*, 107 N. C., 185, and which have been time and again approved since. Every phase of the defendant's contention could have been presented upon the issues submitted, and there could be, therefore, no just ground of exception in that respect. *Willis v. R. R.*, 122 N. C., 905, and cases there cited.

( 94 ) The exception for refusal of the first prayer to instruct the jury that there was no evidence of negligence, and of the fourth prayer to instruct them that there was no evidence that the act of defendant's servant was within the scope of his duties, and of the sixth prayer, to instruct them that there was no evidence that the fireman of defendant's lessee struck the deceased and knocked him off the steps of the tender, are, upon the evidence, without merit. The other part of the fourth prayer, and the seventh prayer for instruction, were given in the charge. The charge of the court given in lieu of the fifth prayer for instruction gives the defendant no ground to complain at the refusal of that prayer.

We will now consider the second and third prayers for instruction, which were:

2. If the jury believe that the intestate of plaintiff was killed by the wanton, willful and malicious act of one of the employees of the railroad company, then the company would not be liable, and the jury should respond to the first issue, "No."

3. If the jury find that the intestate's death was caused by the wanton and malicious act of the fireman, and that his act was not done in the furtherance of the business of the defendant, they should find the first issue in favor of the defendant, "No."

The assumption in these prayers that the defendant is not liable if the plaintiff's intestate was killed by the wanton, willful and malicious act of one of the employees of the defendant, and especially if such act was not done in furtherance of the business of the defendant, cannot be sustained. The true test is, was it done by such employee in the scope of the discharge of duties assigned him by the defendant and while in the discharge of such duties? "In the furtherance of the business of employer" means simply in the discharge of the duties of the employment, and the court properly told the jury that the defendant is responsible for the injury if caused by the wrongful act of the ( 95 ) employee while acting in the scope of his employment. In *Ramsden v. R. R.*, 104 Mass. (at p. 120), *Gray, J.*, says: "If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent. *Howe v. Newmarsh,* 22 Allen, 49; or even if it is contrary to an express order of the master. *R. R. v. Darby,* 14 Howard, 468." The rule is thus laid down in 2 Wood Railways, sec. 316 (at p. 1404, 2 Ed.): "Where the act is within the scope of the servant's authority, express or implied, it is immaterial whether the injury resulted from the result of his negligence, or from his willfulness and wantonness; nor is it necessary that the master should have known that the act was to be done. It is enough if it is within the scope of the servant's authority. Thus, where a servant of a railway company, employed to clean and scour its cars, and keep persons out of them, kicked a boy eleven years old from a railing while the cars were in motion, whereby he was thrown under the cars and killed, it was held that the act, although in nobody's line of duty, being done in the course of the servant's employment, the company was chargeable therefor," citing *R. R. v. Hack,* 66 Ill., 238, and other cases as authorities. Among many other cases almost on "all fours" with the present, are *R. R. v. Kelly,* 36 Kan., 655, in which it was held that, "Where a boy fifteen years old gets upon a freight train wrongfully and as a trespasser, for the purpose of riding without paying his fare, and is commanded by the brakeman to jump off the train while in dangerous motion, in the night time, and in obedience to that command, and in fear of being thrown off, jumps off the train and is run over and injured, the company is liable"; and it is further held that, whether the brakeman "acted wantonly and maliciously or merely failed to exer- ( 96 ) cise due care and caution, the railroad company is liable" for damages resulting from the brakeman's conduct, citing many cases. In

*Rounds v. R. R.,* 64 N. Y., 129, the defendant was held liable where the plaintiff jumped upon the platform of a baggage car to ride to a place where the cars were being backed to make up a train, this being against the regulations of the defendant, and the baggage-master knocked him off, and in falling, he fell upon some wood, rolled under the car and was injured, the Court holding that, "to make the master liable it is not necessary to show that it expressly authorized the particular act; it is sufficient to show that the servant was acting at the time in the general scope of his authority, and this, although he departed from his instructions, abused his authority, was reckless in the performance of his duty and inflicted unnecessary injury." In *Lovett v. R. R.,* 9 Allen (Mass.), 557, it was held that where a boy of ten years old wrongfully got upon a street car, and the driver ordered him to jump off, while running at a dangerous speed, the company is responsible for the injuries sustained by the boy in doing so, unless it was found that the injury was caused by the boy's negligent manner of getting off. Another instance of liability for injuries sustained by a trespasser from the servant's violently and forcibly putting the trespasser off, is *Carter v. R. R.,* 8 A. & E. R. R. Cases, 347, which cites numerous precedents of like purport. But it is needless to multiply cases. All of them hold such ejectment is done by the servant in the general scope of his employment, and if done recklessly or wantonly and maliciously, and even if in a manner forbidden by the master's orders, the company is liable for the tortious act. The ground is that the proximate cause of the injury is not the trespasser's wrongfully getting on the cars, but the tortious manner in which
( 97 ) the servant makes him get off, and that this act, being in the general scope of the servant's employment, the master is liable.

In the present case, whether the child jumped off because ordered by the brakeman, or by reason of the hint of a lump of coal whizzing by his head, or was actually struck and knocked off, this mode of getting him off the moving car was tortious, and the defendant is liable for the injury caused thereby. 14 A. & E., 822, 823, and cases cited in the notes thereto; Pierce on Railways, 278, 279; 99 Am. Dec., 282, and notes; *Peck v. R. R.,* 70 N. Y., 587; *R. R. v. Harris,* 122 U. S., 597.

It is true the child was on the tender in violation of a town ordinance, as the defendant contends, but the penalty for this was a small fine and not a license to the defendant's servant to cripple him or kill him.

The defendant, however, earnestly contends that if the servant's act was malicious the company is not liable for negligence. If that theory ever obtained, the above authorities show that it was contrary to reason and has been duly and fully exploded. Besides, the company is not charged in this case with malice because of any alleged malice of its

agent, and whether, if it was, it could be held liable for punitive damages is not before us. It is certainly liable for compensatory damage for the injury sustained from the tort of its servant.

The brief of the learned counsel for the defendant strenuously insists that a case of this kind cannot be understood by the Court and justice properly administered unless we translate the action back into one of the old common-law forms of actions, and that when that is done it would be seen that the plaintiff cannot sustain his demand. This suggests the precedent of the physician, who, in a difficult case, proposed to give his patient something to throw him into fits, on the ground that he was infallible in curing fits. It was precisely because the old ( 98 ) division into forms of action lent itself to finespun metaphysical distinctions whereby the form of proceeding became more important than the subject-matter and led to frequent miscarriages of justice, that the common sense of an enlightened age swept the old system away, and for more than fifty years the discarded legal jargon of a former age has sounded strange, if referred to at all, at Westminster Hall, in which it grew up. In our own State the Constitution abolished the old system, and by statute we have substituted the simple requirement that the complaint shall contain "a plain and concise statement of the cause of action." Code, sec. 233 (2). That is the case here. We shall not delve in the debris of dead and forgotten centuries, nor disturb the dust that sleeps above the volumes of an outworn and long-rejected legal system. To do so would be to obscure the substantial justice which it should be the sole object of every legal inquiry to ascertain. We need not darken counsel by multitude of words, nor entangle ourselves in the scholastic disputations which once obtained in legal proceeding and very often defeated their object.

Here the plaintiff's intestate was admittedly run over and killed by the defendant's train. Upon the uncontroverted facts of this case, the fireman, as a matter of law, was acting in the scope of his general employment, and the court properly instructed the jury that if the boy was made to get off the car (though he was there wrongfully) by the act of the fireman, whether malicious or not, while the train was moving, so that the boy was killed in consequence of so doing, the defendant was liable for the damage caused by the negligent conduct of its lessee in thus operating its train.

The defendant further excepted "to the charge as given." This is a "broadside" exception which cannot be considered. This has been uniformly so held for a long series of years and in possibly more than fifty cases, and has been recently reaffirmed by *Furches, J.,* ( 99 ) in *Hampton v. R. R.,* 120 N. C., at p. 538, and *S. v. Moore, ib.,* at p. 571; by *Faircloth, C. J.,* in *S. v. Ashford,* 120 N. C., 588, and by

*Douglas, J.*, in *S. v. Webster,* 121 N. C., 586, and other recent cases, two of them at this term. Indeed, the statute (Code, sec. 550) is explicit, requiring the appellant to prepare "a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the requests of the counsel for parties for instructions, if there be exception on account of the granting or withholding thereof, and *stating separately in articles numbered* the errors alleged." It would be so eminently unjust to an appellee to have an entire charge excepted to, without any specifications of the errors alleged therein, that he might prepare himself for argument thereof on appeal, and the decisions that such broadside exception will be disregarded here have been so uniform that we would feel impelled to adhere to so just and uniform a ruling, even if the statute law had not explicitly prescribed it. A careful consideration of the charge, shows, besides, that there is no error therein of which the defendant could complain.

The last exception, which is for refusal of judgment in favor of defendant upon the findings of the jury, needs no consideration beyond what is involved in the preceding discussion.

NO ERROR.

*Cited: Adams v. R. R.,* 125 N. C., 566; *Cook v. R. R.,* 128 N. C., 333, 336; *Perry v. R. R.,* 129 N. C., 335; *Harden v. R. R., ib.,* 359; *Palmer v. R. R.,* 131 N. C., 252; *Lewis v. R. R.,* 132 N. C., 387; *McNeill v. R. R., ib.,* 514; *S. c.,* 135 N. C., 721; *Jackson v. Tel. Co.,* 139 N. C., 354; *Hayes v. R. R.,* 141 N. C., 198; *Carleton v. R. R.,* 143 N. C., 47; *Roberts v. R. R., ib.,* 178; *Coal Co. v. R. R.,* 144 N. C., 748; *Streator v. Streator,* 145 N. C., 339; *Stewart v. Lumber Co.,* 146 N. C., 60, 64, 88; *Jones v. R. R.,* 150 N. C., 477, 481; *Cullifer v. R. R.,* 168 N. C., 311; *Rivenbark v. Hines,* 180 N. C., 242.

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## W. A. REDDITT v. SINGER MANUFACTURING COMPANY.

(Decided 7 March, 1899.)

*Corporations—Torts of Agents—Slander—Damages.*

1. A corporation is now held liable to civil and criminal actions under the same conditions and circumstances as natural persons are.

2. A corporation is liable for the misconduct of its agents, in the line of their duty, if they act under the express or implied authority of the company, or their tortious acts are ratified, as by taking the benefit of such misconduct.

3. When liability is established and the circumstances are aggravating or malicious, the company is subject to punitive damages, on the same principle that natural persons are.

4. As necessary to establish liability on the part of the company, the principle is generally recognized, that in some way the company must authorize or approve the tortious act of its agent, and that it would be unreasonable to hold the company liable on a bare presumption, in the absence of allegation or proof of authorization or ratification, express or at least implied, of acts done by an agent within the course and scope of his employment. This principle would seem to be applicable to corporations, both private and *quasi* public, and, upon proof, both are liable for torts, including libel and slander.

ACTION tried before *Hoke, J.*, at Fall Term, 1898, of PAMLICO, to recover damages on account of slanderous words alleged to have been spoken concerning the plaintiff by defendant, through its agents, Armstrong and Cole. The words alleged in the complaint are:

"I am going to have him arrested at once for larceny." "We intend to have him arrested at once for larceny." "Redditt has been stealing," meaning thereby to charge that plaintiff had stolen the property of the defendant and to charge him with larceny.

The circumstances under which the words were spoken, and the (101) charge of his Honor, excepted to by the defendant, are stated in the opinion. At the close of plaintiff's evidence there was a demurrer and motion to dismiss on part of defendant, which were overruled by the court, and defendant excepted.

Verdict and judgment for $700 for plaintiff. Appeal by defendant.

*Shepherd & Busbee for plaintiff.*
*Osborne, Maxwell & Keerans and D. L. Ward for defendant.*

FAIRCLOTH, C. J. The defendant is a corporation, in the State of Virginia, manufacturing sewing mechines, and has a State agent and subagents in North Carolina, and the plaintiff was one of the agents for selling the machines. The defendant's State agent was directed by the defendant to take possession of the machines in plaintiff's hands and to have a settlement with plaintiff and collect the amount due by plaintiff for machines already sold. The agent brought an action of claim and delivery for the machines, and they were delivered, and, pending negotiations in making the settlement, the plaintiff alleges that said agent used and uttered slanderous words of and concerning the plaintiff, and he instituted this action for damages against the defendant corporation, resulting from the utterance of such slanderous words by said agent. There is no allegation nor any proof that said slanderous words were spoken by the authority or consent of the defendant, or that they have been ratified.

(102) At the close of the plaintiff's evidence the defendant demurred and made a motion to dismiss the action, on the ground that the defendant is not liable for damages for the alleged slanderous words of its agent. The motion was refused and exception entered.

The court charged the jury that "a corporation is responsible for slanderous words uttered by its agent in the course and scope of such agent's employment and in aid of the company's interest." Exception.

This charge presents the decisive question in this case.

An examination in detail of the numerous authorities and decisions would be a tedious undertaking, and it may be remarked that a careful examination into the facts in each would reconcile many apparent conflicts. It is a fundamental principle that the law shall fit the facts in every case. A few general propositions may be stated:

1. That a corporation, contrary to the early cases, is now liable to civil and criminal actions under the same conditions and circumstances as natural persons are.

2. That, as a corporation must do business through agencies, it is liable for the misconduct of its agents, in the line of their duty, if they act under the express or implied authority of the company, or their tortious acts are ratified, as by taking the benefits of such misconduct.

3. That when liability is established and the circumstances are aggravating or malicious, the company is subject to punitive damages, on the same principle that natural persons are.

From our examination, we think, in the vast majority of the cases, that the principle is recognized that in some way the company must authorize or approve the tortious act of its agent, and that it would be unreasonable to hold the company liable on a bare presumption, in the absence of allegation or any proof of authority or ratification.

(103) If A sends his servant downtown to purchase goods, and, in the act of purchasing, the servant should slander, by words, or assault the merchant, it would be a violent presumption that the master approved or had authorized such misconduct, and it would be unreasonable to hold him responsible without something indicating his approval. The principle which we approve is well stated in *S. v. R. R.*, 23 N. J. Law, 369: "If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents, precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its *authority*, express or implied, though there be neither a written appointment under seal nor a vote of

the corporation constituting the agency or authorizing the act." This view is cited and approved in *R. R. v. Harris,* 122 U. S., 608, and cases referred to.

*Hussey v. R. R.,* 98 N. C., 34, was on demurrer, and, looking at the opinion (not the syllabus), we see nothing in conflict with the view we are taking.

In some respects the present case is similar to *Daniels v. R. R.,* 117 N. C., 592, but not so in all respects. That was an action against a common carrier, owing important duties to the public, subject to the demands of the public, within the range of its chartered duties, and the defendant was held to a strict discharge of its duties as such carrier, on the ground of public policy.

In the present case the defendant is a private corporation, owing no duty to the public, on whom the public can make no demand. It may make and sell machines at its own will and pleasure. The public has and feels no more interest in the manner of its business trans- (104) actions than in that of any other individual business enterprise.

We think there was error, in law, and this makes any further discussion unnecessary.

ERROR.

DOUGLAS, J., concurring: While I concur in the judgment of the Court, I cannot concur in the possible inference that a private corporation cannot be guilty of libel; nor do I see any material difference in that respect between a private and *quasi* public corporation. It is true, the latter owes to the public certain special duties, such, for instance, as the protection of its passengers by a common carrier; but these duties and consequent liabilities come under an entirely different principle. I think this distinction is clearly drawn, and the essential principles fully recognized, in *Hussey v. R. R.,* 98 N. C., 34, and in *White v. R. R.,* 115 N. C., 631, 636. The citation in the opinion of the Court from *S. v. R. R.,* 23 N. J. L., 369, cited with approval in *R. R. v. Harris,* 122 U. S., 597, 608; *Hussey v. R. R., supra,* and *White v. R. R., supra,* lays down the general principle applicable to all corporations, that a corporation is civilly liable, precisely as a natural person, for torts committed by its servants or agents by its authority, express or *implied.* It seems to me, there must be at least *implied* authority for all acts done by an agent "within the course and scope of his employment." For this reason I am not prepared to say that it was error in the court below to charge that "a corporation is responsible for slanderous words uttered by its agent in the course and scope of such agent's employment and in aid of the company's interest." I see no error in it, as far as it goes. If a corporation or individual should place in the hands (105)

of an agent a claim for collection, with a false statement, showing the alleged debtor guilty of embezzlement, and such agent should, on the authority of such statement, charge the debtor with felony, I do not see why the principal should not be liable. Again, if the corporation should place in the hands of its agent a claim, with instructions to enforce its payment by threats of criminal prosecution, I think it would be liable for false accusations made by its agent in pursuance of such instructions. Of course, in both instances this view is based upon the general liability of the corporation, regardless of its right of possible justification.

Under all the circumstances of this case, which it is unnecessary for me to review at length in a concurring opinion, I assent to a new trial, when the facts can be more fully developed and the law perhaps more clearly applied, but I do not wish to be bound by an apparent concurrence in principles that do not meet my approval.

CLARK and MONTGOMERY, JJ., concur in the concurring opinion of DOUGLAS, J.

*Cited: Lovick v. R. R.,* 129 N. C., 437; *Hudnell v. Lumber Co.,* 133 N. C., 172; *Daniel v. R. R.,* 136 N. C., 526; *Jackson v. Tel. Co.,* 139 N. C., 354; *Stewart v. Lumber Co.,* 146 N. C., 66; *May v. Tel. Co.,* 157 N. C., 421.

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(106)

JOHN JOHNSON v. W. Z. BLAKE ET AL.

(Decided 7 March, 1899.)

*Trust—Estate—Married Woman.*

1. The general rule is, that trust estates are governed by the same rules and limitations that legal estates are.

2. Where land was conveyed in fee simple to a trustee to hold for the sole and separate use of a married woman—to allow her to live upon it or retain the rents and profits thereof, free from the interest of her present or any future husband, as completely as if she were *feme sole*—and to sell and reinvest the proceeds in other personal or real estate, to be held upon the same terms and trust as specified herein, and no other: *Held*, that this created a fee-simple trust estate in her, which at her death descended to her heirs, and that there was no resulting trust in favor of her husband, although his money may have paid for the land.

JOHNSON *v.* BLAKE

ACTION to foreclose a land mortgage, tried before *Timberlake, J.*, at February Term, 1898, of WAKE.

*S. G. Ryan for plaintiff.* (107)
*W. N. Jones and J. H. Fleming for defendant.*

FURCHES, J. In 1857, Sion H. Rogers conveyed the land in controversy to E. Johnson in fee simple, "to hold the same for the sole and separate use of Mary Ann Finnell, wife of Richard Finnell, and to allow her to live upon the same, or retain the rents and profits thereof, free from the interest of her present or any future husband, as completely as if she were *feme sole,* and to sell and reinvest the proceeds in other personal or real estate, to be held upon the same terms and trust as specified herein, and no other."

Rogers, the grantor; Johnson, the grantee; Mary Ann Finnell, and Richard Finnell are all dead. After the death of Mary Ann, Richard Finnell executed a mortgage, conveying said land to the plaintiff as a security for debt, and plaintiff claims under this mortgage. After the death of both Mary Ann and Richard Finnell, said land was sold by order of court, as the land of Mary Ann, for partition between her children and heirs at law, and defendant became the purchaser at said sale, and claims thereunder. Defendant has also bought and is the owner of any estate the said Rogers may have had in said land by way of a resulting trust. The plaintiff offered Mrs. Jones, former wife of E. Johnson, the trustee, who testified that after the death of Richard Finnell she heard her husband say that "Dick Finnell's (108) money paid for the land." Plaintiff also introduced one Thompson, who testified that he "heard Eldridge Johnson (the trustee) say that he held the land for Mary Ann Finnell, but that Richard Finnell's money paid for the land." This witness further testified that he knew Mrs. Finnell and did not think she had any money. This evidence was all objected to by the defendant, but allowed by the court. Upon this evidence the plaintiff rested his case, and "defendant demurred to the plaintiff's evidence and moved for judgment, as in case of nonsuit."

Defendant's motion was allowed, and plaintiff appealed from the judgment pronounced.

The defendant's exceptions to evidence cannot be considered, for the reason that he did not appeal.

The plaintiff contends that the deed from Rogers to Johnson only declared a trust in Mrs. Finnell for life, and that this evidence proved, or tended to prove, that Richard Finnell, under whom he claims, paid the purchase-money, and that upon the death of Mrs. Finnell he became

the owner of this land as the presumptive or resulting *cestui que trust,* and that it was error in the court not to submit an issue to the jury as to whether Richard Finnell paid the purchase-money or not.

We cannot say that this evidence (its admissibility being out of the way) did not *tend* to prove that Richard Finnell paid the purchase-money. Therefore, if it was material for the plaintiff to prove that Richard paid the purchase-money, there was error in the court not to submit it to the jury.

There is no question but what the deed from Rogers to Eldridge Johnson conveyed the legal estate in fee simple, and that a trust was declared in favor of Mrs. Finnell. But whether that trust was in fee
(109) simple or for her life only, is the principal question in the case.

The general rule is, that trust estates are governed by the same rules and limitations that legal estates are. But it is said that there are some exceptions to this general rule. *Holmes v. Holmes,* 86 N. C., 205. In that case the legal estate was conveyed in fee simple to trustees "in trust for Sarah Moore," and it was held that this created a fee-simple trust estate in Sarah. If this case is controlled by *Holmes v. Holmes,* Mrs. Finnell had the fee-simple estate, and the plaintiff cannot recover.

But the plaintiff says that this case is not controlled by *Holmes v. Holmes;* that the terms creating the trust in this case differ from those contained in that case; that they are substantially the same as those creating the trust in *Levy v. Griffis,* 65 N. C., 236, and that this case is governed by *Levy v. Griffis.*

In *Levy v. Griffis* the legal estate is conveyed in fee simple to Briggs "in trust for the sole, separate and exclusive use and benefit of Caroline Nicholson, free from the control of her present or any future husband, *with the right of the said Caroline to dispose of the said piece or lot of land* to any person she may wish by *deed or appointment in writing in the nature of a will.*" Anderson Nicholson was the husband of Caroline when this deed was made, and paid the purchase-money. Anderson died intestate, and then Caroline died intestate without having made any disposition of said land. The plaintiff was a daughter of the said Anderson and his heir at law, and the defendant was a son of said Caroline and her heir at law. It was held that Caroline had only a life estate, coupled with a power of appointment, which she never exercised; and that, as Anderson paid the purchase-money, the trust "resulted" to him, and the plaintiff, being his heir, was entitled to the land. If *Levy's case* controls the case under consideration, the plaintiff is entitled
(110) to the land.

It will be observed that the language used in the deed under consideration differs to some extent from that used in *Holmes v. Holmes,* and also from that used in *Levy v. Griffis.* In *Holmes' case* the declara-

tion of the trust was simply "to Sarah Moore," and this was held to pass the fee simple. In *Levy's case* it was to the separate use and benefit of Caroline Nicholson, free from the control of her present or future husband, with the power to dispose of the fee simple in writing, as by will. It will be seen that the trust estate in Caroline is limited to a life estate by giving her the power to convey the estate in fee simple by deed, or in writing, as by will. This power of appointment is inconsistent with the idea that she was the fee-simple owner, and by implication limits the trust estate to an estate for life.

In the case under consideration the fee simple in the legal estate is conveyed to the trustee, Johnson, "to hold the same for the sole and separate use of Mary Ann Finnell, wife of Richard Finnell, and to *allow her* to live upon the same, or retain the rents and profits thereof, free from the interest of her present or any future husband, as completely as if she were *feme sole,* and to sell and reinvest the proceeds in other personal and real estate, to be held upon the same terms and trust as specified herein, and no other."

This declaration of trust to Mrs. Finnell contains more words than are contained in the declaration of "trust to Sarah Moore" in *Holmes v. Holmes.* But none of them, by construction or implication, in any way limit her estate. She is to do nothing. Whatever is to be done is to be done by the trustee, and not by her. The trustee may allow her to live upon the trust estate, to receive the rents and profits, and the trustee may sell and reinvest in other properties, but he is to hold the new estate (if a sale and reinvestment should take place) under the (111) same trusts and conditions as the original trust, and no other.

As we find nothing in this deed to limit the trust estate to Mrs. Finnell, it seems to us that it falls within the rule declaring the trust estate in *Holmes v. Holmes,* and is governed by that case. This being so, Richard Finnell had no estate to convey to the plaintiff, and the judgment of the court below is

AFFIRMED.

B. C. BECKWITH, R. B. BECKWITH, SUE W. BECKWITH, J. W. THACKSTON AND WIFE, AND E. W. POU AND JAMES H. POU, EX PARTE.

(Decided 7 March, 1899.)

*Practice—Questions of Fact—Costs—Witnesses Under Section 1370 of The Code.*

1. In an *ex parte* proceeding for partition, an appeal by some of the parties from the decision of the clerk upon the report of commissioners, alleging inequality and unfairness in the allotment, involves questions of fact, properly determinable by the judge, under The Code, sec. 255.

2. Where, at the instance of some of the parties, without opposition from the rest, an issue as to the value of the respective shares was submitted to the jury, who sustained the report and the decision of the clerk upon the exceptions thereto, it was properly adjudged that the exceptants should pay the costs of the trial of the issue.

3. On motion by exceptants to retax the bill of costs so as not to include more than two witnesses as to value: *Held*, that the issue submitted was a complex one, involving the investigation of a multiplicity of single facts material to be ascertained, and to establish each of which two witnesses were allowable under The Code, sec. 1370.

(112) MOTION to retax bill of costs in a special proceeding *ex parte* for partition of land, made before *Bryan, J.*, at November Term, 1898, of JOHNSTON.

*B. C. Beckwith for appellant.*
*Simmons, Pou & Ward contra.*

MONTGOMERY, J. This was a special proceeding *ex parte*, commenced in the Superior Court of Johnston County, for the purpose of having partition made of certain lands among the petitioners according to their several interests. The exceptions of the appellants to the report of the commissioners for alleged unfairness in the partition and inequality in the shares were not sustained by the clerk, the report was confirmed, and the exceptants appealed from the clerk's decision to
(113) the judge of the Superior Court. At the request of the appellants, the other petitioners in the original proceeding making no objection, the judge ordered the proceeding to be docketed on the trial docket of Johnston Superior Court for the purpose of having ascertained, by the verdict of a jury, whether the share allotted to the appellants was their full share in value of the lands described in the partition. Upon the evidence offered, the jury found the question submitted to them

in the affirmative, and the court taxed the appellants with all of the costs arising out of their exceptions to the report of the second set of commissioners. The appellants, at a subsequent term of the court, made a motion to retax the bill of costs, the clerk having made it out according to the directions of the court.

The basis of the motion was the allegation that all of the witnesses of the appellees were subpœnaed to give testimony on a single point—the value of the lots of land—and that, therefore, no more than two witnesses could be allowed to prove against the appellants, under section 1370 of The Code. The motion was heard and overruled by the court, and the bill of costs as made out was approved and confirmed. In the order to that effect it was stated by his Honor that no greater number of witnesses were examined by the appellees than were necessary, and that such of them as were not examined were sworn and tendered to the appellants.

The construction of the proviso of section 1370 of The Code, which is in the following language: *"Provided,* that the party cast shall not be obliged to pay for more than two witnesses to prove a single fact," is the matter before us for decision. And, first, it is in place to say that the matter which was carried before the judge in chambers, on the appeal from the clerk, was not such an *issue* of fact as is referred to in section 256 of The Code, but was a *question of fact,* and, therefore, that the verdict of the jury was simply a method of determining a ques- (114) tion of fact which the judge had adopted by an order made at chambers at the request of the appellants and without objection on the part of the appellees.

There were no issues of any kind raised by the pleadings, for they were *ex parte,* as we have said; the same relief was demanded, and the matter of the fairness of the partition made by the commissioners was a question of fact, to be in the first instance decided by the clerk, subject to review by the judge on appeal from the clerk, under the first part of section 255 of The Code. *Ledbetter v. Pinner,* 120 N. C., 455.

The matter, then, which was submitted to the jury was of broader scope than the finding by them of a single isolated fact. There were three tracts of land and two town lots, the subject of the partition, and to arrive at the value of the share allotted to the appellants, the value of each tract and lot had to be ascertained upon evidence adduced for that purpose. In such an investigation a multiplicity of single facts might be necessary to be proved, and on the investigation in this matter it appears from the case on appeal that the appellees, in reply to the testimony of the witnesses for the appellants, offered evidence as to each and every tract of land, as to the timber, buildings, rental value and prospective value of the town lots. The evidence under each one of these

heads was material matter, to be gone into before a correct conclusion could be arrived at by the jury as to the value of the appellant's share.

His Honor having certified in his order overruling the motion to retax the costs, that the witnesses examined and those tendered by the appellees were no greater in number than were necessary for the purpose (115) of the trial, and the examination appearing from the record to have extended into various matters of single facts, all material to the question at issue, we are of the opinion that, under the statute (The Code, sec. 1370), the appellees ought to be allowed against the appellants as many as two witnesses introduced to prove each single fact necessary to give to the jury such information as would enable them intelligently to answer the question submitted to them for their determination. No more than that number appear to have been subpœnaed by the appellees.

Of course, the trial judge will always see to it that such evidence is not introduced for merely cumulative effect and for the oppression of the party cast. It is in his power, and always has been, in judicial proceedings in this State, to see to it that no oppression in the way of excessive cost bills is practiced by successful litigants upon the party cast.

We can find no direct authority in our reports as applicable to the facts in this case. In connection with the matter, however, the cases of *Wooley v. Robinson,* 52 N. C., 30, and *Holmes v. Johnson,* 33 N. C., 55, may be read with interest as having an indirect bearing.

We feel it necessary to say that we cannot commend the course of his Honor in calling in the aid of a jury to decide a question which he, by law, was required to decide himself, and we must think that there were strong reasons which induced him to make such a departure from the usual course of practice, although they do not appear of record.

AFFIRMED.

*Cited: Mills v. McDaniel,* 161 N. C., 115; *Perry v. Perry,* 179 N. C., 448.

(116)

COMMONWEALTH MUTUAL FIRE INSURANCE COMPANY, W. B. STEVENS, RECEIVER, v. EDWARDS & BROUGHTON.

(Decided 7 March, 1899.)

*Foreign Corporations—Receivers—Assessments—Statute of Limitations—Demurrer.*

1. The statute of limitations is available as a defense only by answer. The Code, sec. 138. The rule does not apply to possessory titles, which are more in the nature of presumptions than strict limitations.

2. A foreign fire insurance company must take out license and comply with the requirements of section 3062 of The Code before doing business in this State; otherwise, it cannot maintain an action for any assessment or other liability arising under the policy. Such action is demurrable.

3. When such foreign corporation has complied with our laws, our courts are open to it for the enforcement of its rights; and should it become insolvent and pass into the hands of a receiver, he, by comity, will be allowed to sue here to enforce the liability of a policyholder.

4. Where a citizen of this State applies for a policy in a foreign company through a broker here, and the application is accepted and the policy is delivered, the broker will be deemed to be the agent of the company and the contract to be made here, subject to the laws of this State. Laws 1893, ch. 299, sec. 8.

ACTION instituted in the justice's court of WAKE to enforce assessments upon two policies of insurance. There were written pleadings, complaint and demurrer. The demurrer was sustained and an appeal taken to the Superior Court and tried before *Brown, J.,* 2 February, 1899, who overruled the demurrer, with leave to the defendants to answer. The defendants appealed.

The principal grounds of the complaint and demurrer are stated in the opinion. (117)

*J. W. Hinsdale and Perrin Busbee for plaintiffs.*
*Douglass & Simms for defendants.*

DOUGLAS, J. This is an action brought by the receiver of a mutual insurance company for the collection of certain assessments upon the defendants, levied under a decree of the Superior Judicial Court of the State of Massachusetts. The case comes before us on demurrer. This disposes *in limine* of all statutes of limitation, which, in cases like the present, can be availed of only by answer. The Code, sec. 138;

*Guthrie v. Bacon,* 107 N. C., 337; *Randolph v. Randolph, ib.,* 506; *Albertson v. Terry,* 109 N. C., 8. This rule, however, does not apply to possessory titles, which are more in the nature of presumptions than strict limitations. *Freeman v. Sprague,* 82 N. C., 366; *Asbury v. Fair,* 111 N. C., 251.

The following allegations appearing in the complaint must be taken as facts for the purposes of this appeal: The plaintiff corporation issues to the defendants two policies of fire insurance—one for $2,000, dated 29 June, 1894, and the other for $3,000, dated 14 July, 1894. It was stipulated in the policies that the insured should pay, in addition to the cash premium, all such sums as might be lawfully assessed by the directors of said company, but not to exceed three times the amount of said cash premium. The present assessments are within the limit. The policies were obtained and delivered through a local agent, denominated a broker by the plaintiff, but whose legal status, as between the parties,

is a question of law on admitted facts. On 19 March, 1895, suit
(118) was brought by the Insurance Commissioner of Massachusetts to

wind up the affairs of the plaintiff company, and on 28 May, 1895, the plaintiff, Stevens, was appointed receiver, to whom the company, on 7 March, 1896, executed an assignment of all its assets. After the institution of the suit, to wit, on 7 March, 1896, the directors of the plaintiff corporation, in accordance with a decree in the cause, levied "an assessment of $250,000 upon the former and present members of the corporation liable thereto, the same being necessary for the payment of losses incurred after the issue of the policies held by the members of the said corporation and before their respective expiration or cancellation, and while the said defendants and the other policyholders against whom the said assessment was made were members of said corporation, and the expenses of collecting and the expenses of the receivership for which the defendants, together with the other policyholders and members, were liable." It is further alleged that all the proceedings were had in all respects in conformity to sections 47 and 49, chapter 522, Laws 1894, of Massachusetts, which, in the absence of an answer, we presume, govern the proceedings in such cases.

There are other allegations in amplification of the above, and also as to notice, individual assessment and nonpayment, with the important averment that the plaintiff corporation complied with the requirements of section 3062 of The Code of North Carolina and received license to transact the business of fire insurance on 2 July, 1894. This was subsequent to the issuing of the first policy, but previous to the second policy.

The learned counsel for the plaintiffs say in their brief that "If policy No. 4214, dated 29 June, 1894, were made in North Carolina, of course

it would be void and the assessment could not be collected." We (119) think that in contemplation of law it was made in North Carolina, and that the broker, in taking the application for the policies, acted as the agent of the plaintiff corporation. Section 8, chapter 299, Laws 1893, provides that "all contracts of insurance, the application for which is taken within the State, shall be deemed to have been made within this State and subject to the laws thereof." Therefore the plaintiffs cannot maintain their action for any assessment or other liability arising under the policy dated 29 June, 1894.

Our attention has been called to chapter 383, Laws 1889, allowing any citizen of this State to contract on his own account for insurance with any company doing an insurance business outside of the State, and allowing the company *to be sued* and to adjust the loss without being subject to penalties for taxes. We do not question the right of any citizen to apply outside the State for insurance, but in the present case the application was made within the State, and therefore subject to the act of 1893. The act of 1889 allows an outside company, that is, one that has not complied with our laws, to be sued, but not to sue. Its evident purpose was to allow such companies to adjust their fire losses without thereby making themselves liable for penalties or taxes. It certainly never intended to permit such companies to practically nullify our insurance laws by the legal fiction of doing business through a broker instead of an agent. To do so would ultimately turn over our vast insurance business to foreign corporations whose solvency we had no means of ascertaining, and who not only contributed nothing to our revenues, but who ignored our laws and were practically beyond our jurisdiction. Our insurance laws, applicable equally to domestic and to foreign corporations, are intended not simply for purposes of revenue, but primarily for the protection of our people. (120) The vast bulk of insured property is never burned, and those who continue to pay their premiums for perhaps a long series of years with no resulting loss or profit beyond the feeling of protection, have the right to demand the fullest security. In the case at bar the plaintiff corporation admitted its insolvency within less than ten months after it issued its policies to the defendants, and it was then apparently worth $250,000 less than nothing. When or how it became insolvent, if it were ever solvent, we have no means of knowing. In the light of these facts, can there be any question as to the justice or policy of our insurance laws?

The prevailing tendency to corporate absorption cannot be ignored, and it is the increasing duty of the State, while giving to all corporations the equal protection of its laws, to equally protect its citizens against corporate abuses. There should be no prejudice against cor-

porations simply because they are corporations. They are not outlaws, but are the creatures of the law, and are not only capable of becoming the most powerful agencies of civilization, but have become absolutely necessary in our present stage of material development. They can be justly condemned only when their powers are abused, but in proportion as their powers are greater than those of an individual, they are more liable to abuse and should be more carefully guarded. One of their great dangers is the risk of insolvency arising from the want of any personal liability of their stockholders, and the uncertain and perhaps fictitious nature of their assets. Some are afflicted with what may be called *congenital* insolvency. They are born insolvent, capitalized into insolvency at the moment of their creation, and eke out a precarious existence in an apparent effort to solve the old paradox of living on the interest of their debts. Such corporations are not only intrinsi-
(121) cally dangerous, but lay the foundation for an unjust suspicion of all other corporate bodies.

The State of North Carolina extends to all foreign corporations a cordial welcome, with the fullest measure of domestic equality, and with her rests the right and the duty of requiring them to comply with such reasonable regulations as may be necessary for the protection of her own people. In upholding such laws we are influenced not only by the letter of the statute, but equally so by the highest principles of justice and of public policy.

This finally disposes of the first policy of insurance, but as to the second policy we think a sufficient cause of action has been stated in the complaint. There are twenty-three stated grounds of demurrer, but as many of them are in the nature of defenses that can be set up only by answer, while others present different views of the same question, it is not necessary to consider them separately.

At this stage of the case we must assume that the suit in Massachusetts was properly conducted, and we see no reason why the courts of this State should not wind up the affairs of its own insolvent corporation. Nor is there any objection to the receiver of a foreign court suing in the courts of this State. What may be the result of that suit is a different matter, but he will be given a hearing. It is true that in *Kruger v. Bank,* 123 N. C., 16, we thought that it was too severe a strain upon the law of comity to permit a foreign receiver, refusing to become a party to the action, to enter a special appearance simply for the purpose of obstructing the administration of our laws and defeating the rights of our citizens. Such is not the case before us. The complaint substantially alleges that the assessment was necessarily and properly levied to meet obligations while the policy of the defendants was
(122) in force. In the absence of any denial this would entitle the

plaintiffs to recover as to the second policy. What defensive facts may be set up in the answer we do not know, and we cannot now properly determine how far the defendants may attack the amount of validity of their individual assessment. There is no merit in the contention of the defendants that the second policy is void under section 6, chapter 299, Laws, 1893, because it provided for assessments. The standard policy specifically permits such necessary alterations in the case of assessment companies, and the act of 1895 was not intended to exclude, by indirection, assessment companies who had otherwise complied with our laws. Its purpose was, as stated in *Horton v. Ins. Co.*, 122 N. C., 498, 507, "to have a uniform policy which would eventually become familiar to our people, and by repeated adjudications acquire a settled meaning."

For the reasons stated above the demurrer should have been sustained as to the first policy. With this modification, the judgment of the court below overruling the demurrer is affirmed, but in view of the modification the costs in this Court will be equally divided between the parties.

MODIFIED AND AFFIRMED.

FAIRCLOTH, C. J., dissents.

*Cited: Person v. Leary,* 127 N. C., 115; *Lacy v. B. & L. Assn.,* 132 N. C., 132; *Lacy v. Packing Co.,* 134 N. C., 571; *Abernathy v. R. R.,* 159 N. C., 343; *Hay v. Ins. Co.,* 167 N. C., 85; *Williams v. Order of Heptasophs,* 172 N. C., 789.

(123)

## M. F. PHILLIPS v. SOUTHERN RAILWAY COMPANY.

(Decided 7 March, 1899.)

*Carrier and Passengers—Railroad Regulations.*

1. It is the coming to the station within a reasonable time, with the *intention* to take the next train, and not the purchase of a ticket (which is merely evidence of the intention), that creates the relation of passenger and carrier.

2. Railroads have reasonable control over their waiting-rooms and the right to establish regulations for the opening and closing of the same—they are not lodging places.

3. A regulation which requires the opening of the waiting-rooms not less than thirty minutes before the arrival of trains, and their closing after the

departure of trains, is a reasonable regulation for the accommodation of passengers; the case of delayed trains and through passengers might form exceptions to the rule.

ACTION to recover damages, alleged to have been occasioned by the wrongful ejection of the plaintiff from the depot waiting-room, at Asheville by defendant, tried before *Green, J.*, at May Term, 1898, of HENDERSON.

(124) *T. J. Rickman for plaintiff.*

*G. F. Bason, F. H. Busbee and A. B. Andrews, Jr., for defendant.*

FUECHES, J. On 15 December, 1896, the plaintiff, intending to take the next train on defendant's road to Hot Springs, in Madison County, entered the defendant's waiting-room at Asheville about 8 o'clock at night, with the intention of remaining there until the departure of the next train on defendant's road for Hot Springs, which would leave at 1:20 o'clock the next morning. He was informed by defendant's agent, in charge of the waiting-room, that according to the rules of the company, she must close the room and that he would have to get out. The plaintiff protested against this, and refused to leave.

But when the clerk of defendant's baggage department (Graham) came and told him that he could not stay, and made demonstrations as if he would put him out, he left; that he had no place to go where (125) he could be comfortable; that the night was cold; that he was thinly clad and suffered very much from this exposure, and took violent cold therefrom, which ran into a spell of sickness from which his health has been permanently injured.

It was in evidence, and not disputed, that the rules of defendant company required the waiting-room to be closed after the departure of defendant's train, and to remain closed until thirty minutes before the departure of its next train; that, under this rule of the defendant, it was time to close the waiting-room when the plaintiff was ordered to leave the room, and he was informed that it would not be opened again until thirty minutes before the departure of defendant's next train at 1:20 o'clock the next morning.

The plaintiff contended that he had purchased a ticket from Asheville to Hot Springs before he entered the waiting-room, which he showed to the keeper of room at the time he was ordered out. This was denied by defendant.

The defendant asked in writing a great number of instructions which were not given. Among these was the following: "If the jury believe

the evidence, the answer to the first issue should be 'No.'" The first issue was as follows: "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?"

The court, among other things, charged the jury that if the plaintiff bought a ticket to take passage on the next train, he had a right to remain in the waiting-room until that train left, and if the jury found from the evidence that plaintiff had bought a ticket and exhibited it, as he alleges he did, he is entitled to recover actual damages, but not punitive damages. To that part of the charge referring to the purchase of the ticket and plaintiff's right to remain in the waiting-room, the defendant excepted.

We are of opinion that both these exceptions are well taken, (126) but it is not necessary that we should discuss them both. If either one of them is sustained, it is substantially an end to the plaintiff's case. In fact, the discussion of the one involves the other.

A party coming to the railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, providing that his coming is within reasonable time before the time for departure of said train. To constitute him such passenger it is not necessary that he should have purchased his ticket, as seems to have been considered by his Honor. 1 Fetter on Carriers of Passengers, sec. 228. But the purchase of the ticket would probably be considered the highest evidence of his intention. But still, it is his coming to the station within a reasonable time before, with the *intention* to take the next train, that creates the relation of passenger and carrier. There is no dispute but what the plaintiff intended to take the defendant's next train to Hot Springs, and we must infer from the charge of the court and the verdict of the jury that they found that plaintiff had purchased his ticket.

So the only question that remains is as to whether the defendant had the right to establish the rule for closing the waiting-room, and was the rule a reasonable one? And we are of the opinion that the defendant had the right to establish the rule and that it was a reasonable one. *Webster v. R. R.*, 161 Mass., 298; 1 Elliott Railroads, secs. 199 and 200; 4 Elliott Railroads, sec. 1579.

The rule would probably be different in the case of through passengers, and in the case of delayed trains; but if so, these would be exceptions and not the rule.

Waiting-rooms are not a part of the ordinary duties pertaining (127) to the rights of passengers and common carriers. But they are established by carriers as ancillaries to the business of carriers and for the accommodation of passengers, and not as a place of lodging and

accommodation for those who are not passengers. This being so, it must be that the carrier should have a reasonable control over the same, or it could not protect its passengers in said rooms. There is error.

NEW TRIAL.

*Cited: Coleman v. R. R.*, 138 N. C., 358; *Williams v. R. R.*, 144 N. C., 502; *Finch v. R. R.*, 151 N. C., 106; *Monroe v. R. R., ib.*, 377.

W. O. STRATFORD v. CITY OF GREENSBORO AND CAESAR CONE.

(Decided 7 March, 1899.)

*Municipal Powers—Public Use—Eminent Domain—Streets—Issues—Judge's Charge—Taxpayer—Property Owner.*

1. While there can be no objection, morally or legally, to a property owner contributing to the expense of laying out or altering streets in a town, because of the incidental benefit he may derive, still the projected improvement must be of a character required by public necessity and convenience.

2. By virtue of their delegated powers, municipal authorities have the right to open, grade and widen streets, and they are the sole judges of the necessity or expediency of exercising that right for public uses; but whether the appropriation of a private property is for public use or for private gain, is a matter for the courts to decide; whether a particular use is public or not, is a question for the judiciary.

3. A resident taxpayer has a sufficient interest in the subject to invoke the courts to prevent an illegal disposition of public funds, or the illegal creation of a public debt, or to prevent the misuse of corporate power.

4. Where the substantial benefit is for the individual and the public benefit merely incidental or prospective, the proceedings of a municipal board is *ultra vires* and void.

5. In such cases an issue should be submitted to a jury, with instruction from the court as to what constitutes a public use.

(128) ACTION by a taxpayer, resident of Greensboro, to enjoin the city authorities from opening, widening, grading, curbing and macadamizing certain streets in Greensboro, and building an iron bridge across the Piedmont Railroad, and from borrowing $15,000 to be used for such purposes; also to restrain defendant Cone from lending them the money, upon the alleged ground that the proposed action by the

board was not undertaken for the benefit of the public, but at the instance and for the private benefit of said Cone, a large landed proprietor of city property. The case was tried before *Robinson, J.*, at June Term, 1898, of GUILFORD, and is fully stated in the opinion.

There was a verdict and judgment for the defendants and appeal by plaintiff.

*James T. Morehead for plaintiff.*
*Bynum & Taylor, R. R. King and Shaw & Scales for defendants.*

MONTGOMERY, J. At the time of the commencement of this action the defendant Cone was the owner of about sixteen hundred acres of land (less that part of it which he had sold to the Cone Export and Commission Company, of New York, in which company he was a stockholder), situated on the north and northeast of the city of Greensboro and lying partly within the corporate limits of the city, that part lying within the city limits containing between three hundred and five hundred acres. That property was connected with the city by the street, Summit Avenue. On 21 and 24 January, 1896, the board of aldermen of Greensboro made an order that a portion of Church Street be widened and then extended as a new street from Lindsay Street in a northeasterly direction to and on the line of Summit Avenue, and then over said avenue (129) as at first laid out to the corporate limits of the city, and that the strip of land necessary for the street be condemned according to law. On 7 February following the board made an order providing for the borrowing of a sum of money not exceeding $15,000 for the purpose of opening and building the streets referred to in the orders of 21 and 24 January, 1896, and repairing other streets and other public improvements in the city, and also for an election to be held for the purpose of submitting the question of the creation of the debt to the qualified voters of the city.

The plaintiff, a resident and taxpayer of Greensboro, brought this action to have these orders made by the board declared *ultra vires* and void; that the defendant board of aldermen be perpetually enjoined and restrained from holding the election and from opening the streets, and that defendant Cone be restrained from lending to his codefendant, the city of Greensboro, the money with which to grade and macadamize, curb and bridge the street, to be called Summit Avenue. In the complaint the plaintiff alleges that the opening and making of the new street and the widening of Church Street are not necessary and not required for the public use of the city, but on the contrary that they were to be made for the private use and benefit of defendant Cone; that such benefits as might accrue to the city were only incidental, and that the alder-

men had entered into a contract with defendant Cone to make the orders concerning the opening of the streets by which many private advantages would accrue to him upon his paying to the owners of the condemned lands the assessed or agreed damages, all of which are set out in paragraph five of the complaint, which is in the following language: "That in order to carry out his wishes of improving his property out-
(130) lying in the city limits, and other personal and private advantages to be gained thereby, he and his codefendant, the city of Greensboro, acting through its mayor and aldermen have entered into a contract in which it is agreed that Cone shall pay for the right of way over the land of the property holders, except that of the First Presbyterian Church, over which said proposed Summit Avenue will run, to build ten houses (whether cheap cottages for operatives or other kind of houses the plaintiff does not know, as nothing in said contract discloses), on his property lying within the city limits, and to move to Greensboro the offices of the Cone Export and Commission Company, a foreign corporation, which pays no taxes to the State, county or city, and to lend to the city the money sufficient at 6 per cent per annum, payable semiannually, to perform its part of the contract, and the city is to at once grade and macadamize, ditch and curb said street, from North Elm Street to the corporate limits, and to build an iron bridge over the track of the Southern Railway, which said street crosses."

The plaintiff further alleged that the defendant city was not authorized in law to take the property of its citizens for private use, although by such a course incidental benefit might accrue to the city, and that all of the acts done and threatened to be done under the orders of the board, made in reference to the opening and widening of these streets, were *ultra vires.*

The judgment prayed for by plaintiff was that the alleged contract, and the action of the board in condemning the lands for the new street, be declared unlawful and *ultra vires,* that its action looking to the borrowing of money from Cone for the purposes alleged in the complaint is unlawful, and that defendants be restrained from further proceedings in the matter.

(131) In their several answers the defendants aver that the proceedings of the board were in good faith, that the opening of the new street and the widening of Church Street were necessary and for the public benefit, and that of these matters the determination of the board was final. In the answer of the city, however, to paragraph five of the complaint, the contract alleged by the plaintiff as having been made between the city and Cone is denied, out and out, while Cone in his answer avers that the contract was made as set out by the plaintiff in paragraph five of the complaint, and that he was ready then to comply with it in

every respect. This contradiction in the two answers is so apparent as to attract attention. If it was the only fact connected with the transaction in reference to the connection Cone had with the enterprise, the contract would not be material. There can be no objection to the contributing of an individual to the expense of laying out or altering a street, nor will such an act prove that the property was taken for the accommodation of private individuals and not for public use. If in point of fact the public necessity and convenience require the improvement of a street or the opening of one, it can make no difference who pays the damages of condemnation. It might be that a party contributing a part or the whole of the assessed damages in the condemnation of land for a public street when the public necessity requires such street, might have lands adjacent which might be improved by the opening of the street, and surely if nothing else appeared it would not be either immoral or illegal for him to pay the damages growing out of the condemnation proceedings. *R. R. v. Naperville,* 169 Ill., 25; *Parks v. Boston* (8 Pick., 218), 19. Am. Dec., 322. But the contradiction in the answers was significant. The following were the issues submitted to the jury:

1. Was the resolution passed by the board of aldermen of the (132) city of Greensboro at its meeting on 21 January, 1896, for the purpose of widening Church Street and opening Summit Avenue, the result of a colorable collusion between said board and Cæsar Cone or any other person?

2. Has said street been opened?

3. Has the money, to restrain the borrowing of which this suit was instituted, been borrowed?

The plaintiff excepted to the issues. The exception to the first issue ought to have been sustained. It was framed on the view that in all cases where municipal authorities proceed to open and build new streets, having authority so to do in their charter or general law, such proceedings cannot be made the subject of judicial investigation except in cases of *actual* fraud. That is an erroneous view of the law in such cases. In cases where the municipal authorities are empowered by the general law, or by their charters, as in this case, to open up, grade and pave streets, the *expediency* or *necessity* of doing so, and the power of exercising the right of eminent domain, condemning the private property of the citizen for that purpose, are entirely within the determination of the corporate body, and their action is conclusive against judicial interference, since such a question is not judicial; it is political. 2 Dillon Mun. Corp., sec. 600. When the use is public, the necessity of expediency of appropriating any particular property is not a subject of judicial cognizance. Lewis Em. Domain, sec. 238; *Boom v. Patterson,* 98 U. S., 403; *Brodnax v. Groom,* 64 N. C., 244; *Vaughan v. Comrs.,* 117 N. C., 434. It is

also true that municipal authority, when lawfully exercising the power of condemning private lands for the public use, do and must determine, in the first instance, that the use to which they intend the land is *public use.* But that decision is not conclusive. But whether the use of
(133) the property which the delegated legislative authority has declared to be a public use *be such a use* as would sustain the authorities in taking, against the will of the owner, his property, is a judicial question. If the taking be in fact for the purpose of private use, if the basis of condemnation be the benefit of an individual and not the public interest and convenience, the courts cannot be concluded by the action of legislative authority from exercising jurisdiction in determining whether the use is a *public* use or one for *private* gain and advantage. 2 Dillon, *supra,* sec. 600; *Call v. Wilkesboro,* 115 N. C., 337. All the courts, we believe, concur in holding that whether a particular use is public or not within the meaning of the Constitution, is a question for the judiciary. Lewis, *supra,* sec. 158; Cooley on Taxation, 110, 120; *Clark v. Sanders,* 74 Mich., 692.

But the defendants contend that even if the question, whether the use for which private property has been taken is a public use, is a matter for judicial determination, the plaintiff is not the proper person to raise that question, for the reason that he was not the owner of any part of the land taken by the defendant corporation in the opening of the streets, and, therefore, he has suffered no injury on account of that proceeding. It is certain, however, that in cases where the board of aldermen of a town or city have taken private property for private use under the claim of exercising the right of eminent domain for the public use, that a resident taxpayer may have his remedy in the courts against the proceedings and may have them declared *ultra vires* and void, thereby saving himself from the imposition of unjust and unlawful taxes that would be required to meet the expenses of such unlawful proceedings. If
(134) such rights were denied to exist against municipal corporations, then taxpayers and property owners who bear the burdens of government would not only be without remedy, but be liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities.

In *Crompton v. Vabriskie,* 101 U. S., 601, *Mr. Justice Field* said, in delivering the opinion of the Court, that "of the right of resident taxpayers to invoke the interposition of a Court of Equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases, and from the nature of the powers exercised by municipal corpora-

tions, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would be eminently proper for Courts of Equity to interfere, upon the application of the taxpayers of the county, to prevent the consummation of a wrong when the officers of these corporations assume, in excess of their powers, to create burdens upon property holders. Certainly in the absence of legislation restricting the right to interefere in such cases to public officers of the State or the county, there would seem to be no substantial reason why a bill, by or on behalf of individual taxpayers, should not be entertained to prevent the misuse of corporate power."

In *Baltimore v. Gill,* 31 Md., 375, it was held that resident taxpayers could restrain the corporation and its officers from taking steps to carry out a city ordinance creating a debt and a violation of the Constitution.

In the case before us, the main question raised by the pleadings was whether the use, to which the new street and improvements were to be devoted, was a public use. It was not necessary on the part of the plaintiff to allege or prove actual fraud in the transaction. If the substantial benefit was for the defendant Cone as an individual, and (135) the benefit to the city only incidental and purely prospective, then the proceedings of the board were *ultra vires* and void. An issue should therefore have been submitted as to whether the action of the board, in making the orders and carrying them out, was for the public benefit, and whether the lands condemned were for public use; and upon that issue the court should have instructed the jury in the law as to what constitutes a public use. In addition, the language of the issue that was submitted was doubtful as to its meaning, and it was submitted without instruction except that if the jury believed the plaintiff's evidence they should answer it "No." There was evidence of the plaintiff going to show that the basis of the orders and acts of the board of aldermen was the private benefit of Cone, and the instruction was erroneous even if the issue had been properly framed and submitted.

There was error, for which there must be a

NEW TRIAL.

*Cited: Trustees v. Realty Co.,* 134 N. C., 48; *Glenn v. Comrs.,* 139 N. C., 418; *Trotter v. Franklin,* 146 N. C., 555; *Howell v. Howell,* 151 N. C., 579; *Jeffress v. Greenville,* 154 N. C., 498; *Bennett v. R. R.,* 170 N. C., 391; *Edwards v. Comrs., ib.,* 451; *Cobb v. R. R.,* 172 N. C., 61; *Comrs. v. Raeford,* 178 N. C., 339; *Allen v. Reidsville, ib.,* 532, 533.

(136)

H. B. PARKS v. SOUTHERN RAILWAY COMPANY.

(Decided 7 March, 1899.)

*Negligence—Contributory Negligence.*

1. Where the evidence is conflicting upon the issues of negligence by defendant and of contributory negligence by plaintiff, they both become questions for the decision of the jury, under proper instructions from the court.

2. Where such was the character of the evidence, special instructions asked for by the defendant—"That if the jury believe the evidence, the answer to the first issue (as to negligence) should be 'No,' and the answer to the second issue (as to contributory negligence) should be, 'Yes' "—were properly declined by the court.

ACTION for damages, alleged to have been sustained by the plaintiff through the negligence of the defendant in allowing its roadbed, where it crossed the public road at Harrisburg in Cabarrus County, to be in a dangerous condition, without warning, whereby he was unable to get over while attempting to cross with his mule and buggy, and was forced to jump out in order to save himself, upon the approach of a train, and was seriously injured in the fall.

Case tried before *Allen, J.*, at July Term, 1898, of CABARRUS.

*Burwell, Walker & Cansler for plaintiff.*

(148) *G. F. Bason, F. H. Busbee and A. B. Andrews, Jr., for defendant (appellant).*

(149) FURCHES, J. This is an action for damages received by the plaintiff at Harrisburg, Cabarrus County. The plaintiff was driving in a buggy drawn by a mule, and was intending to cross the defendant's road upon the public highway, which crossed defendant's road at that point.

The defendant was engaged at that time in repairing its roadbed at the point where the public highway crossed it, and in so doing had dug a trench along its track and across the public highway, and had thrown a pile of dirt from the ditch or excavation into the public road. But plaintiff alleges that this excavation was so made, and the dirt so thrown, that he could not see it until he got on defendant's road, and did not know it was there until he was on defendant's road; that he saw defendant's train coming before he went upon its road, and had plenty of time to have crossed in safety but for the obstruction mentioned, put there by defendant, which frightened his mule and caused it to become

unmanageable; that he was in plain view of the approaching train, and was seen or could easily have been seen by the engineman, after it was plainly apparent that his mule was unmanageable, in time for defendant to have stopped its train; that finding the defendant's train was not going to stop, as it approached at great speed, the plaintiff leaped from his buggy and was badly injured.

Defendant admits that it was at work repairing and removing its track and roadbed, which it says it had the right to do, and although there was a small excavation across the public road and some dirt thrown up in the road, it might easily have been seen by the plaintiff, and would have been seen by him but for the fact that he was running a race with the defendant's train to get across the track before the train reached the crossing; that the train was in full view of plaintiff, and that it was his own fault and negligence to undertake to cross the track when he did; that defendant was guilty of no negligence, but plaintiff was, and cannot recover damages for his injury. The (150) following issues were submitted without objection:

1. "Was the plaintiff injured by the negligence of the defendant?"

2. "Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?"

3. "If the plaintiff by his own negligence contributed to his injury, could the defendant, notwithstanding the negligence of the plaintiff, have prevented the injury to the plaintiff by the exercise of care on its part?"

4. "What damage is plaintiff entitled to recover?"

The jury answered the first issue "Yes," the second issue "No," and the fourth "$2,000." The third issue was not answered, under the direction of the court, as it became immaterial upon the first issue being answered "Yes" and the second "No."

It is not contended but what there was evidence tending to prove the issues passed upon by the jury, and the verdict and judgment must stand unless there was error committed by the court in not charging the law as requested by the defendant, or in erroneously charging the law as claimed by the exceptions of the defendant.

The defendant took and noted more than thirty exceptions to his Honor's charge, which are presented by the record and case on appeal. All these exceptions have been carefully considered by the Court. But defendant, in its brief (while not formally abandoning any of them) discusses only the first and seventh exceptions, which are prayers for instructions on the part of the defendant, and they are as follows:

1. "If the jury believe the evidence, the answer to the first issue should be 'No.'"

7. "If the jury believe the evidence, the answer to the second issue should be 'Yes.'"

(151) The first issue is as to whether the defendant was guilty of negligence, and the seventh is as to whether the plaintiff was guilty of contributory negligence.

From the evidence in the case it is too plain for argument that neither of these exceptions can be sustained, and it seems that this would be an end of the case; but as we have said, although these two exceptions are the only ones called to our attention by the brief of defendant, we have carefully considered all of them, and find no error.

There is much learning displayed and many authorities cited in the brief, many of which have been examined by the Court. But we find that it is unnecessary to call any of them into requisition in deciding this appeal. It would be but to "thrash over old straw" without profit to the parties or to the profession.

NO ERROR.

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E. B. YANCEY ET AL., EX PARTE.

(Decided 14 March, 1899.)

*Devise—Life Tenant—Remaindermen—Order of Sale—Purchaser.*

1. Where there is a devise for life with remainder over to persons not *in esse*, the life tenant still living, the court cannot order a sale, because there can be no one before the court to represent the interest of the remaindermen.

2. It is otherwise, when all the remaindermen living are before the court—they represent a class, and when the gift is general, with no element of survivorship in it, those afterwards born are concluded by the action of the court upon those of the same class then before it—and the purchaser gets a good title.

(152) PETITION, *ex parte,* for sale of land for reinvestment. There was order of sale. Sale reported and heard before *Brown, J.,* at WAKE, February Term, 1899.

One of the purchasers, J. D. Boushall, upon notice, refused to complete his purchase, on the ground, alleged, that he did not buy a good title. The court adjudged otherwise, and required him to complete his purchase, to which ruling the purchaser excepted and appealed.

The point in issue related to a devise for life with remainder over, contained in the will of N. S. Harp.

The devise under consideration, and the circumstances of the case, are stated in the opinion.

*Shepherd & Busbee for appellees.*
*No counsel contra.*

FAIRCLOTH, C. J. N. S. Harp devised as follows: "All the residue of my estate, real and personal and mixed, I give and bequeath to my wife, Lucy H. Harp, during her natural life, and then in remainder to my daughter, Elodia Benton Yancey, wife of Thomas B. Yancey, during her *natural* life *and then to her children.*" Elodia and her children, some of whom are minors represented by their next friend, ask the court to order a sale of the land, and that the proceeds be invested under the direction of the court for their benefit. The purchaser of one lot declines to pay his bid, and raises the question whether the court has the power to order the sale, and that is the only question.

We are not considering whether Elodia acquired an estate in fee or for life only. She and her children are asking for a sale. The only suggested difficulty is that by possibility she may have other children, whose interest cannot now be sold. We think that appellant's contention is untenable. When the life tenant, still living, has no child, it has been held that the court has no power to order a sale of land (153) where it is limited in remainder to persons not *in esse,* because there can be no one before the court to represent their interest. *Watson v. Watson,* 56 N. C., 400; *Justice v. Guion,* 76 N. C., 442.

So also, if the devise was in remainder to *such children as should be living at the death of the life tenant* the court could not sell, for until that event it could not be known who would take. *Miller, ex parte,* 90 N. C., 625; *Williams v. Hassell,* 74 N. C., 434.

But when all the remaindermen living are before the court, they represent a *class,* and when the gift is general and there is no element of survivorship in it, it is otherwise, and by representation those who may afterwards be born are concluded by the action of the court upon those of the same class, then before it, and the purchaser at such sale will acquire a good title against after-born children of the same life tenant. *Irvin v. Clark,* 98 N. C., 437.

In *Williams v. Hassell, supra,* the Court said: "Suppose in the case before us the devise had been to the first takers for life, remainder to their children; that would take in all the children, as well as those born after the death of the testator as those born before, and in such case it may be that the born child might be allowed to represent the class." That supposed case is just what we now have before us.

The invesement will be made as the court may direct, and the cause is retained for further direction.

It is to the interest of our people that the title to property should be clogged as little as possible with "limitations," "trusts," etc., and public policy requires that the alienation of land should be as free from such condition as any article of traffic.

AFFIRMED.

*Cited: Bullock v. Oil Co.,* 165 N. C., 66.

(154)

JOHN G. BRAGAW v. SUPREME LODGE KNIGHTS AND LADIES OF HONOR. (KENTUCKY CORPORATION.)

(Decided 14 March, 1899.)

*Service of Notice by Mail—Presumption—Judge's Charge.*

1. Where there is evidence tending to show that a notice, capable of service by mail, was enclosed in a letter, properly addressed to the proper party, with postage prepaid, and deposited in the postoffice—these are matters for the consideration of the jury, and if established to their satisfaction, there is a presumption that the notice was received, in the absence of evidence to the contrary—and this presumption amounts to *prima facie* proof of service of the notice.

2. Where his Honor correctly charges the law in such case, but afterwards uses expressions implying that notwithstanding this presumption, the question of service was still an open one for the jury—these expressions impair the force of his charge, are misleading and subject to exception.

ACTION upon a certificate of life insurance in the sum of $1,000, payable to the plaintiff upon the death of his wife, Annie C. Bragaw, tried before *Hoke, J.,* at Fall Term, 1898, of BEAUFORT.

The defendant was a corporation, under the laws of Kentucky, for benevolent and charitable purposes, and had subordinate lodges in other States, among them Pamlico Lodge, in Washington, N. C., of which the plaintiff and his wife became members. By its charter the defendant was empowered to issue certificates to participate in the relief fund of the order, payable at death to the beneficiary named therein upon compliance with certain conditions. The plaintiff was the beneficiary named in a certificate issued to his wife, and at her death brought this suit, on demand and refusal to pay. The defense was that the
(155) subordinate lodge of Pamlico had defaulted in meeting assessments or other stipulated engagements, and had been suspended by action of the Supreme Lodge, and that the requisite notice of the suspension had been properly served.

Plaintiff and wife had met their personal obligations, but Pamlico Lodge had defaulted and had been suspended.

There were numerous defenses taken by defendant and noted, to the charge as given and as refused, but for the purposes of this appeal they were winnowed down to the single question—whether proper notice of the suspension was served on Pamlico Lodge by the Supreme Lodge.

The evidence and charge relative to this question appear in the opinion and concurring opinion.

There was verdict and judgment for the plaintiff; appeal by defendant.

*John H. Small for plaintiff.*
*Charles F. Warren and J. L. Bridgers for defendant.*

FURCHES, J. While the law may have been properly stated in the charge of the court, it was done in such a way as to mislead the jury.

The case turned upon the question as to whether the local lodge had been served with notice of suspension by the Grand Lodge. And this seems to be the view taken by his Honor who tried the case. There was no evidence that such notice had been actually received by the local lodge, and the defendant relied on constructive notice. The defendant contended that it properly mailed a notice of suspension, and that this was constructive service upon the subordinate lodge, and that plaintiff had offered no evidence to rebut this presumption. This (156) seems to have been the way the court understood the law. But the evidence as to mailing the notice was not such as authorized the court to charge the jury, that if they believed the evidence the notice had been mailed, as the law required it should be, to create the presumption of service. And we think this question was properly left to the jury to find whether it was mailed or not. It seems to us that the court, in one part of the charge, sufficiently instructed the jury that, if the notice was properly addressed and put in the postoffice, with postage paid, then the law would presume a service.

But in a long charge, answering a great many prayers for instructions, he repeatedly said, "Was this notice served on Cherry? (the secretary). Did he receive it? This is the question." In this way, it seems to us, the jury were most likely left with the impression it was necessary for the defendant to show that Cherry actually received the notice. For this reason there ought to be a

NEW TRIAL.

FAIRCLOTH, C. J., concurring: The defendant was duly incorporated by the laws of the State of Kentucky to promote benevolence and charity

by establishing a relief fund for the relief of its members, and paying stipulated sums to their families in the event of death, when they have complied with the lawful requirements of the Supreme Lodge. It is authorized to permit the establishment of grand and subordinate lodges in different States, with power to prescribe by-laws and regulations for such lodges, to make assessments and receive dues from such lodges for the "relief fund." It has the power to suspend these subordinate lodges when they fail to comply with its laws and regulations. The
(157) organization and procedure of these lodges are prescribed in detail by the Supreme Lodge, and copies thereof furnished each lodge for its guidance, and among these it is provided that when the lodge receives money from its members in payment of assessments, and in all acts performed in complying with the laws of the relief fund, the subordinate lodge and its officers are the agents of the members and not the agents of the Supreme Lodge.

The subordinate lodges are required to hold frequent meetings and to report their acts and doings, and to remit assessed dues promptly to the Supreme Lodge, on pain of suspension for failure to perform the duties required by the regulations.

Pamlico Lodge, No. 715, organized at Washington, N. C., elected its officers, among them one Cherry as its secretary and financial secretary.

The plaintiff and his wife, Annie C., were members and paid their dues regularly to the said Cherry until her death, 5 July, 1895. The plaintiff now sues for the amount of her policy. According to the uncontradicted deposition of the supreme secretary of the Supreme Lodge, on 1 November, 1889, assessments Nos. 256 and 257 were sent to the Pamlico Lodge, pursuant to the regulations. These assessments were never paid, nor any since. About 20 December, 1889, in consequence of such failure, Pamlico Lodge, pursuant to regulations, was suspended by the Supreme Lodge, and notice thereof was caused to be issued and mailed to the secretary of said Pamlico Lodge, No. 715. This suspension is authorized by the laws and regulations, sec. 12 (3), page 36, for nonpayment of assessments, but the charter or dispensation shall not be forfeited until the subordinate lodge shall have been notified of its offense by the supreme or grand secretary. The supreme secretary of the Supreme Lodge says in his deposition: "I did cause a suspension notice to be issued and mailed to the secretary of said Pamlico Lodge, No. 715."

(158) The case, with the evidence, was submitted to the jury, and his Honor charged the jury at length. On reading the evidence introduced by both parties, it is manifest that the members of Pamlico Lodge were guilty of negligence in failing to perform their duties as

required by the regulations, and in failing to require their secretary to make reports to them. The financial secretary of Pamlico Lodge, Cherry, was guilty of gross negligence in failing to report and forward the moneys he had collected to the Supreme Lodge, and of gross negligence and bad faith to the members of his lodge in receiving their money and failing to account for it to either lodge.

C. M. Brown, plaintiff's witness, and a member of the lodge, testified: "Cherry left here a day or two after Mrs. Bragaw's death. No books were kept by him that I saw. No reports were made by him. No trustees supervised his conduct or received his report. It was left pretty much to Cherry to run it. We supposed he was accounting. He absconded and has not been found. After Cherry fled I looked for the books of the lodge at his place of business and failed to find them. No books of the lodge could be found in the hands of any one. If there was any examination of Cherry's books and accounts for several years prior to the death of Mrs. Bragaw, I do not know it. I don't know that Cherry gave any bond in that lodge."

The third issue was: "Was there a valid and proper suspension of the right of Pamlico Lodge to share in the relief fund at the time of the death of Annie C. Bragaw?" At the trial the question of notice of suspension became important and material. His Honor, after stating the contentions of the parties, told the jury: "In order to create a valid and proper suspension under this plan of organization and under the by-laws of the company, three things were necessary to be established on the part of the defendant. It must show that there was default on the part of the local lodge in its operation. It must show that suspen- (159) sion of the local lodge was declared by the Supreme Lodge before it becomes effective. Service by mail in this case is sufficient, provided it was *received by Cherry or the local lodge.* By reason of the default, and in order to make it efficient, it must show that a notice was *served* upon the subordinate lodge." He then said, if the evidence is believed, there was a default and suspension had been declared, and proceeds: "So that the question of suspension of the local lodge, its valid suspension, would turn on the question as to whether there had been a proper notice of that suspension and action of the Supreme Lodge *served* upon this local lodge." His Honor stated that it is a principle that if the paper was properly addressed, with postage prepaid, and was put in the office, there is a presumption that it reached the party to whom it was addressed, and that there would be no evidence here to show that he did not receive it; and further: "But with this fact in view I leave the jury to say whether this notice was *received* by the company or not. The language of the deposition is that he caused notice of the suspension to

be mailed to the secretary of Pamlico Lodge, No. 715. Was it served on Cherry? It is not sufficient for them to issue notice. It is incumbent in making suspension that they not only issue, but cause it to be *served on* the local lodge. On the other hand, if defendant has not satisfied you that this notice was *received,* and has failed to satisfy you that this notice was *served,* then, as heretofore explained in this charge, you should answer this issue 'No,' that there was no proper suspension of this lodge."

It appears throughout this charge that the jury must be satisfied, not only that the notice was duly mailed, but also that it was received by the addressee. So that the jury might be satisfied that it was duly mailed,

(160) and still say that it was not received, whereas there is not a *scintilla* of proof that it was not received. When a letter is duly mailed, it is presumed that it reaches its destination and is received by the party to whom it is addressed. This is a presumption of fact and may be rebutted by evidence, to be considered by the jury. This presumption is an inference of fact, founded on the probability that the government officials will do their duty in the usual course of business. When a person absents himself for seven years and is not heard of, the presumption arises that he died at some time during the seven years, and, if nothing appears to the contrary, the presumption stands and is acted on in the course of business. *Spencer v. Roper,* 35 N. C., 333. The depositing of a letter in the postoffice, addressed to a merchant at his place of business, is *prima facie* evidence that he received it in the ordinary course of the mails, and where there is no other evidence the jury should be so instructed. *Huntley v. Whittier,* 105 Mass., 391. This principle is sustained in several cases by opinions written by *Pearson, C. J.; Parker, C. J.; Shaw, C. J.,* and others. The same proposition is laid down in *Dana v. Kemble,* 19 Pick., 112; *Starr v. Torrey,* 22 N. J. Law, 190; *Howard v. Daly,* 61 N. Y., 362; *Austin v. Holland,* 69 N. Y., 571.

The error in the charge was in allowing the jury to find as a fact that the suspension of the lodge was not valid and proper, for the reason that no notice thereof was received by the lodge or its secretary. Under the charge, the jury might be satisfied that the notice was duly mailed, and still find that it was not received, although there was a total absence of such proof, and thus deprive the defendant of the benefit of the presumption in its favor. We cannot say that the jury did so, but we can see that they had the opportunity to do so without disregarding their instructions.

There are numerous other exceptions, but, as we must order

(161) another trial, it is unnecessary to consider them.

*Cited: Edwards v. R. R.,* 129 N. C., 80; *Cogdell v. R. R.,* 132 N. C., 855; *Mill Co. v. Webb,* 164 N. C., 89; *Trust Co. v. Bank,* 166 N. C., 117; *Nelson v. R. R.,* 167 N. C., 187; *Bennett v. Tel. Co.,* 168 N. C., 499; *Lynch v. Johnson,* 171 N. C., 624.

MARY A. PERDUE ET AL. v. WM. T. PERDUE, SILAS POWELL AND D. Y. COOPER.

(Decided 14 March, 1899.)

*Will—Charge Upon Land—Personal Trust.*

After a testator has devised all his estate, real and personal, to his grandson, in fee, the will says: "Item 3. It is my will and desire that the said William Thomas Perdue shall take care of his grandmother Lundy Falkner, and also of his mother, Mary A. Perdue, during their lifetime, and also to take care of his two sisters, Jennie A. and Bettie Ann Perdue": *Held*, that the words are merely recommendatory—expressive of personal confidence, and do not amount to a trust and charge upon the land, following it in the hands of purchasers.

ACTION asking for the declaration of a trust in favor of plaintiffs upon a tract of land devised to defendant and W. T. Perdue, by his grandfather, James H. Falkner, and conveyed to his codefendants, Powell and Cooper, tried before *Brown, J.,* at Fall Term, 1898, of VANCE.

His Honor ruled that the words used created no trust or charge upon the land. Plaintiffs excepted and appealed.

The devise is stated in the opinion.

*B. W. Shaw and T. M. Pittman for plaintiffs.* (162)
*A. C. Zollicoffer, T. T. Hicks and A. J. Harris for defendants.*

FAIRCLOTH, C. J. The following facts constitute the case:

James H. Falkner died about the year 1888, having first made and published his last will and testament, the construction of items 2 and 3 of which forms the basis of this action by the plaintiffs. The said items are as follows:

"Item 2. I will and bequeath unto my grandson, William Thomas Perdue, all of my land and personal property, to him and his heirs and assigns forever.

"Item 3. It is my will and desire that the said William Thomas Perdue shall take care of his grandmother, Lundy Falkner, and also of his mother, Mary Ann Perdue, during their lifetime, and also to take care of his two sisters, Jennie A. and Bettie Ann Perdue."

The grandmother, Lundy Falkner, is dead, and the said Jennie A. and Bettie Ann Perdue are now married and live with their husbands.

The said James H. Falkner died seized and possessed of a tract of land in Vance County, containing about 66 acres, which William Thomas Perdue mortgaged, and upon default of payment of the debt secured by the mortgage the land was, after several years, sold by the mortgagee, and the defendants Powell and Cooper became the purchasers, went into possession, and now hold the same.

Lundy Falkner is dead, and the question is, does the will make the support of the plaintiffs a charge upon the land in the hands of defendants, or is it a personal trust and confidence in W. T. Perdue?

No rule is better settled than that the intention of the testator must govern. The intention must be express or implied from the language of the will, considered as a whole. Beach on Wills, secs. 255, 256. We see nothing in this will which implies that a charge on the land for the support of the plaintiffs was intended. It is only a recommendation or request.

(163) The following are some instances in which the Court considered that certain words implied the intent to charge the property as a lien thereon:

In *Outland v. Outland,* 118 N. C., 138, the care and support were the "consideration" expressed for the devise to the sons.

In *Misenheimer v. Sifford,* 94 N. C., 592, there was a devise of land to a son, *"provided"* he maintained his mother, during his life, comfortably, etc. *Held,* to be a charge.

In *Gray v. West,* 93 N. C., 442, it was provided in the will that "Arey Gray is to have her support out of the land." This was held a charge.

*Taylor v. Lanier,* 7 N. C., 98, and *Wellons v. Jordan,* 83 N. C., 371, are instances where the trust was personal only, and similar in principle to the one before us.

We find no error in the ruling of the court below.

AFFIRMED.

*Cited: Bailey v. Bailey,* 172 N. C., 674.

J. L. MARKHAM v. ALICE McCOWN AND F. L. FULLER.

(Decided 14 March, 1899.)

*Justice's Jurisdiction—Attorney.*

1. While a justice of the peace has no jurisdiction to *declare an equity*, or to enforce *an equitable lien*, he can enforce the collection of money which *equitably belongs to a party.*
2. An attorney who virtually represents two parties in the collection of a claim, in which both are interested, must settle with them on demand, in accordance with their respective rights, of which he has notice, in the money collected and on hand.

ACTION tried before *Robinson, J.*, at March Term, 1898, of DURHAM, on appeal from justice's court.

There was judgment for plaintiff and appeal by defendants. (164) The circumstances of the case are stated in the opinion.

*Manning & Foushee for plaintiff.*
*Boone & Bryant for defendants.*

FURCHES, J. In May, 1888, the defendant McCown, for the purpose of getting supplies from the plaintiff, made and executed a lien bond and mortgage, under the statute, to the plaintiff, for an amount not to exceed $113.55, upon the crop of that year. Under this contract and lien, the defendant got thirty sacks of fertilizer, at the price of $3.75 per sack, for which she still owes plaintiff a balance of $82.50, according to the findings of the jury. Among other crops raised by defendant that year was a crop of tobacco, which she sold to one Snow and the Modern Tobacco Barn Company. After the defendant McCown had contracted to sell this tobacco, but before it was delivered, she saw the plaintiff and told him that she had sold it for a good price, and asked him not to interfere with her delivering the same, and said, if he did not, he should have his money as soon as it was paid for.

The plaintiff, under this statement, agreed for her to deliver the tobacco. But, Snow and the Modern Tobacco Barn Company failing to pay for the tobacco, the defendant McCown, through her attorneys, Fuller & Fuller, brought suit against the purchasers.

This action pended until the fall of 1892, when the plaintiff in that action, and defendant in this, recovered judgment against Snow and the Modern Tobacco Barn Company. But, owing to the insolvency of the defendants, she was not able to enforce collection until 1895, when the money was paid to her attorney, F. L. Fuller, Esq., who still has

(165) this money in hand and is therefore made a party defendant in this action. We say that he still has this money in hand, as it is shown that he had it in hand at the commencement of this action, and, as there is no evidence that he has disposed of it, the presumption is that he still has it in his hands.

During the pendency of the action against Snow and the Tobacco Barn Company the plaintiff and the defendant McCown had more than one conversation about the matter, in the presence of her attorney, W. W. Fuller; that in one of these conversations the plaintiff, Markham, told defendant that he would bring suit for the tobacco in order to protect his rights, and defendant told him not to do so; that her suit would settle the matter, and as soon as the money was collected he would get the balance due him; that plaintiff, accepting this statement of the defendant McCown, desisted from bringing an action for the tobacco, and took his bond and mortgage to Mr. Fuller, her attorney, and left them with him; that plaintiff, being thus induced to do so, furnished some money and aided in the prosecution and collection of the price of the tobacco from Snow and the Tobacco Barn Company. But after the money for the tobacco was collected and in the hands of Mr. Fuller, the defendant refused to allow plaintiff's debt to be paid out of the fund, and plaintiff brought this action.

Upon the trial the plaintiff recovered judgment against the defendant McCown for $82.50, for which sum the plaintiff had judgment, and the court declared it to be a lien on the fund in Mr. Fuller's hands, and defendants appealed.

Defendants do not object to the amount of the judgment against the defendant McCown, but to that part of the judgment that declares the lien. Defendants say that plaintiff cannot recover this fund, for the reason that what took place between plaintiff and defendant McCown did not amount to an equitable assignment, and if it did, as this (166) action was commenced before a justice of the peace, who has no equitable jurisdiction, that plaintiff cannot succeed against this fund on that account.

It must be admitted that a justice of the peace has no jurisdiction *to declare an equity or to enforce an equitable lien,* while on the other hand it seems to us that it must be admitted that a justice of the peace has the jurisdiction to enforce the collection of money which *equitably belongs to a party.* The distinction between the two is clear to our minds. *Nimocks v. Woody,* 97 N. C., 1.

This tobacco had been dedicated by the defendant to the payment of plaintiff's debt by her "mortgage lien," under which plaintiff was entitled to the possession and was authorized to sell the same and appropriate the proceeds to the payment of his debt. He never surrendered

or abandoned any right he had in this tobacco; he only agreed to her delivering it to Snow upon the understanding that his debt was to be paid out of the proceeds of this sale; that after it was delivered to Snow and the payment was delayed, he proposed bringing suit for the tobacco for the purpose of protecting his rights. This was in the presence of Mr. Fuller, her attorney, when she told him there was no need of this; that her action would settle the liability of Snow, and that as soon as the money was collected his debt should be paid; that with this understanding he desisted from bringing suit for the tobacco, assisted in prosecuting the action against Snow, and carried his "bond and mortgage" to Fuller, her attorney; and W. W. Fuller says in his deposition that he understood he was acting in the prosecution of this claim both for the plaintiff and the defendant McCown. This being so, it seems to us that this money in the hands of the attorney, Fuller, or so much thereof as is necessary to pay the balance of plaintiff's debt, belongs to the plaintiff, and that this is an action in the nature (167) of the old action of assumpsit, for money had and received for his use, and, the amount involved being less than $200, a justice of the peace had jurisdiction.

The defendant Fuller is evidently simply the stakeholder and only wishes to be protected in paying out the money. But as he has the money and refuses to pay it over to the plaintiff, he is a necessary party defendant in the action. The judgment was properly entered against the defendants, McCown and Fuller, though it may not have been proper to declare it a lien on the fund.

NO ERROR.

*Cited: Fidelity Co. v. Grocery Co.*, 147 N. C., 513.

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## CITY OF GREENSBORO v. R. J. WILLIAMS

(Decided 14 March, 1899.)

### *Peddlers.*

A picture dealer, who contracts to sell pictures, has them sent out to him, delivers to the purchaser, and receives the price agreed upon beforehand, is no peddler.

CITY WARRANT for penalty for peddling without license, originating in mayor's court, and heard upon appeal by *Timberlake, J.*, at Fall Term, 1898, of GUILFORD, upon *case agreed.*

His Honor adjudged against the defendant, who appealed.
Case agreed appears in the opinion.

*A. M. Scales for plaintiff.*
(168) *Charles M. Stedman for defendant.*

FURCHES, J. This is a criminal proceeding, instituted by the city of Greensboro against the defendant upon the charge of violating its charter and ordinances against "peddlers and itinerant merchants." On the trial the jury found a special verdict, as follows:

"That on 16 June, 1898, R. J. Williams did sell a picture frame and picture in the city of Greensboro, North Carolina, without having any license to sell the same from the said city. That some time prior thereto an agent of the Chicago Portrait Company made an executory contract with Mrs. J. E. DeLorme to furnish her with a portrait and frame of the manufacture of the Chicago Portrait Company, doing business in the city of Chicago, State of Illinois, to be subject to her approval, and any executory contract made by her to purchase not to be binding unless she afterwards approved of the frame when delivered to her. That in pursuance of the executory contract so made, the Chicago Portrait Company shipped to the city of Greensboro, N. C., several pictures and several frames in bulk, whereupon the defendant, R. J. Williams, acting for the Chicago Portrait Company, broke the bulk of the original package consigned to the Chicago Portrait Company, Greensboro, N. C., and placed the pictures in the frames and sold and delivered one to Mrs. J. E. DeLorme, as aforesaid, and collected for the same in pursuance of the executory contract, heretofore alluded to. That section 57 of the charter of Greensboro, N. C., is as follows: 'That in addition to the subjects listed for taxation, the aldermen may levy a tax upon the following subjects, the amount of which tax, when fixed, shall be collected by the collector of taxes, and if not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner, may be forthwith distrained and sold to satisfy the same, namely:

(169) "'(L) Upon all itinerant merchants or peddlers, vending or offering to vend, in the city, a license tax not exceeding $50 a year, except such only as sell books, charts, or maps, or wares of their own manufacture, but not excepting venders of medicine by whomsoever manufactured. Not more than one person shall peddle under a single license.'

"That the following is an ordinance duly passed by the board of aldermen under and by virtue of the foregoing section of said charter:

"'Be it ordained by the board of aldermen of the city of Greensboro, that all itinerant merchants or peddlers, except such as sell books, charts, or maps, whether sold by auctioneers or otherwise, and except, further, goods of their own manufacture, but not except medicines by whomsoever manufactured, offering for same (sale) goods by sample or otherwise at retail in the town of Greensboro, shall pay a license tax of $50 per year.

"'Any person subject to this tax offering goods for sale without a license shall be fined $25 for each and every offense. License under this ordinance shall be issued by the tax collector, and said license shall bear the date of the issue.'

"If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise, they say that he is not guilty."

Upon this special verdict, the court being of opinion that the defendant was guilty, the verdict was so entered, and the defendant appealed from the judgment pronounced thereon.

It was stated on the argument that the case was intended to present the question of interstate commerce and the constitutionality of the charter and ordinances of the plaintiff city. But it does not seem to us that the special verdict (by which we must be governed) raises these interesting and troublesome questions, and we do not pro- (170) pose to raise or discuss them unless they were presented by the record and necessary to the determination of the appeal. The plaintiff's counsel, on this branch of his case, calls our attention to *Range Co. v. Carver,* 118 N. C., 328. There, we discussed at considerable length the doctrine of interstate commerce and the constitutional question involved in that case; and if it was necessary that we should consider those questions in this appeal, we would probably be very much influenced by what is said in that case, but as they do not arise here, we do not consider or discuss them.

The only question presented by the special verdict is as to whether the defendant was an "itinerant merchant or peddler." "Peddler" is defined in all the leading lexicons and in many judicial decisions; but about the strongest and most favorable definition for the plaintiff, we find, is that given in *Range Co. v. Carver, supra,* on p. 334: "Hawkers: Those deceitful fellows who went from place to place, buying and selling; . . . and the appellation seems to grow from their uncertain wanderings, like persons that with hawks seek their game where they can find it." "Hawkers: Peddlers and petty shopmen; persons traveling from town to town with goods and merchandise." This quotation is from the opinion of *Justice Gray* in *Emert v. Missouri,* 156 U. S., 309. And, even under this definition, we cannot hold that the special verdict makes

the defendant a peddler; nor does it constitute him an "itinerant merchant"—a *traveling* merchant, if there is a difference between a peddler and an "itinerant merchant." There is no finding—not even a suggestion—that he traveled about to sell pictures. Indeed, this idea is negatived when it was found that the picture was sold before it was sent to him, and he only delivered it and received the price agreed upon beforehand. It seems to us that, in the language of the late *Chief*
(171) *Justice Pearson,* the plaintiff has "gotten the wrong sow by the ear." There is error.

REVERSED.

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FARMERS BANK OF ROXBORO v. HUNT, PAYLOR & CO., EMMA J. JAMES AND R. L. MITCHELL.

(Decided 14 March, 1899.)

*Promissory Note—Surety—Renewal—Release.*

Where the principal upon a note, discounted at bank, with three sureties, being desirous of renewing for a larger amount, agrees with the bank to offer the same three sureties, but is only able to obtain the signatures of two of them, and that upon the promise to each that the note would not be used without the signature of the third, of which promise the bank had no notice, and upon the refusal of the third was induced to discount upon the signatures of the two: *Held,* that the two sureties are liable, and are not released by reason of the broken promise of their principal.

ACTION upon a promissory note, upon which the firm of Hunt, Paylor & Co. was principal, and the other defendants were sureties, tried before *Timberlake, J.,* at August Term, 1898, of PERSON.

The principal obligor set up no defense. The sureties controverted their liability. There was verdict and judgment against them also, and they appealed. The circumstances of avoidance relied upon by them are stated in the opinion.

*John W. Graham for plaintiff.*
(172) *Boone & Bryant for defendants.*

MONTGOMERY, J. This action was brought for the recovery of the amount due upon a promissory note made by the defendants to the plaintiff. The defendants, Hunt and Paylor, the principal debtors, made no defense. The defendants James and Mitchell, the sureties, in their answer, averred that in November, 1895, Hunt and Paylor, doing business as Hunt, Paylor & Co., desired to borrow money from the plaintiff,

to be used in their business, and proposed to the plaintiff to give as sureties, to secure the note, the defendants James and Mitchell, and also one S. P. Williams; that Paylor came to the defendants James and Mitchell and secured their signatures to a note, blank as to amount, date, time of maturity, and name of obligors; that the note was, by agreement with Paylor, not to be used or discounted until it was signed by Williams; that after the note was signed by the defendants it was taken to the plaintiff, who was then notified of the conditions under which the defendants had executed it; and that, notwithstanding the refusal of Williams to sign the note, the plaintiff, aware of all the facts, accepted it in payment of a debt due by Hunt, Paylor & Co. to the plaintiff, or discounted the same for their account.

On the trial the defendant Mitchell testified that Paylor brought the note to him, in blank as to date, amount, time of maturity, and name of obligors; that he signed it, and that at that time there was the name of no other obligor to the note; that Paylor stated to him that the note was to be in the sum of $1,000 and would be signed by Mrs. James, the other defendant, and also by S. P. Williams, as sureties, and that that would be done before it was used in the bank; that the witnesses signed with that understanding with Paylor; that he lived 18 miles from Roxboro, the residence of both the plaintiff and Williams.

Upon cross-examination the witness stated that he had had no (173) conversation or agreement or understanding with the plaintiff in regard to the note, or any agreement with the plaintiff that the note would not be discounted in the event that Williams did not sign it.

Mrs. James testified that, when she signed the note, Paylor made the same statements to her that he made to Mitchell, and that Mitchell and Williams would sign the note as sureties with her. She testified, further, that she had had no agreement with the bank about the manner of the execution of the note or of its discount.

The issues submitted to the jury were: (1) Were defendants, Mrs. E. J. James and R. L. Mitchell, sureties to the note sued on? (2) Did Mrs. E. J. James and R. L. Mitchell sign the note sued on, with the agreement or understanding that the same was not to be discontinued by the Farmers Bank until and unless S. P. Williams also signed the same? (3) Did Farmers Bank have notice of said agreement or condition?

His Honor instructed the jury that if they believed the evidence to answer the first and second issues "Yes," and the third issue "No."

To the holding that there was not sufficient evidence of knowledge of the agreement on the part of the plaintiff, and to the instruction to answer the third issue "No" if they believed the evidence, the defendants excepted. The execution of the note by the defendants James and Mitchell was admitted by them. The burden of proof was then upon

them to make good the matters which they had set up in avoidance in their answer. There was not a *scintilla* of evidence that the plaintiff had actual knowledge of the agreement and understanding which the defendants Mitchell and James testified that they had had with Paylor when they signed the note. But it was argued by the defendants' (174) counsel that the testimony of the defendant Paylor tended to prove that the plaintiff had constructive notice of the understanding between Paylor and the defendants James and Mitchell, derived through a conversation with Paylor when he delivered the note to the plaintiff and had it discounted. We can see nothing in Paylor's testimony that tends to show constructive notice on the part of plaintiff as to what was done or said at the time of the signing of the note by the defendants James and Mitchell. All of the defendants in this action, together with Williams, owed a debt of $500, by note, to the plaintiff; and the defendants Hunt and Paylor owed more by their overdrafts, and wished still further accommodations. The plaintiff wished that matter settled, and informed Hunt and Paylor that they must arrange to get the money. The cashier of the plaintiff's bank was asked by Paylor if a note signed like the first one would be sufficient, and he was told that it would be. The note sued on for $1,000 was brought to the bank of the plaintiff with the blanks properly filled in, signed by Hunt and Paylor, and by the defendants James and Mitchell as sureties, with the statement by Paylor that Williams would sign it as additional surety. Williams refused to sign the note and his refusal was communicated to the plaintiff. Thereupon Paylor said that note was good for the amount as it was, and the cashier of the bank said he thought so, and the note was discounted. There was nothing suspicious about that transaction; nothing about it calculated to put the plaintiff upon inquiry as to why Williams had not signed the note. Paylor had not intimated that there was any agreement or understanding between himself and James and Mitchell that Williams should sign the note before it was used at the bank. The officers of the bank had simply said in the beginning that the three, James, Mitchell and Williams, would be sufficient security upon (175) the note, and that, at the instance of Paylor himself. When Williams refused to sign the note the plaintiff thought it good without his signature and discounted it. The transaction seems to be open and fair, and so far as the evidence goes there were no suspicious circumstances attending the execution of the note which ever came to the knowledge of the plaintiff.

The plaintiff, then, had neither actual nor constructive notice of the alleged agreement between Paylor with the other defendants James and Mitchell. The question then is, is the note binding on the defend-

ants James and Mitchell, the sureties, who signed the note under an agreement with one of the principals that he was not to use it with the plaintiff unless he procured the signature of Williams also?

We are of the opinion that they are liable upon the note. The precise point was before the Court in *Gwyn v. Patterson,* 72 N. C., 189. In the opinion in that case is quoted, with approval, the point decided in *Millett v. Parker,* 2 Metc., 608: "One who signs a covenant as surety upon the conditions and agreement between him and his principal that is not to be binding upon him or delivered to the covenantee unless another person should sign it, as surety, is bound thereby, although the principal to whom he entrusted it delivered it to the covenantee without a compliance with such a condition, of which and its breach the latter had had no notice." To the same effect is the decision in *S. v. Lewis,* 73 N. C., 138. The defendants cited to us several decided cases like that of *Rawlings v. U. S.,* 4 Cranch, 219, in which it was held that, where a surety signed a bond on which was written the name of another person who was to sign the bond, but who failed to do so, the sureties who did sign were released and not liable. In the case of *S. v. Barnes, supra,* it was said of the decision in *Rawlings v. U. S.,* (176) *supra,* it might "perhaps be supported on the ground that the appearance in the body of the bond of the names of persons who had not signed was of itself notice that the instrument was incomplete, and its delivery by the principal obligor alone was unauthorized." But such a case as the last referred to is not before us, and we are not called upon to make a decision upon it to decide the point.

This may be a hard case on the defendants James and Mitchell, but it will be a still harder case on the plaintiff if it should be subjected to the loss of its money lent in good faith upon a note perfect in form and with nothing about the matter to excite suspicion, or to put it on inquiry. From the statements of the defendants James and Mitchell, they gave to Paylor their confidence, and it was misplaced. Loss has ensued on account of this breach of confidence, and it must fall upon those who reposed the confidence rather than on an innocent person.

The counsel for the defendants argued that as a part of the money derived from the discount of the note went toward the payment not only of the $500 note but to certain overdrafts of the defendants Hunt, Paylor & Co., Paylor became the agent of the plaintiff in the transaction by which the $1,000 note was procured, and that thereby the plaintiff is fixed with the knowledge of the agreement made with James and Mitchell. We do not take that view of the matter. The burden of proof being on the defendants to show the matters pleaded in avoid-

ance, they having admitted the execution of the note, and no proof having been offered tending to prove such matters, it was in the province of the judge to direct the answer to the third issue as he did.

NO ERROR.

*Cited: Cowan v. Roberts,* 134 N. C., 423; *Bank v. Jones,* 147 N. C., 421.

(177)

MARY A. WHITE AND ALEXANDER GREEN v. BOYD & YOUNG.

(Decided 14 March, 1899.)

*Principal and Agent—Tort Waived—Landlord and Cropper.*

1. Where a tort-feasor disposes of personal property through an agent, who sells and pays over to him the proceeds of sale, the true owner may waive the tort growing out of the conversion, ratify the sale, and sue either of them for money had and received, and in such case ignorance of the tort is no defense for the agent.

2. Where the proprietor of a "tobacco warehouse" receives tobacco from a farmer, not for storage for hire, but to sell, on commissions at public auction by his own auctioneer and to deliver to the purchaser, he is not a warehouseman proper, but the agent of his employer, although that employer may be present with the privilege to refuse the bid made to the auctioneer.

ACTION for conversion of lot of tobacco. Tort waived, and suit on contract, commenced in justice's court in HALIFAX, and carried by appeal to Superior Court and tried before *Norwood, J.,* at November Term, 1898.

The defendants, Boyd & Young, owned a tobacco warehouse at Enfield, and were engaged in the business of selling leaf tobacco there on commission. Their auctioneer would sell the tobacco on the floor—they would pay the farmer, and hold the tobacco until paid for by the purchaser. The farmer, if dissatisfied with the bid offered, could reject it.

J. M. Crowder was the cropper of the plaintiff, Mary A. White, in 1897. Without her knowledge and consent he carried a lot of tobacco raised that year to the warehouse of the defendants, where it was sold, and he received the money. On this lot of tobacco the plaintiff
(178) White had the landlord's lien, and the plaintiff Green had registered mortgages on it from both landlord and cropper, of which defendant had notice, for their respective interests. Crowder went off

with the money, $147.05, without settling either lien or mortgage. Upon this evidence, the defendants moved for judgment as of nonsuit, which the court allowed.

The plaintiffs excepted and appealed.

*E. L. Travis for plaintiffs.*
*MacRae & Day for defendants.*

MONTGOMERY, J. For the convenience of both the buyer and the owners of the tobacco in the leaf, salesrooms, commonly called warehouses, are to be found at convenient places in the tobacco-growing districts, to which the article is carried to be sold. This action was brought to recover the proceeds of the sale by the defendants of certain leaf tobacco, alleged to have been the property of the plaintiffs and to have been sold by the defendants without the knowledge or consent of the plaintiffs. The plaintiffs waived the tort growing out of the alleged conversion of the tobacco by the defendants, ratified the sale and brought this action for money had and received, which remedy they had the right to adopt. *Sugg v. Farrar,* 107 N. C., 123; *Brittain v. Payne,* 118 N. C., 989.

It appeared from the evidence that the defendants sold certain leaf tobacco, which was delivered to them by one Crowder, who was both the cropper of the plaintiff White and a mortgagor of the plaintiff Green; that the compensation which the defendants received in the transaction was in the nature of commissions on the sales; that the tobacco was sold without the knowledge or consent of the plaintiffs, and that defendants had actual notice of the mortgage. The plaintiff White, landlord, had also executed a mortgage on the tobacco to the other (179) plaintiff.

Upon the conclusion of the plaintiffs' evidence, on motion of defendants' counsel, his Honor dismissed the action under chapter 109, Laws 1897.

We may say, in the beginning of the discussion, that the facts in this case do not constitute the defendants warehousemen, whatever they may call the place where the tobacco was sold. They sold upon commission and did not undertake to store the tobacco for hire. "A warehouse is a building or place provided for the receipt and storage of property. A warehouseman is a person who receives goods and merchandise for hire." 30 A. & E., 38. Whether or not his Honor was correct in dismissing the action depends upon the nature of the business of the defendants, that is, whether they were agents, under any of the various forms of agency, of Crowder, the person who delivered to them the tobacco to be sold. If they were the agents of Crowder, then in our opinion they are liable to plaintiffs for their action in the sale of the tobacco.

The defendants' contention is that they were not the agents of either Crowder or the purchaser of the tobacco; that they simply brought together the buyer and Crowder, the apparent owner of the tobacco, for the convenience of them both, and that it was in the power of Crowder to refuse the bid made to the auctioneer of the defendants "by turning the tag," that is, by removing or displacing the scrap of paper attached to a small pointed splinter of wood and stuck into the pile of tobacco by an employee of the defendants, who followed along upon the heels of the auctioneer, and on which paper was written the name of the purchaser and the price bid. And the defendants further contend that they did not undertake to hold the tobacco against the lawful claims (180) of any one, and that they had no interest in, nor did they claim any, in the tobacco; and that as a compensation for their services in offering the tobacco for sale and finding a purchaser, they received only a commission on such sales. In support of their contentions the counsel of the defendants referred us to the case of *Abernathy v. Wheeler,* 92 Ky., 320. In that case the tobacco of the mortgagee was shipped to the managers (called warehousemen) of the salesrooms by a person other than the mortgagee, without the latter's knowledge or consent, was sold, and the proceeds paid to the shipper. The fact appeared, there, that the salesmen of the tobacco had no actual notice of the mortgage. In the opinion in that case it was recited as a reason for the decision that the defendants were not liable to the mortgagee for a conversion of the property, that they had no knowledge or information that any other person than the shipper had any interest in the tobacco. The decision, therefore, can be of no service to us, even if it was correct in the conclusion that a lack of actual notice of the mortgage on the part of the defendants protected them against the suit of the plaintiffs, for, as we have said, the defendants here had actual knowledge of the mortgage of the plaintiff Green. But we do not concur in the reasoning of the case of *Abernathy v. Wheeler, supra,* nor in the conclusions of the of the court. We think that so far as the legal effect of the acts of the defendants in our case is concerned, the matter of actual notice, on the part of the defendants, of the mortgage, is of no consequence.

The question is, did the defendants, when, at the request and under the direction of Crowder, they took possession of the tobacco conveyed in the mortgage and sold it in the manner set out in the evidence become mere intermediaries, mouthpieces of Crowder, or did they become (181) Crowder's agent, for the purpose of selling and delivering the tobacco to the purchaser? Their possession of the tobacco was complete; it was on their floor; it was "cried off" by their auctioneer; they delivered it to the purchaser; they collected the price from the buyer and paid it to Crowder himself, who had no right to receive it.

All this was done under the direction of Crowder. The agency was as complete as it could possibly be made. The contention that the sale was in fact made by Crowder himself, because he had the privilege under the rules governing the sales, to indicate his refusal to accept the bid, will not stand the test of examination, for the reason that he did not avail himself of the privilege, but accepted the bid and received the money on it. Also the defendants received compensation in money for their services in making the sale. The agency, then, being complete, did the facts constitute a conversion? The conversion of personal property is complete when one who is not the owner of the property deals with it as if he were the true owner. In Pollock on Torts the author says: "Actually dealing with another's goods as owner, for however short a time and however limited a purpose, is therefore conversion; so is an act which in fact enables a third person to deal with them as his own, and which would make such dealing lawful only if done by the person really entitled to possess the goods. It makes no difference that such acts were done under a mistaken but honest and even reasonable supposition of being lawfully entitled." In Cooley on Torts, p. 451, it is written: "One who buys property must at his peril ascertain the ownership, and if he buys of one who has no authority to sell, his taking possession, in denial of the owner's right, is a conversion. The vendor is equally liable whether he sells the property as his own, or as an officer or agent; and so is the party for whom he acts, if he assists in or advises the sale." In Story on Agency, 311 and 312, it is said in refer- (182) ence to the liability of agents to third persons for their own misfeasances and wrongs: "In all such cases the agent is personally responsible, whether he did the wrong intentionally, or ignorantly by the authority of his principal, for the principal could not confer on him any authority to commit a tort upon the rights or the property of another. *A fortiori* if the principal is a wrongdoer, the agent, however innocent in intention, who participates in his acts, is a wrongdoer also." In the case of *Hoffman v. Carow,* 20 Wend., 285, an auctioneer who sold stolen goods was held to be liable to the owner for the conversion, notwithstanding that the property was sold and the proceeds handed over to the thief, without notice of the felony. To the same effect is *Koch v. Branch,* 44 Mo., 542. In that case are brought forward *Lord Ellenborough's* remarks in *Stephens v. Elwall,* 4 Maule & Selw., 259, where the plaintiffs were the assignees in bankruptcy of a man by the name of Spencer, and the bankrupt sold goods of the bankrupt to one Deane, who bought for the trade in America and who had a house in London in which the defendant was his clerk. "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for

a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." In *Kimball v. Billings,* 55 Me., 147, it was said by the Court: "It is no defense in an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner and is ignorant of such
(183) person's want of title." In that case a grocery merchant exchanged for money some government bonds, for a person who had stolen them, the groceryman, defendant, having no knowledge of the theft. In *Coles v. Clark,* 3 Cushing, 399, the defendant, who was an auctioneer, sold goods which were delivered to him by a mortgagor, and without any knowledge of the mortgage, and the Court said: "That the sale and disposition of the goods, the delivery of them and receiving the proceeds by order and direction of the mortgagor, who had neither title nor power, was a conversion, and that this action may be maintained." The plaintiff in the present case had a qualified property and right of possession by virtue of his mortgage, of which the registration was constructive legal notice; the sale and disposal of the goods by the defendants were in law a conversion, without knowledge of suspicion of the fraudulent purpose of Blake, the mortgagor, and the jury should have been so directed."

In *Robinson v. Bond,* 158 Mass., 357, the defendant, who was an auctioneer, sold goods which were delivered to him to be sold by a bailee, and was held liable at the suit of the bailor for the conversion. The Court said in that case: "The defendant is an auctioneer, who has sold personal property belonging to the plaintiff. Therefore, he is liable for a conversion, unless he can show some other excuse or justification than his good faith and his ignorance of the plaintiff's title."

There was error in the ruling of his Honor in dismissing the action.

REVERSED.

*Cited: Sanders v. Ragan,* 172 N. C., 616.

( 184)

HATTIE N. DILLON v. THE CITY OF RALEIGH.

(Decided 21 March, 1899.)

*Public Streets—Duty, Power, and Liability of Municipality—Tort Feasors—Proximate Cause—Evidence.*

1. The duty and power of the municipal authorities, under Code, secs. 3802 and 3803, to prevent and abate nuisances and obstructions in the public streets, are ample and complete; and they may be held liable to the party injured in consequence of their dereliction.
2. If a person unlawfully places such obstruction in the public streets and the town authorities permit it to remain there an unreasonable length of time, both fall within the rule as to joint tort-feasors, and are jointly and severally liable to the traveler for an injury resulting therefrom without fault on his part. He may have his remedy against either, and the question of primary and secondary liability is for them to adjust between themselves.
3. In determining what is proximate cause, the rule is that the injury must be the natural and probable consequence of the negligence. When two causes combine to produce an injury, the one being a culpable defect in the street, and the other some other occurrence for which neither party is responsible, *e grege*, the running away of a frightened horse, the municipality is liable, provided the injury would not have been sustained but for such defect.
4. Evidence that the obstruction has since been removed, while incompetent to prove the *character* of the obstruction, is admissible to show that it was unnecessary.

ACTION to recover damages for personal injury in consequence of a collision with an obstruction in a public street in Raleigh, tried before *Bryan, J.*, at October Term, 1898, of WAKE.

His Honor charged the jury that if they believed the evidence, the plaintiff was entitled to recover from the defendant, the city of Raleigh. Defendant excepted.

Verdict and judgment for plaintiff. Defendant appealed. (185)

The nature of the obstruction and the circumstances of the cases are fully stated in the opinion of the *Chief Justice*.

*Argo & Snow for plaintiff.*

*Perrin Busbee and Douglass & Simms for defendant.*

FAIRCLOTH, C. J. This action is based on the alleged omission of duty on the part of the defendant in failing to keep its streets in repair and removing obstructions therefrom, in consequence of which the plaintiff sustained personal injuries. There is practically no disagreement as to the facts.

Many years ago the city was duly organized as a municipal corporation, with proper municipal officers, and it was laid out in squares and streets, and has so continued to the present time. One of its principal streets leads from the capitol building southward to the corporate limits, and there connects with a public county road, along which street and road the public were accustomed to travel, and on which street the injury occurred.

By its charter (Laws 1848-9, ch. 82) the North Carolina Railroad was permitted to enter the corporate limits of defendant city and to cross its streets, and it did cross said street about fifteen feet above the level of the street. The railroad runs diagonally across the street, and its stringers are supported by four sets of upright posts, or benches, standing in the street. These benches are ten or twelve feet long and about twelve feet apart. They stand at right angles with the railroad stringers and form an acute angle of forty-five degrees with the direct course of the street.

(186) The existence and presence of these upright benches in the street were known to the municipal authorities of the city at and before the date of the injury alleged in the complaint.

In January, 1896, the plaintiff, with another lady, was driving a gentle horse along said street in the direction of the railroad crossing, when suddenly the horse became frightened, without any known cause, and dashed through said benches, and the buggy struck the far off corner of one of them, and the injury complained of was the result.

The issues submitted were: 1. "Was the plaintiff injured through the negligence of defendant?" Ans.: "Yes." 2. "What damage, if any, is the plaintiff entitled to recover?" Ans.: "$3,000."

The defendant caused the railroad company to be made a party defendant and filed a "cross-complaint," under section 424 of The Code, against said railroad company, to which a demurrer was filed and the cross-complaint was dismissed, alleging that said road was *primarily* liable for any injury sustained by the plaintiff. While we do not propose to discuss the liability or nonliability of the railroad company, we see no error in the cross-complaint.

In the charter of said railroad company, allowing it to pass through the city limits and cross its streets, section 26 provides "that the said company (railroad) shall not obstruct any public road without constructing another equally as good and as convenient," etc.

The main question presented to this Court is, "Is the city defendant liable in damages to the plaintiff for alleged injury?" In some jurisdictions liability in such cases is implied at common law, but in many of the different States, perhaps in all, we find the matter regulated by special or general statutory provisions. In our State, The Code, sec.

3803, enacts that the commissioners of towns and cities "shall (187) provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best," etc. And section 3802 says, "they may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens." The duty and power of the municipality thus appear to be ample and complete. If any person shall unlawfully erect an obstruction or nuisance in the streets of a city, and the town authorities shall permit it to remain an unreasonable length of time, the town and the tort-feasor are jointly and severally liable to the traveler for an injury resulting therefrom, without any fault on his part. The question of primary and secondary liability is for the offending parties to adjust between themselves. The injured party shall have his remedy against either, as they fall under the rule as joint tort-feasors. Burwell on Personal Injuries, sec. 190.

The evidence that the benches had since been removed was incompetent to prove the *character* of the obstruction, but was admissible to show that the obstruction was unnecessary. It was in evidence that travelers could, and did, pass through the bridge safely, when driving a gentle horse, by changing their course to conform to the diagonal direction of the benches. No contributory negligence on the part of the plaintiff is found, nor is there any evidence to support such an issue. The cause of the horse's becoming frightened is unknown. It was gentle and road-worthy, and we cannot, without some proof, impute carelessness in the driver under such circumstances. The plaintiff evidently lost control of the horse in its flight.

The defendant contends that, as the injury was the result of at least two causes, *i. e.*, the running of the horse and the presence of the benches in the street, the *proximate* cause cannot be ascertained, and, therefore, the plaintiff cannot recover. This is a question of some difficulty and we believe it has never been passed on by this Court. It has, (188) however, been considered frequently in other jurisdictions. It seems to be settled by authority and reason that when both parties have been equally negligent, the plaintiff cannot recover unless in cases of continuing negligence. It is still more complicated when the parties have been negligent in different degrees. When it appears that the defendant has been negligent and the plaintiff has not, the plaintiff may recover, although the injury is produced by the concurrent acts of both parties. It is the duty of corporate authorities to remove dangerous and unnecessary obstructions from the streets, and "in determining what is proximate cause, the rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under

the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." *West Mahoney v. Watson,* 112 Pa., 574.

When two causes combine to produce an injury to a traveler on a highway, both of which are in their nature proximate—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible—the municipality is liable, provided the injury would not have been sustained but for such defect. *Ring v. Cohoes,* 77 N. Y., 83.

The town cannot be exonerated because other causes coöperate with the obstruction or defect, for, under such a rule it never would be liable. The true principle is that the wrongdoer, either by commission or omission, must be held responsible.

In *Bunch v. Edenton,* 90 N. C., 431, the duties and liabilities of towns and cities were discussed by *Merrimon, J.* The case was that an adjoining lot owner made an excavation to the line of the sidewalk, and
(189) that a footman, walking on the sidewalk at night, fell into the excavation and was injured, without any undue care on his part. The excavation was known to the defendant, and there was no railing or guard on the line of the excavation. The Court held the defendant liable, and that the negligence of the lot owner, if any, was no defense for the town. On the same subject, see *Russell v. Monroe,* 116 N. C., 720. Upon this view of the case it seems unnecessary to express any opinion on the numerous exceptions made, and we see no error in the record.

NO ERROR.

*Cited: Jones v. Greensboro, post,* 312; *S. v. Dickson, post,* 873; *Kramer v. R. R.,* 127 N. C., 335; *Raleigh v. R. R.,* 129 N. C., 266; *Clark v. Guano Co.,* 144 N. C., 78; *Howard v. Plumbing Co.,* 154 N. C., 227; *Sircey v. Rees,* 155 N. C., 300; *Bailey v. Winston,* 157 N. C., 259; *Pearson v. Clay Co.,* 162 N. C., 225; *Guthrie v. Durham,* 168 N. C., 575.

S. H. TROXLER v. SOUTHERN RAILWAY COMPANY.

(Decided 21 March, 1899.)

*Railroads—Damages—Negligence—Defective Appliances—Injury to Employee—Automatic Car-couplers.*

1. Reason, justice and humanity, principles of the common law, irrespective of congressional enactment and interstate commerce commission regulation, require the employer to furnish to the employee safe modern appliances with which to work, in place of antiquated, dangerous implements, hazardous to life and limb, and the failure to do so, upon injury ensuing to the employee, is culpable, continuing negligence on the part of the employer, which cuts off the defense of contributory negligence and negligence of a fellow-servant—such failure being the *causa causans.*

2. It is negligence, *per se*, in any railroad company to cause one of its employees to risk his life and limb in making couplings which can be made automatically without risk.

ACTION to recover damages for personal injury, alleged to have (190) been occasioned by the negligence of defendant, tried before *Timberlake, J.*, at August Term, 1898, of GUILFORD.

This is the same action in which there was a former trial and appeal, reported in 122 N. C., 902. The plaintiff was a brakeman on a through freight train of the defendant company, and by direction of the conductor undertook to couple two cars, which were not furnished with automatic couplers. He used first a stick, and failing with that, used his hand, but in the effort, owing to the rebound, his hand got caught between the deadlocks and was so badly crushed that it had to be amputated.

In the light of the former trial his Honor declined to submit an issue as to whether the plaintiff was injured by the negligence of a fellow-servant, informed the jury that this Court had decided that railroad companies should use automatic couplers or other safe coupling appliances in general use, and that the true question was whether the plaintiff was injured by the defective appliances with which the coupling of the cars was to be made—the use of such as were defective and dangerous would be negligence in the company, it being their duty to furnish safe appliances to their employees.

The defendant excepted to the refusal of his Honor to submit the issue as to the negligence of a fellow-servant, and to the charge relating to negligence of the defendant. There was verdict and judgment for plaintiff. Appeal by defendant.

*C. M. Stedman and D. Schenck, Jr., for plaintiff.*
*F. H. Busbee for defendant.*

(191) CLARK, J. The plaintiff was injured in attempting to couple cars of the defendant on which there were no automatic car-couplers, but in lieu thereof skeleton draw-heads of unequal height. The court below held that the absence of automatic couplers, in general use, was negligence, *per se,* and refused to submit an issue whether the injury was not caused by the negligence of a fellow-servant, and refused to instruct the jury, as prayed, that the plaintiff was guilty of contributory negligence if he could by proper care have coupled the cars by hand without accident.

The duty to furnish proper and safe appliances is that of the common master, and injury caused by their absence cannot be attributed to the negligence of a fellow-servant. *Troxler v. R. R.,* 122 N. C., 902; *Wright v. R. R., ib.,* 959. It has been heretofore held in *Greenlee v. R. R.,* 122 N. C., 977, that failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence, *per se,* continuing up to the time of the injury sustained by an employe in coupling cars by hand, and renders the company liable, whether such employee was negligent in the manner of making the coupling or not. The same ruling had been previously made as to the duty of furnishing automatic car-couplers on passenger trains in *Mason v. R. R.,* 111 N. C., 482, decided in 1892. Where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances, in general use, when the use of such appliances would have prevented the possibility of the injury), there can be no contributory negligence which will discharge the master's liability. This has been repeatedly held. *Norton v. R. R.,* 122 N. C., 911; *McLamb v. R. R., ib.,* at p. 873; *Cone v. R. R.,* 81 N. Y., 206. The failure to provide the necessary appliances is the *causa causans.* The defendant, however, frankly asks us to reconsider and overrule *Greenlee's case.* That case was the expression of no new doctrine, but the affirmation of one as old as the law, and founded on the (192) soundest principles of justice and reason, to wit: That when safer appliances have been invented, tested and have come into general use, it is negligence, *per se,* for the master to expose his servant to the hazard of life or limb from antiquated and defective appliances which have been generally discarded by the intelligence and humanity of other employers. *Witsell v. R. R.,* 120 N. C., 557. This must be so, if masters owe any duties to their employees, and unless economy of expenditures on the part of the railroad management is to be deemed superior to the conservation of the lives and limbs of those employed in their operation.

In the Twelfth Annual Report of the Interstate Commerce Commission (1898), published by authority of the United States Government, upon returns made by the railroad companies themselves, it is stated (at p. 88): "Since the enactment of the law in 1893 (requiring automatic couplers) there has been a decreasing number of casualties. There were 1,034 fewer employees killed and 14,062 fewer injured during the year ending 30 June, 1897, than during the same period in 1893. The importance of this subject will be realized when the yearly casualties to railway employees are compared with those which occurred during the recent war. In the Spanish-American War there were 298 killed and 1,645 wounded. In 1897 there were 1,693 men killed and 27,667 injured from all causes in railway service. From coupling and uncoupling cars alone 219 less were killed and 4,994 less were injured in 1897 than in 1893, when the law was enacted. The number of such employees killed has been reduced one-half, and the number of injured also practically reduced one-half. The reduction in the number of accidents from all causes largely exceeded (by nearly three to one) in a single year the entire casualties resulting from the prosecution of the late war."

Thus in four years—from 1893 to 1897—notwithstanding the (193) increase of thousands of miles of railways, and many thousands of employees, and the further fact that the railroad corporations have been able to procure from the Interstate Commerce Commission an extension of the time at which the law of Congress, imposing a penalty for operating any cars without self-couplers, will come into force, the shadow of the law has procured so general an attachment of these self-couplers, that 5,213 fewer employees were killed and wounded in coupling and uncoupling cars in 1897 than in 1893. Can it, therefore, be seriously contended that the absence of such safety appliances is not negligence *per se,* rendering the railroad company liable for damages? As these appliances have been patented, and more or less in use for over thirty years, it should not have required an act of Congress to enforce their universal adoption. Failure to adopt them, after being so long and widely known and used, was negligence in the defendant, upon the principles of the common law. *Witsell's case, supra.* The act of Congress imposing a penalty for failure to add the appliances after 1 January, 1898, in no wise affected the right of any employee to recover for damages, sustained by the negligence of any railroad company to attach them. The action of the Interstate Commerce Commission, in extending the date at which such act should come into force (by virtue of authority given in the act) could not set aside the principle of law that failure to adopt such appliances was negligence *per se,* nor have any other effect than to postpone the date at which the United States Government would impose the prescribed penalty upon all railroads engaged in interstate commerce

failing to equip all their cars with automatic couplers, a penalty which is imposed irrespective whether any accidents occur from such failure or not.

(194) The indifference of railroad companies shown in not adopting these life and limb-saving appliances is all the greater, since their cost is comparatively small. Indeed, the Interstate Commerce Commission, in the above-cited report (page 89), states that, considering the less expense required in repairs, they are an actual saving. They say: "Figures submitted by one of the leading railroad companies indicate that the adoption of the automatic coupler will result in saving a very large sum annually, in comparison with the expense incurred in former years, in applying and maintaining the link-and-pin type; and this does not take into account the reduced cost to the roads, which must result from fewer suits for damages by injured employees. And further, that there being too much slack in the old pin-and-link for the brake to act economically or successfully, the automatic coupler makes the requirements of railroad operation better, as well as minimizes the danger to employees."

In *Witsell v. R. R.*, 120 N. C., 557 (at p. 562), it is said: "If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it." But not only, as above, the use of self-couplers would be an actual economy to the defendant, but that it is amply able to put on these appliances, if it were not, is shown by the published report of the defendant company that its gross earnings for the year 1895 (when this injury was inflicted) were over seventeen millions of dollars, and its net earnings, over and above all expenses, were more than five millions of dollars (Poor's R. R. Manual, 1898, p. 792)—figures which for the year just past have risen to over twenty-two millions dollars gross earnings and over seven millions three hundred thousand dollars net earnings.

With such an array as above of the terrible cost of life and limb by failure to use appliances to avoid coupling and uncoupling cars by hand (in doing which the plaintiff was injured), and the small

(195) expense, nay actual economy of adopting them and the ample means the defendant possesses, we cannot reverse our ruling in *Greenlee's case,* that it is negligence *per se* in any railroad company to cause one of its employees to risk his life or limb in making couplings which can be made automatically without risk.

This matter of requiring these great corporations to protect the traveling public, and their employees as well, by the adoption of all safety appliances which have come into general use, is so important that we have gone into the subject at this length. Ordinarily owned by great syndicates out of the State in which they operate, and their management

at all events removed from subjection to that sound public opinion which is so great a check upon the conduct of individuals and of government itself, the sole protection left to the traveler and the employee alike is the application of that law which is administered impartially, and which can lay its hand fearlessly upon the most powerful combination and protect with its care the humblest individual in the land.

The subject is one of transcendent importance, for notwithstanding the partial adoption of these appliances and consequent reduction in casualties, the Twelfth Interstate Commerce Commission shows (p. 77) that for the year ending 30 June, 1897, on the railroads engaged in interstate commerce (which alone report to that commission), there were still 43,168 casualties, of which 6,437 resulted in death. Of these 1,693 killed and 27,667 wounded, were railroad employees, among whom 214 were killed and 6,283 wounded in coupling or uncoupling cars. In our own State, the Report of the North Carolina Railroad Commission for 1898 (p. 250-1) shows that for the year ending 30 June, 1898, the railroads reported 879 persons killed and wounded (of whom 99 were killed) and of these, 23 of the killed and 599 of the wounded (196) were employees: total, 622. As, of the 9,000 employees reported in this State, 4,000 (according to the usual ratio) were employees engaged in the actual operation of the trains, it follows that in this State one such employee in every 6½ was in that year injured or killed. In view of such mortality, rivaling that of the bloodiest wars, this Court cannot reverse its declaration heretofore, which is sustained by every sentiment of justice and humanity, that where a life and limb saving appliance, like automatic car-couplers, has come into general use, and its partial adoption has in four years, notwithstanding the increase in railroad mileage and employees, decreased the injuries and deaths from coupling cars one-half, that the failure to adopt and use it is negligence *per se*.

Considering the economy in money of using such appliances, as well as the ample revenues of the defendant, it is passing strange that it (or any other railroad company) should have delayed till now, or even till 1895, to protect the lives and limbs of their employees in this particular, or that there should have been need of an act of Congress or the verdict of a jury to stimulate considerations of humanity towards their patrons and their employees.

Counsel for defendant read, as part of his argument, a clipping from a newspaper, and repeats in his brief, that a noble English Lord who was a railroad manager as well as an hereditary member of Parliament, had changed his party affiliations because the one to which he had belonged had advocated the enforced adoption of self-couplers upon English railways. That simply shows that one such manager at least

possesses a lordly disregard for the thousands of deaths and injuries of employees yearly, caused by the lack of safety appliances, and, it may be, there are others who entertain sentiments of higher allegiance (197) to the net earnings of the syndicates that employ them than to those great principles which every political party professes to advocate, as being for the best interests of the public. But the hostility of one or more railway managers towards the matter cannot affect the impartial enforcement of the sound legal principle, that employees and the traveling public alike have a right to be protected against any dangers which can be avoided by the adoption of safety appliances which have been tested by experience and which have come into general use.

In the present case, the defendant has the less excuse because there was uncontradicted testimony not only that automatic car-couplers were in general use at the time of the injury (March, 1895), but that the skeleton draw-heads, in attempting to make a coupling with which the plaintiff was injured, were defective in that they were of different heights from the ground and evidence that the cars could not have been coupled with a stick or in any other manner, except by hand.

NO ERROR.

*Cited: Lloyd v. Haynes,* 126 N. C., 362; *Wright v. R. R.,* 127 N. C., 227; *Coley v. R. R.,* 128 N. C., 537; *Harden v. R. R.,* 129 N. C., 355; *Coley v. R. R., ib.,* 415; *Ausley v. Tob. Co.,* 130 N. C., 40; *Elmore v. R. R., ib.,* 506; *Fleming v. R. R.,* 131 N. C., 481; *Elmore v. R. R., ib.,* 581; *Orr v. Telephone Co.,* 132 N. C., 693; *Elmore v. R. R., ib.,* 866, 876; *Walker v. R. R.,* 135 N. C., 741; *Bottoms v. R. R.,* 136 N. C., 473; *Stewart v. R. R.,* 137 N. C., 694; *Hicks v. Mfg. Co.,* 138 N. C., 330, 335; *Pressly v. Yarn Mills, ib.,* 423; *Biles v. R. R.,* 139 N. C., 532; *Stewart v. R. R.,* 141 N. C., 275; *Horne v. Power Co., ib.,* 55; *Rolin v. Tob. Co., ib.,* 314; *Harton v. Telephone Co., ib.,* 468; *Hairston v. Leather Co.,* 143 N. C., 516; *Britt v. R. R.,* 144 N. C., 256; *Gerringer v. R. R.,* 146 N. C., 36; *Phillips v. Iron Works, ib.,* 217; *Dermid v. R. R.,* 148 N. C., 184, 193; *Montgomery v. R. R.,* 163 N. C., 600; *McNeill v. R. R.,* 167 N. C., 398; *Horne v. R. R.,* 170 N. C., 650; *McMillan v. R. R.,* 172 N. C., 858; *Smith v. Electric R. R.,* 173 N. C., 494; *Hines v. Lumber Co.,* 174 N. C., 296; *Parks v. Tanning Co.,* 175 N. C., 30; *Ware v. R. R., ib.,* 508; *Grant v. Bottling Co.,* 176 N. C., 259; *Goff v. R. R.,* 179 N. C., 224; *Lee v. R. R.,* 180 N. C., 420.

T. M. CLARK AND MINNIE E. CLARK v. OLA A. BENTON, A MINOR, BY GUARDIAN.

(Decided 21 March, 1899.)

*Construction of Will—Posthumous Child.*

Where it can be gathered from the will that it was the intention of the testator that a posthumous child should share equally with his two children, *in esse*, the court will effectuate his intention.

PETITION FOR PARTITION of land filed before the clerk of (198) IREDELL, and transferred to term, and heard before *McIver, J.*, at May Term, 1898.

The parties all claimed under the will of Alexander Clark. T. M. Clark was a posthumous child. The decision of the cause involved the proper construction of this will. His Honor decided that they all shared equally, each taking one-third. The defendant excepted and appealed.

A copy of the will appears in the opinion.

*Armfield & Turner and L. C. Caldwell for plaintiffs.*

*J. B. Connelly for defendant.*

CLARK, J. This was a petition for partition, brought by T. M. Clark and Minnie E. Clark against Ola A. Benton (joining W. O. Benton, her guardian), transferred to the Superior Court upon issues raised by the pleadings. The result depends upon the proper construction of Items 2 and 4 of the will of Alexander Clark, deceased, which are as follows:

"Item 2. I will unto my son Alexander Clark as trustee, and in trust to the use of my daughter Mary E. Lemly during her lifetime, and then to her children, if she has any, and if not, to my two youngest children, Minnie Etta and Alice Rebecca, a piece of land bounded as follows: 'Beginning at an elm, John Setzer's and my corner (here follows the boundaries), containing one hundred and fifty or sixty acres, more or less.'

"Item 4. I will and bequeath unto by son Alexander Clark, as trustee, and in trust to the use of my beloved wife, Clarentine D., the balance of my home plantation, during her life, and then to my two daughters Minnie and Alice R.; and in case my wife should be in a family way and have a living child, it is to receive an equal part in the above land with Minnie E. and Alice R."

1. It was admitted that Alexander Clark died in August, 1869. (199)

2. It was admitted that Troy M. Clark was twenty-six years of age at the commencement of this action, and is the posthumous son of Alexander Clark, the testator, born in a few months after his death, and is the person mentioned in the third paragraph of said will.

3. It was admitted that Alice R. Clark died, leaving the defendant Ola A. Benton as her only child and heir at law, and that the said Alice R. Clark has married W. O. Benton.

4. It was admitted that Minnie E. Clark is still living.

5. The land sought to be partitioned is admitted to be the same land as that described in the second paragraph of the will and in the petition.

6. It was admitted on the trial that Mary E. Lemly died in 1896, without issue.

The defendant offered Alexander Clark as a witness, who testified that he was the trustee mentioned in the second paragraph of the will, and that Mary E. Lemly received the rents of said land from the death of the testator to her death in 1896.

It is admitted that Troy M. Clark, the plaintiff, has never received any part of the rents of said land.

Upon the foregoing evidence the judge charged the jury that if they believed the evidence they should, in response to the issue, find that the plaintiffs, Troy M. Clark and Minnie E. Clark, and the defendant Ola A. Benton, were each entitled to one-third interest in the land in controversy (described in the second item of the will), and the defendant excepted.

(200) There can be, in our opinion, no reasonable doubt that this was the intention of the testator. By the death of Mary Lemly without issue, the limitation over to Minnie and Alice took effect, and this tract of land became theirs under the will, as much so as that devised in the fourth item, and as such the plaintiff Troy M. Clark is entitled to one-third therein, which renders the share of the other plaintiff, Minnie E., and the defendant Ola A. Benton likewise one-third each, instead of one-half each, as contended by the defendant.

Item 4 gives the posthumous child (if there should be one) "an equal part with Minnie E. and Alice R. in the above land"; *i. e.*, not merely in the land devised to them by that clause, but in all that was given them by the will.

Being tenants in common, nothing less than adverse possession for twenty years would bar the plaintiffs' right of partition. *Lenoir v. Mining Co.*, 113 N. C., 513. Indeed, that defense seems to have been abandoned.

AFFIRMED.

T. M. CLARK v. OLA A. BENTON, BY GUARDIAN, AND CATHERINE E. BENTON.

(Decided 21 March, 1899.)

*Construction of Will—Posthumous Child.*

Where, by will of their father, two children, *in esse*, were to take upon a contingency, which failed to occur, a posthumous child, who was to share equally with them, will be precluded also.

PETITION FOR PARTITION of land transferred from the clerk, (201) IREDELL, and heard at May Term, 1898, by *McIver, J.*

This case, like the preceding one, involved the construction of the will of Alexander Clark. His Honor decided that Catherine E. Benton was sole owner. The plaintiff excepted and appealed.

The opinion states the circumstances of the case.

*Armfield & Turner and L. C. Caldwell for plaintiff.*
*J. B. Connelly for defendant.*

CLARK, J. This is also a petition for partition and involves the construction of the third item of the will of Alexander Clark, deceased, but the parties are different from the preceding case, in that herein T. M. Clark alone is plaintiff, and Ola A. Benton (with her guardian) and Catherine E. Benton are defendants.

Item 3 is as follows: "I will and bequeath unto my son Alexander Clark, as trustee, and in trust to the use of my two daughters Catherine E. and Margaret A., equally, the lower end of my land, as follows: Beginning at the river bank (here follow the boundaries), said land to be equally divided when Catherine becomes of age and she receives her part, and in case either should die before coming of age, then the other is to receive her part; and in case both should die before coming of age, then said land to go to my two daughters Minnie E. and Alice R., and in case my wife should be in a family way at present, and have a living child, then it to receive its proportionable part of the above lands."

1. It was admitted that Alexander Clark died in August, 1869, (202) and that Troy M. Clark was twenty-six years of age at the commencement of this action and is the posthumous son of Alexander Clark, the testator, and that he was born in a few months after the death of the testator, and that he is the person mentioned in the third paragraph of the will.

2. It was admitted that Margaret A. Clark died before she was twenty-one years old and without issue.

3. It was admitted that Catherine E. Clark is now the wife of W. O. Benton and is living.

4. It was admitted that Alice R. Clark died, leaving the defendant Ola Benton as her only child and heir at law, and that the said Alice R. Clark was the first wife of W. O. Benton.

5. It was admitted by the parties that Minnie Clark is still living.

6. It was admitted that the land described in the third paragraph of the will and in the petition is the land sought to be partitioned.

It was in evidence that the rents of said land were received by Margaret and Catherine till the death of the former, and since then Catherine had received the rents till the trial.

The plaintiff claimed to be the owner of one-half interest in the land embraced in Item 3 above set out, as tenant in common with Ola Benton, who answered, claiming sole seizin in herself; and Catherine E. Benton, having been made a party defendant, filed an answer setting up sole seizin and ownership for herself. Upon issues submitted as to the interest of each of the respective parties, the court instructed the jury that upon the above admissions they should find that Catherine E. Benton was sole owner. The plaintiff, Troy M. Clark, excepted. The instruction of his Honor was certainly correct in excluding Ola Benton from any (203) interest in said land. This Item 3 gives the land jointly to Margaret and Catherine, to be equally divided when Catherine becomes of age, and adds, "in case either should die before coming of age, then the other is to receive her part." It being admitted that Margaret died before she was twenty-one years old, then the whole vested in Catherine, who is living and of full age, and the contingency, upon which any interest could devolve upon Alice, through whom her daughter Ola Benton claims, has failed. The sole question admitting of debate is, whether Troy M. Clark has any interest in said land. We think not, for the devise is, first to Catherine and Margaret; second, if either dia before becoming of age then the whole to the survivor; and, third, if both die before coming of age then to Minnie and Alice, and then in that event there is added, "and in case" there is a posthumous child, it is to have its proportionable part. Taking the second and fourth items of the will, as set out in the preceding case, it seems to have been the intent of the testator (which we are seeking for and wish to effectuate) to give the posthumous child an equal share with Minnie and Alice in the property given in the fourth clause, an equal share in the property in the second item which might devolve upon them by the death without issue of Mary, and now in like manner an equal share with Minnie and Alice should the property given in the third item devolve upon them by the contingency of the death of both Catherine and Margaret before coming of age.

The plaintiff's contention would destroy that equality between him and Minnie and Alice, by giving him one-half of the tract in Item 3, wherein they get nothing, and if both Margaret and Catherine had died before coming of age, would have cast the *whole upon him,* thereby defeating entirely the devise over to Minnie and Alice.

We think his Honor correctly held that the participation of (204) the plaintiff was contingent, as in regard to the property in the second item, upon its devolving upon Minnie and Alice.

NO ERROR.

*Cited: Withers v. Comrs.,* 163 N. C., 344; *Moran v. Comrs.,* 168 N. C., 290.

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SAMUEL BEAR v. COMMISSIONERS OF BRUNSWICK COUNTY.

(Decided 21 March, 1899.)

*Mandamus—School Fund—Public Fund—Judgment Estoppel—Waiver —Necessary Expenses—Constitution, Art. VII, sec. 7.*

1. School orders issued by the school committee upon the treasurer of the county board of education, under the former system, were payable out of the school fund only, and were not a valid charge upon the public funds of the county.

2. Judgments rendered upon school orders against the county commissioners will not be enforced by *mandamus*, not being for necessary expenses within the purview of Article VII, section 7, of the Constitution.

3. An estoppel, to be made available, must appear in the pleadings, otherwise it is waived and the trial proceeds upon the merits.

4. While *mandamus* is in the nature of an execution, it is also in the nature of a civil action, with summons, pleadings, and Code practice. A party applying for it to compel the county commissioners to levy a tax to pay his judgment against the county, must show affirmatively that the consideration of the debt upon which the judgment was recovered, was for an ordinary or necessary county expense, or had been sanctioned by a vote of the people.

PETITION to rehear this cause, decided at February Term, 1898, and reported in 122 N. C., 434.

*J. D. Bellamy and Shepherd & Busbee for plaintiffs.*
*E. K. Bryan and Frank McNeill for defendants.* (205)

MONTGOMERY, J. This case is before us on a petition to rehear, the first opinion having been filed at the Spring Term, 1898, 122 N. C., 434. After further argument and a closer investigation, we have arrived at the conclusion that there was error in the former opinion in its reversal of the judgment of the Superior Court. That judgment ought to have been affirmed.

The plaintiff in his complaint alleged that the defendants were indebted to him in the sum of ..... dollars due by eight judgments originally had in a court of a justice of the peace, and afterwards docketed by transcript in the office of the clerk of the Superior Court of Brunswick, and prayed judgment that the defendants be compelled to levy a tax to pay the judgments and costs. The defendants in their answer admitted that the judgments were procured as alleged, but averred that they were not valid and binding against the defendants, for the reason that they were obtained against a former board of commissioners on school claims for which neither the defendants nor their predecessors were liable in law. The defendants further aver that the judgments were obtained on certain school orders issued about the year 1886 by the school committeemen of certain school districts of Brunswick County upon the treasurer of the county board of education, and that they were not a valid charge against the defendants, the board of commissioners, or a charge upon the public funds of the county, or (206) upon any other fund except those expressly set apart for school purposes. And for a further defense the defendants aver that section 7, Article VII of the Constitution of North Carolina prohibits any tax from being collected or levied by any county, city or town, or other municipal corporation, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein; and the defendants aver that the consideration upon which the judgments were had was not for the necessary expenses of the county or for a debt contracted in the manner provided by the Constitution.

When the case came on for trial a jury trial was waived and it was agreed that his Honor who presided should find the facts, and the case was heard by the court by the consent of counsel of the plaintiff and of the defendants. What facts could have been in the minds of the counsel, except the facts connected with the consideration of the claims on which the original judgments were procured, and those connecting the judgments of 1894, docketed in the Superior Court by transcript, as being the same judgments which were originally rendered by the justice of the peace in 1888? No other facts could have been referred to, for they were raised by the pleadings, and the defendants in their answer had admitted that the judgments had been obtained by the plaintiff, as set out in his complaint. The plaintiff having failed to plead his judgments

in estoppel of the matter set out in the answer, or to demur to the answer, waived his rights as to any advantage which the law had given to his position, and by his agreement to submit the facts to the finding of the court, went to the hearing on the merits of the original consideration upon which the judgments were granted. "Numerous decisions in this country and England hold that where a party has an opportunity to plead an estoppel, and voluntarily omits to do so, but goes to the issue on the facts, he thereby waives the estoppel, and the jury is (207) at liberty to find according to the facts of the case. So, where the advantage might have been taken of an estoppel by means of a demurrer, and the party fails to so take advantage of it, he will be held to have waived the estoppel." 8 A. & E., 13, and cases there cited. If the plaintiff intended to avail himself of the full benefit and effect of his judgments, it was incumbent on him to do so by some proper pleading, because of the nature of defendant's answer; for, though *mandamus* is in the nature of an execution, yet it is in the nature of a civil action; it is commenced by summons, and the pleadings and the practices are the same as are prescribed for the conducting of civil actions. The Code, sec. 623.

His Honor found as a fact, upon the evidence, none of which was objected to, that the original judgments were obtained upon certain school orders issued during the year 1886, and that the judgments of 1894 in the Superior Court were the same judgments which were obtained before the justice of the peace in 1888, and that there was nothing in the record or judgment of 1894 to show what the cause of action was, except that they were brought on former judgments. Now, upon his Honor's findings of fact, the legal question arises, Were school orders issued in 1886 a debt for which the county was liable, and for which the board of commissioners could be made to provide by taxation? We think not.

The law in force at the time when the school orders upon which the plaintiff's action was brought were issued was The Code, ch. 15, as amended by chapter 174, Laws 1885. Section 2551 of The Code provides that the county board of education shall, on the first Monday in January of each year, apportion among the several districts all (208) school funds, specifying how much of the same is apportioned to each race, and give notice thereof to the school committees of the several districts of the county. It is further provided in the same section that the sums thus apportioned to the several districts shall be subject to the orders of the school committees thereof, for the payment of the school expenses authorized by law. In section 2555 of The Code it is provided that "all orders upon the treasurer of the county board of education for school money for the payment of teachers, duly countersigned by the

county superintendent of public instruction, and all orders for the purchase of sites for schoolhouses, and for the costs of building, repairing and furnishing schoolhouses, shall be signed by the school committee of the district in which the school is taught, or in which the site or schoolhouse is situated, which orders, duly endorsed by the person to whom the same are payable, shall be the only valid vouchers in the hands of the treasurer of the county board of education, to be paid out of the funds apportioned to the district in which the schoolhouse is erected."

The county treasurer of each county was required to receive and disburse the public-school funds, not under his general bond, but under a separate bond, conditioned for the faithful performance of his duties as treasurer of the county board of education. The county board of education were empowered, if they deemed it necessary, to require the treasurer of the county board of education to strengthen his bond, and for any breach of that bond action was to be brought, not by the county commissioners, but by the county board of education. The Code, sec. 2554.

The treasurer of the county board of education was required to open accounts with each public-school district, and report yearly to each school committee the amount apportioned to the respective districts for the year, and to the county board of education the amounts (209) received from all sources for public-school purposes.

From this review of the law in force when the school orders were issued, upon which the plaintiff's judgments were obtained, it appears that there was a complete separation of the school funds from the general county fund upon the apportionment being made, and from that time all control of the same by the county commissioners ceased; that the funds were taken charge of by the treasurer of the board of education under a separate bond; that the disbursements were made by that officer under orders signed by the school committee; that the accounts of the school fund were kept by that officer and the several school committees, and a report, yearly, to the county board of education made of all receipts of school funds by him, and the amount apportioned to each district was the fund out of which school orders were to be paid.

The county, therefore, through the board of commissioners, was not liable for the debt upon which those orders were issued.

If the amount apportioned to the district or districts upon whose committee or committees the orders were drawn, had been in the hands of the treasurer of the board of education, and he had defaulted in their payment, then the law required action for such defalcation to be instituted against that officer and his bond. If there never had been in the treasurer's hands funds to meet those orders, because they were improperly issued, then there was no liability on either the county or the treasurer.

But besides the view of this case as expressed above, we are of the opinion that before *mandamus* can be issued to compel the board of commissioners of a county to levy a tax to pay a judgment against the commissioners, the plaintiff—judgment creditor—must show (210) affirmatively by the record or other competent evidence that the consideration of the debt upon which the judgment was obtained was of such a character as to fall under the head of ordinary or necessary county expenses. Any other view of the law would enable a board of county commissioners to levy a tax to pay a debt reduced to judgment by confession or by default, which debt, under section 7 of Article VII of the Constitution, the county would be prohibited from contracting, unless the question was submitted to a vote of the qualified voters of the county. Such a course would in effect be a convenient method whenever the county commissioners might choose to do so, of destroying a most salutary provision of the Constitution. It would be equivalent to holding that, by a rule of pleading, a plain provision of the Constitution can be abolished. No technical learning based on the rules of pleading can force us into such a conclusion.

The prayer of the petitioners must, therefore, be granted. The case must be reheard, and the judgment of this Court entered therein at the Spring Term, 1898, must be set aside and judgment entered at this term affirming the judgment of the Superior Court.

PETITION ALLOWED.

FAIRCLOTH, C. J., dissenting: On this petition to rehear I am unable to agree with the opinion of a majority of the Court.

The facts: The plaintiff, in 1888, instituted several actions before a justice of the peace against defendant board of county commissioners. The only matter filed in the nature of a complaint was "claim," and stating the amount of each. No denial of the claim, nor any defense, was made by the defendant, and judgments were entered in each case for the amount of the claim and costs. These judgments were not paid, and they were docketed in the Superior Court on 29 (211) September, 1893. In 1894, the plaintiff obtained judgments upon these former judgments, and it does not appear that defendants then made or offered any defense.

In the present action, by consent of parties, his Honor found the facts in these words: "That the judgments sued on in the complaint were obtained in the year 1894 in certain actions brought on former judgments obtained in 1888; that the cause of action on which said judgments of 1888 were obtained were school claims, as alleged in the

answer; that there was nothing in the record of judgments of 1894 to show what the causes of action were, except that they were brought on former judgments."

This action for *mandamus,* to compel defendants to levy a tax and pay said judgments, was before us at last term by appeal from the Superior Court, refusing to grant the writ, and this Court held that was error, and reversed the judgment below. In this proceeding, the defendants answer and deny the validity of the judgments, and plead section 7, Article VII of the Constitution, and aver that said school claims are not necessary expense of the county.

I shall not further remark on the effect and force of the judgments, as I did so for the Court in this case, *supra.* The case of *Young v. Henderson,* 76 N. C., 420, is decisive. The Court now admits the integrity of the judgments—that they cannot be impeached, and that the matters therein in issue are *res adjudicata*—and puts its opinion on the ground that the consideration is a debt, not for a necessary county expense. Passing over the competency of evidence, in the executionary stage of the cause, to go behind the judgments to set up a defense which was open to the defendants before the judgments were entered, we must consider whether the expense of the public common county school system is a necessary expense. What is a necessary expense is a question for the court whenever the question arises. It is necessary for (212) the good, safety and happiness of the whole people that certain benefits and improvements shall be recognized as necessary expenses. The public-school system tends to improve the manners, morals and material condition of the people in the march of civilization. This Court has often said that the building of courthouses, public roads and bridges are necessary expenses. *Vaughan v. Comrs.,* 117 N. C., 434. We have said that waterworks is not a necessary expense of a corporation (*Charlotte v. Sheppard,* 120 N. C., 411), and that electric lights are not a necessary corporate expense. *Mayo v. Washington,* 122 N. C., 5.

In *Lutterloh v. Comrs.,* 65 N. C., 403, it was held: "Where a party has established his debt against a county by *judgment,* and payment cannot be enforced by an execution, he is entitled to a writ of *mandamus* against the board of commissioners of said county to compel them to levy a sufficient tax to pay off and discharge his said judgment." It does not appear that it then occurred to any layman or lawyer that executionary process was inhibited by Article VII, section 7, of the Constitution, which was then in force. The opinion of the Court refers briefly to that case, but fails to distinguish it from the present case. Every

necessary expense in the whole list is such by force of the law, written or unwritten. Public education is a cherished object of our Constitution and of our Legislature and people. It is of vital importance to society and to the State. Is it less so than a public bridge across a stream which can be crossed by a common ferry-boat?

The Constitution, Art. I, sec. 27, declares that "The people have the right to the privileges of education, and it is the duty of the State to guard and maintain that right." Article IX, section 4, makes a most liberal provision for funds for the purposes of education, and commands that they "shall be faithfully appropriated for estab- (213) lishing and maintaining in this State a system of free public schools, and for no other uses or purposes whatsoever." Article IX, section 15, empowers the Legislature to *require* every child within the prescribed age to attend the public school, unless educated by other means.

Finally, Article IX, section 2, declares "that the General Assembly . . . *shall* provide, by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State."

I have thus quoted to show how important and necessary the Constitution considers the subject of public education. Every one knows that much machinery is necessary to perform this command of the organic law. Are not teachers necessary? And who will teach if his undisputed "school claim" cannot be collected, as this plaintiff's cannot be if the remedy he prays for is withheld by this Court? The Court cites no authority whatever in support of its position, except *Rodman v. Washington,* 122 N. C., 39. Let us examine that case: The defendants were proceeding to levy and collect a tax under a special act (Laws 1897, ch. 343) to meet the expenses of a corporation graded school, and the plaintiff obtained an injunction on the ground that the act was not passed according to the Constitution, Art. VII, sec. 7, as construed by a majority of this Court. This was admitted by the defendants, but they insisted that the expense was a "necessary expense," in the spirit of that article. It was also admitted that the tax, if levied, would largely exceed the constitutional limit of taxation. The Court held that, while it favored public education, it could not hold that a tax over and beyond the constitutional limit is a necessary corporation tax, that the act in that respect was void, and affirmed the judg- (214) ment. I am unable to see how that case supports the defendant's contention as to a necessary county expense to support the public-school system, when neither the record nor the opinion refers to that question.

My conclusion is, that the opinion ought to be dismissed, and that the writ of *mandamus* should issue.

FURCHES, J., concurring in the dissenting opinion.

*Cited: White v. Auditor,* 126 N. C., 603.

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J. D. HOCUTT AND E. McLENDON, ADMINISTRATORS OF W. B. HOCUTT, v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 21 March, 1899.)

*Damages—Misjoinder—Statute of Limitations.*

1. The objection of misjoinder of parties is to be taken by demurrer; the failure to demur is a waiver of the objection.

2. Permanent damages to land go to the heir. When the answer demands to have all permanent damages, if there be any, assessed in this action, the defendant cannot object if it is done, nor if the heir is subsequently made party upon defendant's own motion.

3. While a person may, under certain circumstances, bring an action to enjoin the commission of an act that threatens irreparable injury, he cannot maintain an action for damages until injury has been sustained. The injury is the cause of action, and the statutes of limitation cannot begin to run before the cause of action accrues.

4. Neither a corporation nor an individual can divert water from its natural course, so as to damage another, neither may they cut ditches through a watershed and conduct water to a watercourse insufficient to carry it off, whereby the water is flooded upon the land of another.

(215) ACTION to recover damages for flooding plaintiffs' land, and thereby injuring both crops and land, tried before *Adams, J.,* at Spring Term, 1898, of PENDER.

The action was commenced on 30 August, 1895, by W. B. Hocutt, intestate of plaintiffs.

At the instance of the defendant, an issue was submitted as to permanent damages, and in this Court, upon motion of defendant, the heirs were made parties.

The answer denied any liability and pleaded the statute of limitations.

It was in evidence that the ditches, cut by the defendant to drain its roadbed, conducted the water to a natural watercourse, and had been in use over twenty years without injury to plaintiffs' land.

It was also in evidence that the defendant's ditches diverted the surface water from its natural course, across the watershed, and in consequence of heavy rains in May, 1895, more water was conducted through the ditches than could be carried off by the small stream into which they emptied, and plaintiffs' crop and land were flooded and injured.

His Honor's charge, in the various aspects of the evidence (which was very voluminous), was considered by this Court as liable to no just exception. There was no exception to the evidence.

The jury rendered a verdict assessing permanent damages. Defendant excepted. Judgment and appeal.

*Allen & Dortch and J. T. Bland for plaintiffs.*
*Junius Davis and Marsden Bellamy for defendant.*

DOUGLAS, J. This is an action brought to recover damages (216) arising from the floodings of land, caused, as alleged, by the unlawful diversion of water through the defendant's ditches. The action was originally brought by W. B. Hocutt, the owner of the land, who died during its pendency. Thereupon J. D. Hocutt and E. McLendon, administrators of W. B. Hocutt, were made plaintiffs.

Before the call of the case the plaintiffs moved in this Court to make the minor heirs of W. B. Hocutt parties plaintiff through their general guardian, J. D. Hocutt. This motion was proper, and was granted. After it was granted, the defendant moved to rescind this order, on the ground that it created a misjoinder of parties as well as of subject-matter, inasmuch as the damages for loss of crops would go to the administrators, while all the damage to the land itself belongs to the heirs. Had the administrators and the heirs originally brought a joint action for the loss of the crop, together with the permanent damage to the land, there might have been such a misjoinder, but such was not the case. Even if it had been, the defendant could have sustained its objection only by demurrer, as the error would appear from the face of the complaint. *Finley v. Hayes,* 81 N. C., 368; *Mining Co. v. Smelting Co.,* 99 N. C., 445; *Hall v. Turner* 111 N. C., 180; *McMillan v. Baxley,* 112 N. C., 578; *Kiger v. Harmon,* 113 N. C., 406, 408. The failure to demur would have been deemed a waiver of the objection. The defendant contends that as the heirs were made parties plaintiff only in this Court, it had no occasion to demur in the court below, and now avails itself of its first opportunity to demur *ore tenus* before us. We think the defendant has clearly waived its right to demur by its action in the court below. After the death of the original plaintiff, and the administrators becoming parties, it demanded that the permanent damages to the land should be assessed. If, as it contends, and which

(217) we concede, such damages should go to the heirs, it ill becomes the defendant to object to the heirs becoming parties to an action in which it has demanded an adjudication of their rights. If there is any misjoinder of causes of action, it has been brought about by the defendant itself injecting into this case the issue of permanent damages. A defendant may demur to the complaint, but not to its own answer.

The defendant further contends that it should be granted a new trial because the damages have not been apportioned among the respective plaintiffs, and that a new lawsuit might otherwise become necessary between the plaintiffs themselves in order to adjust their relative rights. We do not see how this contingency would concern the defendant. In one aspect it is better for the defendant that the minor heirs should become parties, as they are thereby bound by the judgment, which will thus vest in the defendant the easement it has sought. The plaintiffs allege that the defendant, in order to drain its roadbed and right of way, has cut deep ditches beside its road, whereby it diverts large volumes of water from its natural course and flow, and empties it into a small branch or flat bottom, known as Rattan Trestle or Jumping Run Branch; that it has provided no sufficient outlet for such accumulated and diverted waters, thereby causing the same to pond or back up and overflow the plaintiffs' land, whereby they and their intestate have been greatly damaged within the three years next preceding the action.

The defendant files three successive answers, denying the cause of action, alleging that the ditches are properly constructed and have been used for more than three years before the bringing of this action, for more than five years and for more than twenty years; that the railroad was built prior to the year 1840, and has since been in constant (218) operation. In its final answer it "demands to have all permanent damages, if there be any, assessed in this action."

Under our decisions, this turns the action into one for permanent damages, whatever may have been the original nature of the plaintiffs' claim. *Parker v. R. R.*, 119 N. C., 677; *Nichols v. R. R.*, 120 N. C., 495; Laws 1895, ch. 224.

It is difficult to see how permanent damages can be assessed in all cases where there is no permanent damage, and where the only injury results from causes that are not in their nature permanent and may never again occur. But as the defendant demanded such an assessment, and as the case was tried upon that issue, we do not feel at liberty to disturb the verdict on that ground. It does not appear when or how the defendant withdrew its demand for permanent damages, unless inferentially from its objection to the issues submitted; but, then, its own

seventh issue tendered was broad enough to admit of such an assessment. In fact it did not vary from the second issue submitted as to the character of the damage to the land, but only as to its cause.

It is unnecessary to separately consider each exception, as they naturally group themselves around two or three essential principles. We see no error in the refusal to submit the issues tendered by the defendant. Those submitted, taken in connection with his Honor's charge, were sufficient to present and determine all material points of controversy. The charge itself appears to be unexceptionable. It is full, clear and accurate, in which the principles of law laid down are correctly applied to the facts involved. None of the statutes of limitations appear to bar the action. It is contended by the defendant that the sole damage was done by the freshet of 1895, which happened only a few months before the bringing of the action. It makes no difference when the ditches were dug, provided they did not injure the plaintiffs. The defendant had a perfect right to dig its ditches or use its land as it saw fit, without injury to another. The digging of (219) the ditches, or the building of the road, or any other act done five or twenty or fifty years before was utterly immaterial to the present controversy, as, in themselves, they constituted no cause of action. While the plaintiff might, under certain circumstances, have enjoined the commission of an act that threatened irreparable injury, he could not have maintained an action for damages that he had not sustained, and might never sustain. It is well settled that the injury is the cause of action and that no statute of limitations can begin to run before the cause of action accrues. This principle is the only just basis for any statute of limitations, which otherwise would be subversive of common right. They are statutes of repose, intended to force all men to litigate their claim within a reasonable time, while the facts are yet fresh in the memory of living witnesses, and before the probable loss or destruction of important papers. It has been well said that by such statutes the law is constantly building up around the rights of the citizens muniments of title to take the place of those naturally decaying under the touch of time's effacing finger.

But why force a man to sue when he can recover nothing? The principle is well settled. *Ridley v. R. R.*, 118 N. C., 996; *Beach v. R. R.*, 120 N. C., 498. The injury complained of is the flooding of the plaintiffs' land, caused by the unlawful act of the defendant in diverting water from its natural course, and concentrating it at a point where there was no sufficient natural or artificial outlet. It is now well settled that neither a corporation nor an individual can divert water from its natural course so as to damage another. They may increase and accelerate, but not divert. *Jenkins v. R. R.*, 110 N. C., 438; *Parker v. R. R.*, 123 N. C., 71.

(220) There was certainly sufficient evidence of diversion to go to the jury, and this of itself disposes of several of the exceptions. In addition to the testimony, there was a map accompanying the record, which shows a natural watershed some distance north of the plaintiffs' land and about 400 feet south of Branch No. 2, which flows east. The waters of Big Bay originally flowed into this branch, but were diverted by Devil's Ditch and discharged into Branch No. 3 still further to the north. Had the natural watershed remained intact, when the dam at Devil's Ditch broke, its water would have resumed its old channel in Branch No. 2 and would not have reached the plaintiffs' land, going far to the northeast. But its outlet into Branch No. 2 was closed, and it naturally found its way into the railroad ditch which had been cut through the watershed. It was thus diverted from its natural outlet to the east, and carried back south to the head of Jumping Run. It is true the testimony shows that the railroad ditch stopped about 200 feet from Devil's Ditch, but it also shows that it was cut through the watershed to a flat place that lay between it and Devil's Ditch.

The same diversion was shown as to the water of Branch No. 6, which naturally flowed south into Jumping Run about a thousand feet west of the trestle, but which was carried by Porter's ditches east into the railroad ditch, and by it discharged into Jumping Run at its head at Rattan Trestle. The effect of this diversion and concentration was to accumulate a large amount of water at the head of Jumping Run, which it was unable to carry off and which, therefore, flowed back upon Hocutt's land.

It is true that Jumping Run is a natural watercourse and drain-way, as contended by the defendant; but it is such only as to those waters that naturally flow into it. The defendant contends that it should (221) not be held responsible for Porter's ditches. This might be true were it not for the fact that its own ditch received the water from Porter's ditches and discharged it upon the plaintiffs, thus becoming the proximate cause of the injury.

At the request of the defendant, his Honor charged that "If the damages to the plaintiffs' land and crops were caused by the water coming down through the ditch of the defendant on the west side of the railroad to Rattan Trestle, and then through the trestle and ditch dug by Hocutt from the trestle to his land, then the defendant is not liable, and the plaintiffs cannot recover any damages." The jury evidently did not believe that Hocutt's ditch caused the damage, and their conclusion is not surprising, in view of the fact that this ditch was dug to drain Hocutt's land west into Jumping Run. That such a ditch should carry sufficient water upstream, not only to fill its own banks but to flood the surrounding country, would seem somewhat remarkable.

As we see no error in his Honor's charge, or his refusal to charge, and as there was sufficient evidence to go to the jury upon the material issues, the judgment must be affirmed.

NO ERROR.

*Cited: Mizzell v. McGowan,* 125 N. C., 444; *Lassiter v. R. R.,* 126 N. C., 512, 513; *Geer v. Water Co.,* 127 N. C., 354; *Mizzell v. McGowan,* 129 N. C., 94; *Rice v. R. R.,* 130 N. C., 376; *Mullen v. Canal Co.,* 130 N. C., 502; *Phillips v. Tel. Co., ib.,* 527; *Duval v. R. R.,* 161 N. C., 451; *Marcom v. R. R.,* 165 N. C., 261; *Cooper v. Express Co., ib.,* 539; *Barcliff v. R. R.,* 168 N. C., 269, 270; *Cardwell v. R. R.,* 171 N. C., 366; *Van Dyke v. Ins. Co.,* 173 N. C., 701; *Mullen v. Water Co., ib.,* 502; *Phillips v. Tel. Co., ib.,* 527; *Craft v. R. R.,* 136 N. C., 51; *Mast v. Sapp,* 140 N. C., 539; *Briscoe v. Parker,* 145 N. C., 17; *Roberts v. Baldwin,* 151 N. C., 408; *S. c.,* 155 N. C., 281; *Hooper v. R. R.,* 156 N. C., 157; *Daniels v. R. R.,* 158 N. C., 428; *Godwin v. Jernigan,* 174 N. C., 76; *Barcliff v. R. R.,* 176 N. C., 41; *Mizzell v. R. R.,* 181 N. C., 39.

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(222)

## WHIT HANCOCK v. NORFOLK AND WESTERN RAILWAY.

(Decided 21 March, 1899.)

*Damages — Negligence — "Fellow-Servant Act" of 1897—Unnecessary Printing—Rule 22.*

1. "The Fellow-Servant Act," ratified 23 February, 1897, notwithstanding it is improperly published among the Private Laws, is a Public Law, of which the court will take notice without being pleaded.
2. Said act does not grant exclusive privileges, and is not in contravention with the Constitution, Federal or State, neither does it cut off the defense of contributory negligence.
3. The cost of sending up necessary matter in the record will be paid by the party occasioning it to be done.

ACTION for damages for personal injury, caused by the negligence of a fellow-servant in the employment of the defendant company, tried before *Timberlake, J.,* at October Term, 1898, of DURHAM.

The complaint alleged that the plaintiff, in June, 1898, was an employee of the defendant company, and while acting under orders with other section hands, was engaged in propelling a hand-car to their place of work, in front of a freight train then shifting upon the same track, and that when about 150 yards from the starting point the hand-car

ran through an open switch, unperceived by him, and which some brakeman or other employee of the defendant had negligently permitted to remain open, in consequence of which the hand-car ran off the iron rails onto the cross-ties, and he was violently thrown to the ground and dreadfully and permanently injured and disabled.

The answer controverted the injury to the extent alleged in the complaint, and sets up the defense of contributory negligence. Appeal by defendant.

(223) *Boone & Bryant for plaintiff.*
*Guthrie & Guthrie for defendant.*

CLARK, J. The decision of this case depends upon chapter 56, Private Laws 1897, "An act to prescribe the liability of railroads in certain cases." This statute, commonly known as the "Fellow-Servant Act," was ratified 23 February, 1897, and provides:

"Section 1. That any servant or employee of any railroad company operating in this State, who shall suffer injury to his person, or the personal representative of any such servant or employee, who
(224) shall have suffered death in the course of his services or employment with said company, by the negligence, carelessness or incompetency of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.

"Sec. 2. That any contract or agreement, express or implied, made by any employee of said company to waive the benefit of the aforesaid section shall be null and void."

The plaintiff was injured in the service of the defendant since the ratification of this act. The defendant contends that the injury was caused by the negligence of a fellow-servant of the plaintiff, to wit, a brakeman on the passenger train, in leaving the switch open, whereby the hand-car was derailed. Its counsel cites, *inter alia, Ponton v. R. R.*, 51 N. C., 245; *Pleasants v. R. R.*, 121 N. C., 492, and *Wright v. R. R.*, 122 N. C., 852, which sustain the contention that if the injury was thus caused the action could not have been maintained at common law. The defendant excepts as to above statute, which the judge held confers a right of action in such case, because (1) "It is a private act, and as such, under section 264 of The Code of North Carolina, it should have been pleaded. (2) Whether this act is public or private, it is unconstitutional and void when applied in a case like this to fellow-servants of a 'railroad company operating in this State,' upon the ground that it undertakes to confer upon servants and employees of such companies separate and exclusive privileges from the rest of the community engaged

in similar private employment, which are denied even to servants and employees of railroad construction companies and of street railroads and railroad bridge companies and partnerships operating lumber and mining railroads, since its provisions are confined strictly to railroad companies, and therefore violates Article I, section 7, of the Constitution of the State." (225)

As to the first ground of exception, the act is so plainly and clearly a public statute that it is a mystery why it was placed among the Private Laws. *Kinney v. R. R.*, 122 N. C., 961; *Wright v. R. R.*, 123 N. C., 280. But by whom and for what purpose this was done is immaterial. Whether a statute is private or public depends upon its contents and not upon the conduct or judgment of the person who directs the compilation in which it shall be published. *Durham v. R. R.*, 108 N. C., 399. Indeed, part of an act may be public and parts thereof a private act. Being a public statute, the fact that it was printed among the private acts did not make it incumbent upon the plaintiff to plead it.

As to the second ground of exception, nothing in this case requires us to pass upon the questions, which cannot arise upon the facts herein, whether the " 'Fellow-Servant Act' applies to street railroads, partnerships operating lumber and mining railroads, railroad construction companies, and railroad bridge companies, and whether the defendant can set up the defense of a knowledge of defective machinery by the plaintiff and assumption of risk." Beyond controversy, the plaintiff was in the employment of "a railroad company operating in this State" when injured. These matters may possibly come up for adjudication when the facts of some case present the question. But in the meantime "sufficient unto the day is the evil thereof."

As to the other question learnedly argued in the brief, whether under the "Fellow-Servant" statute the defendant can plead contributory negligence on the part of the servant injured, there can be no doubt. The statute goes no further than to remove the defense that the injury was sustained by the negligence of a fellow-servant. The defendant does not take his own argument on this point seriously, for in fact (226) he sets up the plea of contributory negligence, and an issue thereon was submitted to the jury and found in favor of the plaintiff.

We see no ground for the defendant's contention that the act in question violates Article I, section 7 of the North Carolina Constitution, by "conferring exclusive privileges upon any set of men." The law exempting a master from liability to a servant for the negligence of a fellow-servant is by judicial construction and of comparatively recent origin. Its history is traced in *Hobbs v. R. R.*, 107 N. C., 1. Its extent has been differently outlined in different States by judicial construction, and in several States it has been restricted by legislative enactment so as not to

extend to employees of railroad companies, as has now been done in this State. As the original ground of the decision was that a servant knew the character, for care, of his fellow-servant, and entered service with a view to that risk, the courts themselves might logically have long since modified the ruling not to extend to an employment like that of railroads embracing many thousands of employees and exposing its servants to peculiar risks. The "Fellow-Servant Act" now in question applies to a well-defined class, and operates equally as to all within that class. Indeed, any act incorporating a company confers special privileges upon the stockholders, but not exclusive privileges within the meaning of the Constitution. We fail to see in this act any conferring of "exclusive privileges" within the language or intent of the constitutional provision in question. *Broadfoot v. Fayetteville,* 121 N. C., 418, and similar "Fellow-Servant Acts," almost *in totidem verbis,* in other States have been held by the Federal Supreme Court to be not in conflict with the "equal protection" clause of the Fourteenth Amendment. Our statute specifies "servants or employees of any railroad company operat-
(227) ing in this State," etc. The Kansas statute, which uses the words "every railroad company organized and doing business in this State shall be liable," etc., was held valid in *R. R. v. Mackey,* 127 U. S., 205, and the Iowa statute, which uses the words, "every corporation operating a railroad shall be liable," etc., was sustained in *R. R. v. Herrick,* 127 U. S., 211, and both cases have been very recently reviewed and reaffirmed in *R. R. v. Matthews,* 165 U. S., 1 (at p. 25), all of which have been lately cited as authority by this Court in *Broadfoot v. Fayetteville, supra,* at p. 422.

In another recent case (*R. R. v. Pontius,* 157 U. S., 209, at p. 210), the Federal Supreme Court, through *Chief Justice Fuller,* approving *R. R. v. Mackey,* 127 U. S., 205, has thus stated the ruling, with approval: "As to the objection that the law (the Kansas statute above cited) deprived the railroad companies of the equal protection of the laws, and so infringed the Fourteenth Amendment, this Court held that legislation which was special in its character was not necessarily within the constitutional inhibition, if the same rule was applied under the same circumstances and conditions; that the hazardous character of the business of operating a railroad seemed to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public; that the business of other corporations was not subject to similar dangers to their employees, and that such legislation could not be objected to on the ground of making an unjust discrimination since it met a particular necessity, and all railroad corporations were, without distinction, made subject to the same liability."

The attack of the defendant's counsel upon the constitutionality of the "Fellow-Servant Act" has been delivered with force and ability, but we cannot perceive that the reasoning in the above decisions of our highest Federal Court is otherwise than sound.

The other exceptions taken in this appeal are without merit (228) and do not require detailed discussion.

The defendant further moved in this Court, under Rule 22, to tax the appellee with the costs of transcript and of printing "all the evidence, there being no exception thereto, and the special instructions asked for by the defendant and which were given, and the judge's charge in full," the appellant having objected to sending up this matter, as unnecessary, when settling the "case on appeal," citing *Mining Co. v. Smelting Co.,* 119 N. C., 415; *Durham v. R. R.,* 108 N. C., 399, and *Roberts v. Lewald, ib.,* 405. The defendant's exceptions to the charge required that the whole charge be sent up (if the appellee desired it done), as it would be manifestly unjust to single out a single sentence without aid from the context, and for the same reason the instructions asked by the appellant, though given, were not improperly sent up. But there was no exception to evidence and no dispute as to it, nor any phase of it, presented by exceptions to the charge, which required the evidence to be sent up, there being a hypothetical presentation in the charge, and the special instructions of the different states of fact alleged by the parties to have been proved. The sending up of the evidence in full over the appellant's objection was unnecessary, and the appellee, though successful here, must be taxed with the cost of transcript of the evidence and the printing thereof. While appellate courts do not encourage motions as to mere matters of costs of appeal, it is their duty, when objection is made, at the time of settling a case on appeal, to sending up unnecessary matter in the record, to protect appellants, if unsuccessful, from the needless expense thus thrown on them. If the appellant is successful, of course the appellee must bear the charges of his own extravagance, and no motion is necessary. The appellant's (229) motion in this Court is allowed in part, but the judgment of the court below is affirmed.

NO ERROR.

*Cited: Baker v. Hobgood,* 126 N. C., 152; *Coley v. R. R.,* 128 N. C., 539; *S. c.,* 129 N. C., 409; *S. v. Patterson,* 134 N. C., 615; *Sigman v. R. R.,* 135 N. C., 183; *Cressler v. Asheville,* 138 N. C., 486; *Nicholson v. R. R., ib.,* 517; *Moore v. R. R.,* 141 N. C., 112; *Hemphill v. Lumber Co., ib.,* 490.

STRAUGHAN & CHAPIN, ADMRS. DE BONIS NON OF JOSIAH TYSOR, v. MISSOURI TYSOR, WIDOW, AND H. D. TYSOR ET ALS., HEIRS AT LAW OF JOSIAH TYSOR.

(Decided 21 March, 1899.)

*Possession—Title—Joint Occupancy—Tenancy in Common.*

Joint occupancy by members of the same family does not constitute tenancy in common when the title is in one only. Possession is implied from title, in the absence of proof to the contrary, and accompanies the title.

SPECIAL PROCEEDING to sell land for assets, transferred from the clerk of CHATHAM and heard before *Robinson, J.*, at February Term, 1898.

(230) *H. A. London and Womack & Hayes for plaintiffs.*
*T. H. Calvert for defendants.*

FAIRCLOTH, C. J. This is a petition filed before the clerk by plaintiffs, as administrators *d. b. n.* of Josiah Tysor, against the defendants, the widow and brother and sisters of said Josiah, for the purpose of selling land for assets. The plaintiffs allege that their intestate died in 1896 seized and possessed of the land described in the petition. The defendants, except the widow, answer and aver that they were tenants in common with said intestate. On the trial of this issue in the
(231) Superior Court, "Was the plaintiffs' intestate seized and possessed in severalty of the lands described in the complaint at the time of his death?" his Honor instructed the jury that if they believed the evidence, to answer the issue "Yes," which they did, and judgment was entered directing that the sale proceed and that the commissioners to sell make their report to the clerk.

The plaintiffs introduced as evidence a deed, proper in form, to convey title to their intestate from his uncle, Harris Tysor, dated and delivered in June, 1868, and proved that their intestate lived on said land until his death in 1896, and that no one else ever cultivated the land or had anything to do with it.

The defendants proved that Dennis Tysor, father of plaintiffs' intestate and defendants, formerly lived on this land and that after the death of Dennis his widow, daughters and said Josiah lived on the land until the daughters were married. This was the evidence. There is no question of ouster or adverse possession in the case. The defendants have shown no title from any source, but simply occupation with their brother Josiah until they married. They asserted no claim until this action was instituted. The plaintiffs show title, color of title, and possession in

their intestate, and that he alone exercised ownership by cultivation, etc., until his death, covering a period of more than twenty-six years after the date of his deed.

On the principle that possession is implied from title, in the absence of any adverse claim, until the contrary is shown, we hold that the plaintiffs' intestate was not only seized but was possessed of the land in dispute and covered by plaintiffs' deed, and that no error was committed by the court below.

NO ERROR.

*Cited: Currie v. Gilchrist,* 147 N. C., 652.

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(232)

## A. H. MOTLEY COMPANY v. THE SOUTHERN FINISHING AND WAREHOUSE COMPANY.

(Decided 21 March, 1899.)

*Exclusive Privileges.*

1. Exclusive privileges are inhibited by the Constitution, Art. I, sec. 7.

2. Warehousemen are liable, under the general law, for damages caused by their negligence.

3. The clause in the charter of the defendant company which reads as follows: "*Provided, however,* that said company shall not be held responsible for losses arising from the act of God, or of common enemies, nor for any loss or damage not provided for in its warehouse receipt or contract; and said company may make such stipulations in its warehouse receipts or contracts, as to loss or damage ensuing by fire or other cause, as it may deem necessary and proper," is in contravention of the Constitution.

PETITION to rehear this cause, decided at February Term, 1898, 122 N. C., 347.

*C. M. Stedman and R. R. King for petitioner.*
*Bynum & Bynum and A. M. Scales contra.*

FURCHES, J. This is a petition on the part of the defendant to rehear and review the former opinion of this Court (122 N. C., 347). Upon this petition a rehearing has been ordered, but restricted to the constitutional question involved. And upon the rehearing, this question has been interestingly discussed on both sides, but there were no new develop-

ments in the case. Nor was there any phase or aspect of the case presented that had not been presented and considered on the former hearing. There was more elaboration in the argument, and some (233) authorities cited that were not cited on the former argument, but they were only cumulative and no stronger than those cited before.

It seems to us that the petition and the argument are predicated upon a misconception of the opinion of the Court. They seem to be based upon the idea that the Court had decided that it was unconstitutional for the Legislature to grant the defendant the right to contract against loss. If the Court had decided this to be the law, its decision would most undoubtedly be erroneous. But this is not the case—the opinion does not so decide. The defendant did not contract against loss, as will plainly appear by the receipt copied in the former opinion, which is admitted to contain the contract of the parties. Under this contract and the findings of the jury the defendant has been guilty of negligence and is liable to plaintiff in damages, if it is subject to the general law governing the liabilities of warehousemen.

But defendant contends that it is not liable to the same rule of damages that other warehousemen are; that while *they* are liable under the general law for the damages caused by *their* negligence, *it* is not only liable for damages when *it* specially contracts to be liable, whether the damage was caused by *its* negligence or not.

If this is not a special privilege, not enjoyed by other corporations or by individual citizens, and which could not be granted to them, we are incapable of understanding what would be.

It is exclusive, because it is a privilege; a thing that others are excluded from, and not entitled to, and not because it could not be granted to other corporations (if it were constitutional to do so), but because it is not done, and others are excluded from the benefit of this privilege.

It was so held in *Simonton v. Lanier,* 71 N. C., 498; *Staton v.* (234) *R. R.,* 111 N. C., 278, cited in the former opinion of this Court. And as these cases seem to be founded upon sound public policy, we have no disposition to overrule them.

We do not see that we can add anything more to the argument contained in the former opinion, and will not discuss the matter further.

PETITION DISMISSED.

*Cited: S. c.,* 126 N. C., 339.

D. L. GORE v. RACHEL DAVIS.

(Decided 21 March, 1899.)

*Mortgage—Default—Foreclosure—Demurrer—Practice—The Code, Sections 272, 274.*

1. Where a note is payable three years after date, but the interest is payable semiannually, and a mortgage given to secure the note subjects the land to sale upon default of payment of principal and interest, or any part of either, at maturity, and the debtor fails to pay interest when due, according to the conditions of the mortgage both principal and interest become due, and the creditor is entitled to foreclosure.

2. Upon overruling a demurrer, the defendant is entitled to answer at that term (The Code, sec. 272). Further time is in the discretion of the court (section 274).

3. In judgment upon foreclosure, the sum due should be distinctly stated.

ACTION for foreclosure of land mortgage, tried before *Timberlake, J.*, at January Term, 1899, of NEW HANOVER.

Demurrer filed. Overruled. No answer. Judgment. Exception and appeal. The case is sufficiently stated in the opinion.

*John H. Gore, Jr., for plaintiff.*
*Iredell Meares for defendant.*

CLARK, J. The note sued on was dated 19 October, 1897, and (235) payable three years after date, but the interest was made "due and payable semiannually." The mortgage to secure the note specified, "if default shall be made in payment of said bond or the interest on the same, or any part of either at maturity," the creditor could proceed to sell the land and out of proceeds of sale "pay said bond and interest on the same." The defendant failed to pay the interest which fell due 19 April, 1898. By the conditions of the mortgage, the principal and interest became due. The demurrer of the defendant, that this action for judgment on the note and foreclosure of the mortgage was premature, was properly overruled. *Capehart v. Dettrick,* 91 N. C., 344; *Kitchin v. Grandy,* 101 N. C., 86; *Whitehead v. Morrill,* 108 N. C., 65; *Kiger v. Harmon,* 113 N. C., 406; *Barbee v. Scoggins,* 121 N. C., 135. Nor is a demand or refusal to pay necessary before beginning an action of this nature.

Upon overruling the demurrer, the defendant was entitled to answer at that term (The Code, sec. 272), but the refusal of further time to answer was in the discretion of the trial judge. The Code, sec. 274.

The defendant having failed to answer, and the complaint being verified, the court rendered judgment that if $3,000 (the principal of said note) and interest and costs were not paid within the time specified in the judgment, the mortgaged premises should be sold, after due advertisement, and judgment against the defendant for any deficiency, after applying the proceeds of said sale to the satisfaction of the judgment. The judgment is loosely and inartificially drawn. There is no sum adjudged to be due by the defendant to the plaintiff, which should be done before a foreclosure is directed. It may be inferred, upon the maxim, *id certum est quod certum reddi protest.* The judgment should be reformed by the court below to accord with the established form in such cases. This loose practice cannot be encouraged, and the costs of this Court will be divided between the parties. The Code, sec. (236) 527. With this modification, the judgment below is affirmed.

MODIFIED AND AFFIRMED.

*Cited: Perry v. Comrs.,* 130 N. C., 561; *Hinton v. Jones,* 136 N. C., 57; *Bizzell v. Roberts,* 156 N. C., 274; *Eubanks v. Becton,* 158 N. C., 233; *Sanderlin v. Cross,* 172 N. C., 240.

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T. J. MITCHELL v. CAROLINA CENTRAL RAILROAD COMPANY.

(Decided 21 March, 1899.)

*Common Carrier—Limited Liability—Burden of Proof—Negligence—Connecting Lines.*

1. Common carriers, while they may limit their common-law liability by special contract, reasonable in its essential features and not contrary to public policy, cannot exempt themselves from the results of their own negligence.

2. In cases of limited liability, proof of shipment and loss or injury makes a *prima facie* case for the shipper, and then the burden is upon the carrier to show that the circumstances of the loss bring it within the excepted causes; and when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence.

3. It is a principle of law, when a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, upon him rests the burden of proof.

4. Among connecting lines of common carriers, the one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption.

MITCHELL *v.* R. R.

ACTION to recover damages for injury to livestock transported over defendant's road, tried before *Norwood, J.,* at Fall Term, 1898, of CRAVEN.

The animals were transported by connecting lines from Nashville, Tenn., to New Bern, N. C., under a bill of lading limiting the common-law liability of common carriers, in consideration of reduced rates. In the transit one of the animals, a mule, died on the (237) cattle car of the defendant.

His Honor charged the jury that, notwithstanding the contract, the defendant was liable for the exercise of proper care in handling and transporting the stock over its line; that the burden was upon the plaintiff to show want of ordinary and proper care, and that upon the whole evidence there was no evidence that the defendant was negligent in handling and transporting this stock. The plaintiff excepted to that portion of the charge relating to the burden of proof, submitted to judgment of nonsuit, and appealed.

*Simmons, Pou & Ward for appellee.*
*No counsel contra.*

DOUGLAS, J. We cannot assent to the proposition that in cases of limited liability the burden of proof rests upon the plaintiff to show *primarily* the negligence of the defendant. In the case before us the plaintiff brought suit for the value of a mule which was shipped to him from Nashville, Tenn., in a car with other horses and mules. When the car reached New Bern the mule was missing. The plaintiff has no means of knowing what became of it, except information furnished by the defendant, who says that it died en route. This may be true, and we presume it is, from the testimony for the defendant, but it has neither been admitted by the plaintiff nor found as a fact by the jury.

Uncontradicted testimony is never equivalent to an admitted fact, as the jury may not believe it, and this is especially so where the alleged facts are peculiarly within the knowledge of the witness. Here, the plaintiff simply knew that the defendant received his mule under a contract to deliver it to him at New Bern, which it has failed (238) to do. He simply asks for his mule or its value, neither of which does he obtain. The defendant says that the shippers, implied agents of the plaintiff, signed a bill of lading releasing the defendant from all risk of loss or damage from any cause whatever not resulting from the negligence of its agents, and that the burden rests upon the plaintiff of proving affirmatively not only the shipment and the loss, but that the loss occurred through the negligence of the defendant, when, in fact, he neither has nor could have any knowledge as to how it occurred. It is

true, the defendant introduced testimony to show the death of the mule from natural causes, but it did so purely as a matter of supererogation, with the burden of proving nothing. If its contentions are correct, it need not have said a word. It made no difference how the loss occurred, provided the plaintiff could not prove that it occurred through its negligence. The entire carload of stock might have been safely stolen through the gross negligence or actual connivance of its agents, if done without the knowledge of the plaintiff, or of any one, by whom he might prove it. If this is the law, what protection is there for the shipper? If a resident of Raleigh ships freight to New York under so-called "released" bill of lading, he cannot be expected to go with it and watch it, day and night; and yet, if he did not, how could he know the facts connected with its possible loss? The carrier could stand upon the word "released," and, without one word of explanation as to the nondelivery of the freight, simply say to the plaintiff, "Prove your case."

It is too well settled to need any citation of authority that common carriers cannot exempt themselves by contract from the results of their own negligence. This principle is recognized in the bill of lading (239) before us, yet we are asked to establish a rule of evidence that will destroy its vital principle and subvert its beneficial purposes. It makes no difference to the plaintiff whether you deny his right or simply deprive him of the only remedy by which it can be obtained, and it is equally beneficial to the defendant whether you relieve it from all liability or only place it beyond the possibility of proof.

It seems to us that the error lies in a misapprehension of the true nature of the bill of lading. It is not an agreement primarily intended to release the common-law liability of the carrier, but, as said in *Pollard v. Vinton,* 105 U. S., 7, "It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel; in the latter, it is a *contract to carry safely and deliver.*" The safe carriage and delivery are the essential objects of the contract, and it is the duty of every party to a contract to comply with his agreement to show such facts as will excuse his nonperformance. This is especially so where the contract is made in the performance of a public duty.

It is the duty of a common carrier, irrespective of contract, but subject to reasonable regulations, to accept, safely carry and deliver all goods entrusted to it. If the goods are lost, it must show what became of them, and if they are damaged it must prove affirmatively that they were damaged in some way that would relieve it from responsibility. The plaintiff has a *prima facie* case when he shows the receipt of goods by the carrier, and their nondelivery or delivery in a damaged condition. Any further defense is in the nature of confession and avoidance. If

the defendant pleads exemption by virtue of a special contract, it must prove the contract and show that the loss or damage comes within some one of the exceptions. It must appear to the court as matter of law that the contract is *reasonable* in all of its essential features, and that the exemptions are not contrary to public policy. All such exemptions, being in derogation of common law, should be strictly (240) construed.

So far, we think the principles herein laid down are properly deducible from *all* the authorities; but we now come to an irreconcilable conflict of decisions as to the subsequent burden of proof. The courts of Alabama, Georgia, Iowa, Minnesota, Mississippi, Ohio, South Carolina, Texas, Tennessee, and West Virginia, and perhaps one or two others, hold that the burden still rests upon the carrier of showing that the loss was not due to its own negligence. This view is clearly laid down in an able opinion by *Judge Cooper* in *R. R. v. Moss, 60* Miss., *1003*, where he says: "To us it also seems that public policy forbids the further relaxation of the principles of the common law governing common carriers. It is no uncommon thing in this age to see under one management a line of railroads extending from the lakes of the North to the Gulf of Mexico, or from the Atlantic to the Pacific Ocean. To hold that a shipper in New York or Chicago shall be required to establish the negligence of the carrier by proof of the circumstances of a fire in California or New Orleans would in a great number of cases result in a verdict for the carrier, even though there was in fact negligence. In a large majority of cases the facts rest exclusively in the knowledge of the employees, whose names and places of residence are unknown to the shipper. In many cases the witnesses are the employees whose negligence has caused the loss, and if known to the shipper it may be dangerous for him to rest his case upon their testimony, since the natural impulses of mankind would sway them in narrating the circumstances to palliate their fault by stating the occurrence in the most favorable light to themselves. All the authorities hold that it devolves (241) upon the carrier to show the loss to have occurred by the excepted cause. In doing this it will add but little to his burden to show all the attending circumstances; and that the burden rests upon him to do so and disprove his own negligence, we think, arises from the terms of the contract, from the character of his occupation and from the rule governing the production of evidence, which requires the facts to be proved by that party in whose knowledge they peculiarly lie."

This opinion is especially interesting, because it tersely reviews the authorities on both sides of the question, which is the single point in the case. Bishop Evidence (14 Ed.), sec. 219, adopts the same view in the following words: "And if the acceptance was special, *the burden of*

*proof* is still on *the carrier* to show, not only that the cause of the loss was within the terms of the exception, *but also that there was on his part no negligence or want of due care.*"

It would seem from the recent work of Elliott on R. R. that this has now become the settled rule of a majority of the States, as the authors say in section 1548, on page 2403: "There is some conflict among the authorities as to the burden of proof in such cases; but the *prevailing rule,* where the owner or his agent does not go with the stock, is, that when the animals are shown to have been delivered to the carrier in good condition, and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence."

This rule strongly commends itself to our better judgment and receives our approval, especially in view of the universal acceptance of the principle that where a particular fact necessary to be proved rests peculiarly within the knowledge of a party, upon him rests the burden of
(242) proof. 5 A. & E. (2 Ed.), p. 41; Best on Evidence, sec. 274; 1 Greenleaf Ev., sec. 79; Starkie on Evidence, sec. 589; Rice on Evidence, sec. 77; *R. R. v. U. S.,* 139 U. S., 560, 567; *S. v. McDuffie,* 107 N. C., 885, 888; *Govan v. Cushing,* 111 N. C., 458, 461.

On the other hand, the Federal courts, with those of a large number of States, hold that under a bill of lading containing a contract of limited liability, the burden rests upon the plaintiff of proving that the loss or damage was caused by the negligence of the defendant carrier. But we think that an examination of the cases will show that the true principle of the rule in those jurisdictions is, that the burden of proving the negligence of the carrier does not primarily rest upon the plaintiff, but is *shifted* to him upon the carrier proving that the loss fell within one of the excepted causes. That the carrier must prove that the injury complained of came within one of the special exemptions created by law or contract, is admitted by all the authorities.

By the act of 1851, Congress relieved the owners of seagoing vessels from all responsibility for loss by fire unless caused by their own design or neglect, and from responsibility for loss of money and other valuables named, unless notified of their character and value, with certain other limitations of liability not arising from their own negligence. These limitations are substantially brought forward in chapter 6, title 48, of the Revised Statutes, subsequently amended by the act of 13 February, 1893. Several of the States enacted similar legislation, and the same general principles are held to apply to common carriers on land. In addition to this, it became the custom of ship owners to protect themselves by contract from risks arising from the perils of navigation.

Within reasonable restrictions these contractual limitations have (243) been held to be valid; and it is upon these two classes of exemptions that the decisions generally rest. Those referring to the proper or inherent vice of animals do not appear to have any bearing upon the case at bar in its present status.

It must be admitted that among the different States adhering to the same general rule there is much diversity of application as well as uncertainty of definition. This may come in some degree from the unfortunate tendency of some otherwise able judges to formulate general principles upon special cases, unmindful of the limitations or modifications that may necessarily arise from the varying facts of other cases. Some of these definitions, like our old State grants, where each grantee furnished his own survey, cover much more than was originally intended and lap over upon other essential principles. Those unlucky rights which lie within the lappage are necessarily of uncertain tenure. Of course, perfection of definition is impossible to human foresight; and as human motives and resulting action do not run in parallel lines, there is frequently an ultimate point of conflict between essential principles themselves. There the superior principles must prevail, such, for instance, as depend upon public policy or natural right. The great principle of legal construction was never better stated than by *Lord Mansfield* in *Rex v. Bembridge,* 3 Doug., 332, where he says: "The law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases."

It is impracticable to review any considerable number of cases bearing upon that at bar, but a few citations from the Supreme Court of the United States, which sustain the rule most favorable to the carrier, will sufficiently illustrate this view:

In *Mohler v. Ins. Co.,* 21 Wall., 230, 233, the Court says: "It (244) is insisted that the loss occurred through a peril of navigation, which was one of the exceptions contained in the bill of lading, and that, therefore, the carrier was excused from a delivery of the wheat. The burden of proof lies upon the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment."

In *Clark v. Barnwell,* 12 Howard, 272, the Court held, quoting from the *syllabi,* that: "Where goods are shipped, and the usual bill of lading given, promising to 'deliver them in good order, the dangers of the sea excepted,' and they are found to be damaged, *the onus probandi is upon the owners of the vessel* to show that the injury was occasioned by one of the excepted causes."

"But though the injury may have been occasioned by one of the excepted causes, yet the owners of the vessel are responsible if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes *shifted* upon the shipper to show the negligence."

The same rule is sustained in *Rich v. Lambert,* 12 Howard, 347; the *Majara v. Cordes,* 21 Howard, 7; the *Majestic,* 166 U. S., 375. In *Trans. Co. v. Downer,* 11 Wall., 124, the Court says: "On the trial the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee . . . in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation."

(245) *In re Edwin I. Morrison,* 153 U. S., 199, the Court says, on page 212: "In any aspect, the real point in controversy is, did the respondents so far sustain *the burden of proof which was upon them?"* etc. It further held that, even where the loss was caused by the dangers of the sea, the burden was still upon the owners of the vessel to show that it was seaworthy. In all these cases of limited liability the rule is invariably recognized, that proof of shipment and injury makes a *prima facie* case for the plaintiff, and that then the burden is always upon the carrier to show that the circumstances of the loss bring it within the excepted causes. When the carrier has shown this by a preponderance of testimony, then, and then only, does the burden shift to the shipper of showing that the loss, even if within the excepted classes, might have been avoided by diligence and care upon the part of the carrier.

Therefore, under the most stringent rule, the plaintiff in the case at bar is entitled to a new trial, as the defendant did not prove to the satisfaction of the jury, by whom alone the fact could be found, that the circumstances of the loss brought it within the exception. The mere proof or admission of the terms of the bill of lading containing the stipulated exceptions is no proof that the loss comes within those exceptions. The necessary issues do not appear to have been submitted. Ordinarily, parties cannot complain of the issues in the absence of a special tender and exception; but this Court has held, in *Tucker v. Satterthwaite,* 120 N. C., 118, that the court below must of its own motion, with or without suggestion, submit such issues as are necessary to settle the material controversies arising on the pleadings.

If the issue as to negligence of the defendant was intended to raise the question whether the loss came within the exception, then the burden

of proof of that issue rested upon the defendant, in order to (246) rebut the *prima facie* case already made out by the plaintiff. The defendant cannot be permitted, by the mere form of an issue or a "broadside" stipulation of exemption, to change the rules of evidence and practically destroy essential principles firmly resting upon public policy. At that stage of the proceedings the burden was admittedly upon the defendant. Has it ever been lifted or shifted? If so, we cannot see when or where.

It is contended for the defendant that it is exempted by this contract from *all* loss or damage not arising from its own negligence, and that, therefore, it cannot be required to prove the loss within the excepted classes without requiring it, in effect, to prove its own want of negligence. Even so. If, standing with the burden of proof upon it, it claims a total exemption, it must show every fact necessary to prove that exemption. It is not placed in any better condition than the ordinary defendant merely by the unreasonable extent of its stipulations.

The bill of lading, covering five printed pages, is full of the most stringent stipulations, all in favor of the carrier, among which is the broadside exemption from all risk "of loss or damage from any cause or thing not resulting from the negligence of the agents of said party of the first part." It then provides that, "in case the said party of the first part (the carrier) shall furnish laborers to assist in loading and unloading said stock, they shall be subject to the orders, and deemed *employees,* of the said party of the *second part* while so assisting." It gravely winds up by requiring the shipper, who has shipped nothing but horses and mules, to sign a written agreement that turkeys are reasonably worth only 12½ cents apiece in Nashville. The "reasonableness" of such a bill of lading may be well questioned.

These extraordinary stipulations strongly recall the pertinency (247) of *Mr. Justice Bradley's* language in delivering the opinion of the Court, in *R. R. v. Lockwood,* 17 Wallace, 357, where he says on p. 378: "It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. . . . It is true that the public interest is not affected by individual contracts of the kind referred to. Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation. The carrier and his customers do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or

stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents, often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay the tariff rates. . . . Of course, no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected. If
(248) the customer had any real freedom of choice; if he had a reasonable and practical alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do in fact control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness."

The action of the court below seems to have been based on the opinion of this Court in *Smith v. R. R.*, 64 N. C., 235, which, on careful examination, does not seem to decide the question before us. The general principles were not elaborated, and the opinion was evidently based entirely on the particular facts of the case. There, the exemption claimed was not general, but special, being as to fire only. The contract was proved, and it was shown that the cotton was destroyed by fire. This brought the loss within the exception. What the Court evidently intended
(249) to say was that *then* the burden of proving negligence rested on

the plaintiff. The opinion cites but two authorities, namely, 1 Parson's Contracts, 1, 704 (perhaps meaning Vol. I, p. 704), and *Steam Nav. Co. v. Bank,* 6 Howard, 344.

In *Nav. Co. v. Bank,* the question of the burden of the proof of negligence arose only incidentally, but the Court clearly recognized the prior burden of the carrier, on page 383, where it says: "The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

For the same reasons, the case of *Selby v. R. R.,* 113 N. C., 588, does not conflict with the principles now discussed.

The only case that we can find in our reports that seems to settle the point now in question, and to settle it apparently in favor of the plaintiff, is *Mfg. Co. v. R. R.,* 121 N. C., 514, where this Court has laid down the rule, without dissent, that "among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the *burden is upon it to rebut the presumption.*"

For the reasons given above a new trial should be ordered.

We think that our view of the common law is expressly recognized in chapter 46, Laws 1897, entitled, "An act for the better protection of the traveling public," which reads as follows:

"Section 1. That all railroad and steamboat companies doing (250) business in this State shall be required to handle with care all baggage and *freight* placed with them for transportation, and they shall be *liable in damages* for any and all injuries to the baggage or *freight* of persons from whom they have collected fare or *charged freight.* While the same is under their control, and upon proof of injury to baggage or *freight* in the possession or under the control of any such company, *it shall be presumed that the injury was caused by the negligent acts of said company's agents or servants.*" While its caption does not fully indicate the scope of the act, we think the words italicized by us are plain and unequivocal in their meaning and effect.

NEW TRIAL.

FAIRCLOTH, C. J., dissenting: The plaintiff shipped livestock from Tennessee to New Bern, N. C., over several railroad lines, including the defendant's line. One mule was found dead in the car. The plaintiff sues for its value and alleges negligence as the cause of the loss of the mule.

The plaintiff had a right to ship his stock over the railroads, as common carriers, by paying the usual charge for transportation or to ship by special contract, and he elected to take the latter course. He, by special contract, for a consideration in reduced rates for transportation, agreed to relieve the carriers from their liability of common carriers in the transportation, and agreed that their liability should be only that of a private carrier for hire, and he assumed all risk of injury by the animals to each other; or of heat or suffocation or other ill effects of being crowded in the cars, etc. We then have the case of a carrier liable for want of *ordinary care;* in other words, for *negligence.*

The liability of common carriers is harsh, but upon the ground of public policy it is not unjust. After the parties closed the examination, his Honor explained the rights and liabilities of carriers and
(251) instructed the jury that there was no evidence in this case that the defendant was negligent in transporting the stock, to which the plaintiff excepted.

I have carefully read the evidence, and I see no error in the charge of the court. The mule seems to have died of colic or from some natural cause, which may have been induced and accelerated by the crowded condition of the car. I think the burden of showing negligence on the part of the defendant rested on the plaintiff, and that the special agreement was a valid contract. *Smith v. R. R.,* 64 N. C., 235; *Selby v. R. R.,* 113 N. C., 588.

PER CURIAM. NEW TRIAL.

*Cited: Hinkle v. R. R.,* 126 N. C., 937; *Gardner v. R. R.,* 127 N. C., 296; *Mfg. Co. v. R. R.,* 128 N. C., 283; *Bank v. Deposit Co., ib.,* 373; *Williams v. R. R.,* 130 N. C., 124; *Hosiery Co. v. R. R.,* 131 N. C., 240; *Ray v. Long,* 132 N. C., 893; *Parker v. R. R.,* 133 N. C., 338, 339, 341; *Meredith v. R. R.,* 137 N. C., 487; *Everett v. R. R.,* 138 N. C., 70; *McConnell v. R. R.,* 144 N. C., 90; *Furniture Co. v. Express Co., ib.,* 645; *Walker v. Carpenter, ib.,* 681; *Jones v. R. R.,* 148 N. C., 585, 589; *Winslow v. R. R.,* 151 N. C., 254; *Stringfield v. R. R.,* 152 N. C., 128, 138; *Kissenger v. Fitzgerald, ib.,* 253; *Harden v. R. R.,* 157 N. C., 250; *Beville v. R. R.,* 159 N. C., 229; *Mule Co. v. R. R.,* 160 N. C., 223, 247; *McConnell v. R. R.,* 163 N. C., 508; *Lyon v. R. R.,* 165 N. C., 146; *Mewborn v. R. R.,* 170 N. C., 208; *Schloss v. R. R.,* 171 N. C., 353; *Phillips v. R. R.,* 172 N. C., 89; *Ange v. Woodmen,* 173 N. C., 37; *Osborne v. R. R.,* 175 N. C., 596; *Tillotson v. Currin,* 176 N. C., 483; *Trading Co. v. R. R.,* 178 N. C., 179.

## BANK v. BURLINGTON.

(Decided 21 March, 1899.)

*Practice—Court Evenly Divided.*

Where the appellate court is evenly divided, the settled practice in such cases is, that the judgment below stands, not as a precedent, but as a decision in the case.

ACTION tried before *Timberlake, J.*, upon report of referee and exceptions thereto, at September Term, 1898, of ALAMANCE. Judgment in favor of plaintiff. Appeal by defendant.

*Winston & Fuller for plaintiff.*
*Bynum & Taylor, C. E. McLean, and W. H. Carroll for defendant.*

PER CURIAM: In this case *Justice Clark* did not sit, and the Court is evenly divided. According to the settled practice of appellate courts in such cases, the judgment below stands, not as a precedent, but as the decision in this case. *Puryear v. Leach,* 121 N. C., 255; (252) *Durham v. R. R.,* 113 N. C., 240, and cases there cited.

AFFIRMED.

*Cited: Barnes v. Public Service Co.,* 163 N. C., 365.

## JOSEPH DUNN v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 28 March, 1899.)

*Negligence—Obstruction of Public Street—Practice—Evidence.*

1. Where the question is, whether there is sufficient evidence of the negligence of the defendant to go to the jury, the evidence must be construed in the light most favorable for the plaintiff.
2. The use of the highway belongs to the public by common right, and no one may obstruct it without paramount necessity.
3. Whatever renders dangerous the use of a highway, whether placed in it or near it, is an obstruction.
4. Unnecessarily to keep an engine, under a head of steam, in dangerous proximity to a highway, is strong evidence of negligence.

ACTION to recover damages for personal injury suffered by the plaintiff from being thrown from his wagon, his horses taking fright from the negligent letting off steam by the defendant from its engine on a sidetrack, along a public street in Warsaw, tried before *Robinson, J.*, at Special December Term, 1897, of DUPLIN.

(253) *Allen & Dortch, and Simmons, Pou & Ward for plaintiff.*
*Junius Davis and H. L. Stevens for defendant.*

DOUGLAS, J. This is an action to recover damages on account of personal injuries received by the plaintiff through the alleged negligence of the defendant, in causing or permitting steam to escape from one of its engines while standing in or near a public street, whereby the horses driven by the plaintiff became frightened, ran away and severely injured the plaintiff. The usual issues were submitted, the first being as follows: "Was the plaintiff injured by the negligence of the defendant?" The court directed the jury to answer this issue in the negative, which ended the case.

The following facts appear by evidence or admission: The defendant's sidetrack on which the engine was standing ran along and immediately adjoining a public street leading to the warehouse of the
(254) defendant and much frequented. On the day of the injury, about one o'clock, the plaintiff, driving a team with a loaded wagon, drove past the engine to the warehouse, where he unloaded the goods. He then came back the same street, and while directly opposite the engine the horses were frightened by steam escaping therefrom, which came into the street near and directly towards them. The horses ran and threw the plaintiff out of the wagon, thus causing the injuries of which he complains.

The engine came regularly into the town of Warsaw every morning about 8 a. m., and remained until its return trip, about 4:30 p. m. During the eight hours intervening it was, prior to the accident, kept on the sidetrack, where it was when the plaintiff was injured. It was not necessarily there, but could have been kept without practical inconvenience on another sidetrack below the warehouse, where there is little passing, or it could have been placed on the Clinton track, where it would have been out of the way. Since the injury to the plaintiff, it does not stand where it did, but stands below the warehouse.

What caused the escape of the steam is not clearly shown. One of the defendant's witnesses testified that "an engine standing generates steam, and pops off," while another of its witnesses stated that "the noise described by the plaintiff could not have been made except when the

donkey-pump was working, or when the injector is put on," thus requiring human agency. It was admitted that the engine was in good condition and was standing on the sidetrack, and that Mack Jones, who was then on the engine, was a fireman in the employ of the defendant.

There was other evidence, some of which tended to prove the contributory negligence of the plaintiff, but this cannot be considered on a motion for nonsuit or a direction of the verdict upon the issue of the defendant's negligence.

The case as now before us presents the single question, whether (255) there was sufficient evidence to go to the jury as to the negligence of the defendant, and for the purpose of this inquiry the evidence must be construed in the light most favorable for the plaintiff. These principles have been fully and recently considered and affirmed in *Spruill v. Ins. Co.*, 120 N. C., 141; *Cable v. R. R.*, 122 N. C., 892; *Cox v. R. R.*, 123 N. C., 604, and many other cases.

We think there was sufficient evidence to go to the jury tending to prove the negligence of the defendant arising not only from negligently causing or permitting the escape of steam, but also from keeping the engine for more than eight hours during the business part of the day in a position where it might naturally frighten the horses of those lawfully upon the street. *Andrews v. R. R.*, 77 Iowa, 669. Railroad companies are, at least in contemplation of law, organized primarily for the public benefit, and it is this public use that is the sole foundation for the extraordinary powers that are conferred upon them, such as the right of condemnation. Given such exclusive privileges, they are held to an equal responsibility; and they will be protected in the proper exercise of all lawful acts that may be reasonably necessary in the performance of their exacting duties to the public as common carriers. If it had been necessary for any public purpose to have kept the engine by the side of a public street, then the mere act would not of itself have been negligence, but to keep an engine under steam in a place of danger to the public when it could just as well have been placed beyond all opportunity of danger, is at least strong evidence of negligence. It is true the mere presence of the engine was not *causa causans* of the injury to the plaintiff, but it was certainly *causa sine qua non*, without which the injury would not have happened.

Whether the steam escaped through the automatic safety- (256) valves or was blown off in any way by the fireman is immaterial to the issue, as either might be negligence. It is urged that safety-valves are necessary to prevent explosion. That may be true, but was it necessary to keep up for so long a time a head of steam sufficient to open these valves? It is also said that it becomes necessary to put on the injector

so as to force water into the boiler when it gets too low, but was it necessary to do so at the precise moment when the plaintiff was passing? All these are questions for the jury.

The use of the highway belongs to the public by common right, and no one can obstruct it without paramount necessity. This is equally true whether the obstruction is in the highway or so immediately adjacent thereto as to obstruct its use. It is unnecessary to add that whatever renders dangerous the use of a highway is an obstruction. The public has certainly as much right to the highway as the railroad company has to its right of way, and each should respect the relative rights of the other. The rule is the same whether they intersect or are merely contiguous. The public would not be permitted to unnecessarily obstruct the track or to do anything that would endanger a passing train, neither must the company unnecessarily obstruct the highway nor place in useless jeopardy the life of the individual. We think that the cases of *Myers v. R. R.*, 87 N. C., 345, and *Harrell v. R. R.*, 110 N. C., 215, fully decide the principles now under discussion, but as they are of increasing importance, it may not be amiss to show that they are practically sustained by the uniform current of authority.

The following extracts from leading authors will show the general tenor of decisions, many of which are therein cited: "A railway company is liable to indictment if it unreasonably obstructs a highway, either by its trains or by leaving objects thereon *or near thereto*—
(257) as a hand-car—which are calculated to frighten horses; and it is liable civilly for all the damages that ensue therefrom." 3 Wood on Railways, sec. 336. "And generally, if these companies do any acts in a public street or highway which are detrimental to the public, without authority, or, if with authority, they exercise the powers conferred in an improper or negligent manner, they are liable to indictment so far as the rights of the general public are infringed, and to a civil action in favor of any individual who is specially injured thereby." 3 Wood, *supra*, sec. 336. "Although a railroad company is not liable under ordinary circumstances for the fright of horses, caused by the operation of its road in the usual manner, it is liable for frightening horses and causing injury by unnecessary and excessive whistling or letting off steam under such circumstances as to constitute negligence or willfulness." Elliott on Railways, sec. 1264. "When a railway company is entitled by law to run its trains along a street, it is not liable for damages caused by the horses of a traveler taking fright at the *necessary* blowing off of steam from one of its locomotives; but if the steam were blown off *negligently* it would be liable." 1 Thompson Negligence, sec. 15. "In most cases, whether the blowing of the steam whistle was a reasonable and proper exercise of the company's rights, is a question

of fact for the jury." *Ibid.* "Neither is the company responsible for the fright caused by its giving, with ordinary care, signals required by statute or by ordinary prudence upon the approach of its trains; but such noises as blowing whistles, sounding large bells, *or letting off steam made without necessity,* when animals are near and likely to be frightened, and when ordinary care would have permitted or directed a postponement of the noise until the animals were out of hearing, (258) will sustain a verdict of negligence." 2 Shearman & Red. Neg., sec. 426.

In the English case of *R. R. v. Fullarton,* 14 C. B. (N. S.), 108 C. L. R., 54, very similar to that at bar, it was held that where a railway crosses a highway on a level, at a place where there is considerable traffic, the fact of the engine-driver blowing off steam from the mud-cocks in front of the engine so as to frighten horses waiting to pass over the line, was sufficient to warrant the conclusion that the company had been guilty of actionable negligence, *Earle, C. J.,* saying for the Court that "it is clear that the company have not used their railway with that attention to the rights and the safety of the Queen's subjects which, under the circumstances, they were bound to exercise."

In *Jones v. R. R.,* 107 Mass., 261, it was held that "a railroad corporation is liable for injuries sustained by a traveler driving a horse upon the highway with due care, through the fright of the horse occasioned by a derrick which the corporation maintained, projecting over the highway so as naturally to frighten passing animals, although it was maintained for the purpose of loading and unloading freight on the cars."

In the well-considered case of *R. R. v. Barnett,* 59 Pa. St., 259, 263, where the engine of the defendant, having given no notice of its approach, whistled under a bridge whilst a traveler was passing over it, whereby his horses took fright, ran off and injured him, the defendant was held liable, the Court saying: "The degree of care demanded of the company in running its train depended on circumstances, and whether it observed due care in approaching the bridge, or was guilty of negligence in not sounding an alarm whistle, was a question which properly belonged to the jury to determine. If there had been no evidence of negligence or any facts or circumstances from which negligence could be fairly inferred, the court ought not to have submitted (259) the question to their determination. But it is as clearly the duty of a railroad company as it is of a natural person, to exercise its rights with a considerate and prudent regard for the rights and safety of others, and for injuries occasioned by negligence both are equally responsible. Nor is it any excuse or justification that the act occasioning the injury was in itself lawful or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done. If

there was no danger to the persons and property of those who might be traveling along the public road in running its trains without giving any notice of their approach to the bridge, then the company is not chargeable with negligence in not giving it. But if danger might be reasonably apprehended, it was the duty of the company to give some notice or warning in order that it might be avoided. . . . The sounding of the alarm whistle as the train was passing under the bridge was the cause of the horses becoming frightened and running away, and the injury to the plaintiff was the result. This was an act of gross negligence, and a sufficiently proximate cause of the injury to render the company liable therefor."

In *Tinker v. R. R.*, 157 N. Y., 312, where the plaintiff was injured by being thrown from a wagon in consequence of the horse's becoming frightened at two old pieces of timber lying on the side of the highway, about ten feet from the traveled part, it was held that whether so placing the timber was reasonably necessary in the conduct of repairs, and not an unreasonable interference with the rights of the public, was a question for the jury, and upon their finding the defendant was held liable. After stating that the law recognized the right of temporary obstruction of the highway under certain circumstances, the Court lays down
(260) the following rule, quoted from *Flynn v. Taylor,* 127 N. Y., 596, which meets our approval: "Two facts, however, must exist to render the encroachment lawful: (1) The obstruction must be reasonably necessary for the transaction of business. (2) It must not unreasonably interfere with the rights of the public."

The rule that the existence of obstructions in a street is such evidence of negligence as requires of the authorities explanation in order to escape liability, is laid down in *New York City v. Sheffield,* 4 Wallace, 189, 196, and we do not see why it should not apply to the circumstances of the case at bar. We do not think there was sufficient evidence of wantonness or malice to justify an issue as to punitive damages.

For the error of his Honor in directing a verdict upon the issue, thus taking the case from the jury, a new trial must be ordered.

NEW TRIAL.

FAIRCLOTH, C. J., dissenting: I am unable to hold that the evidence was sufficient to let the case go to the jury. This question has probably been discussed by every court in the Union. From those I have seen, the rule seems to be that the evidence should be such as would satisfy the mind of a reasonable man that the defendant was guilty of negligence, and the burden of showing negligence is upon the plaintiff.

In the present case there is not a *scintilla* of evidence that the steam was unnecessarily let off, or that it was done in a careless manner or

recklessly, in disregard of the plaintiff's rights. *Wittkowsky v. Wasson,* 71 N. C., 451; *Kahn v. R. R.,* 115 N. C., 638. "There is, or may be, in every case a preliminary question for the judge, not whether there is absolutely no evidence, but whether there is more than a *scintilla* of evidence upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the burden of proof is (261) imposed." *Comrs. v. Clark,* 94 U. S., 278. It is well settled, thus: "While negligence is an inference to be drawn from the facts, the existence of the facts themselves must not be left to conjecture, but facts must be established by evidence which would warrant a *reasonable* man in inferring negligence." *R. R. v. Clark,* 23 L. R. A., 504. The question is not what by possibility might be proved at another trial, but what has been proved in this case.

The evidence on the part of the plaintiff was, without reciting it in detail, in substance: That the defendant's engine was standing on the sidetrack of defendant's road, about half way between two street crossings in the town of Warsaw; that the plaintiff drove his team by the engine along the adjacent street to the defendant's warehouse, unloaded and returned on the same street, and when opposite to the engine the engineer let off steam which flew in the direction of the horses and frightened them; that they dashed towards the sidewalk, threw the plaintiff out of his wagon, and he was thereby injured.

The defendant's evidence was in substance: That the engine was in good condition, was at its *usual* place when not in action; that there were times when it is necessary to turn off steam, whether standing or in motion, to avoid danger to the engine; that the noise was not loud and unnecessary, and that the plaintiff did not have his reins in hand at the time of the accident.

His Honor instructed the jury upon the whole of the evidence to answer the first issue, "No," and plaintiff appealed; that is, "Was the plaintiff injured through the negligence of the defendant?"

I think his Honor's ruling should be affirmed.

FURCHES, J. I concur in the dissenting opinion.

*Cited: Gates v. Max,* 125 N. C., 144; *Powell v. R. R., ib.,* 372; *Brinkley v. R. R.,* 126 N. C., 91; *Dunn v. R. R., ib.,* 343; *S. c.,* 131 N. C., 449; *Duffy. v. R. R.,* 144 N. C., 28; *Stewart v. Lumber Co.,* 146 N. C., 56, 57.

(262)
J. A. McALLISTER, RECEIVER, ETC., v. CHARLES A. PURCELL AND WIFE, MATTIE PURCELL.

(Decided 28 March, 1899.)

*Mortgage, First and Second—Probate Before a Relative of the Mortgagor.*

1. Probate and private examination taken before an officer are not invalid simply because he is related to the parties.

2. Such proceedings is not adversary, and is in the nature of declarations against the interest of the relatives making them.

FORECLOSURE OF MORTGAGE, tried before *Allen, J.*, at Spring Term, 1898, of ROBESON.

(263) *A. W. McLean for appellants.*
*Proctor & McIntyre, and Shepherd & Busbee for appellee.*

CLARK, J. The plaintiffs' mortgage was executed in 1884 and duly registered. An interlocutory decree of foreclosure thereon was entered in this action in 1890, but before sale made the defendants executed a second mortgage to Worth & Worth, in 1897, who are made parties defendant and plead that they should be preferred in the decree of foreclosure by reason of the fact (which is admitted) that the justice of the peace who took the acknowledgment of Purcell, the mortgagor, and the privy examination of his wife, was the brother of Purcell. Whether this made the registration of the first mortgage taken upon such acknowledgment and privy examination void, is the vital question in this case, for if it did, no notice of the first unregistered mortgage, however full and explicit *(Quinnerly v. Quinnerly,* 114 N. C., 145) would bind
(264) the second mortgagee, and the interlocutory judgment of foreclosure was effective therefore only as between the parties thereto.

In *White v. Connelly,* 105 N. C., 65, *Turner v. Connelly, ib.,* 72, and *Freeman v. Person,* 106 N. C., 253, it was held that by virtue of The Code, sec. 104 (3) the probate of a deed by a clerk of the court, though upon an acknowledgment and privy examination taken by a justice of the peace, is void, if the clerk or his wife is a party to the deed or a subscribing witness thereto.

*Long v. Crews,* 113 N. C., 256, holds that an acknowledgment and privy examination taken before a justice of the peace is a judicial, or at least, a *quasi* judicial act, and cites numerous cases where probate and registration were void because based upon an acknowledgment and privy

examination before an officer who by reason of his locality had no power to take them. This was a defect apparent upon the face of the record. *Long v. Crews* went further and held that the same principle invalidated an acknowlegment and privy examination before an officer who was a party, trustee or *cestui que trust* in the deed. The decisions have carried the doctrine no further. Here, neither the probate nor the acknowledgment and privy examination was had before an officer who was either party, trustee or *cestui que trust* in the deed, and the justice of the peace and the grantors resided within the county in which the acknowledgment and privy examination were taken, as was provided by The Code, sec. 1246 (1), and if there had been defects in the last regard it was remedied by the curative acts (1891, ch. 12, and 1893, ch. 293) before the second mortgage was executed. *Williams v. Kerr,* 113 N. C., 306; *Barrett v. Barrett,* 120 N. C., 127.

There is no principle of law, nor precedent, which invalidates an acknowledgment and privy examination taken before an officer who has neither any interest in the instrument nor is a party thereto, simply because he is related to the parties. Such proceeding is (265) not adversary, and the acknowledgment and privy examination are in the nature of declarations against interest of the relatives making them. The persons claiming thereunder are strangers. Certainly an officer can administer an oath to a relative in an *ex parte* proceeding in which the officer is neither a party nor interested, and this is of no higher dignity. While propriety might discourage an officer taking acknowledgment and privy examination of instruments where the parties thereto are nearly related to him, there is no illegality attaching to his action.

The court below properly adjudged that in the decree of foreclosure the second mortgage must be subordinate to the first mortgage.

AFFIRMED.

*Cited: Blanton v. Bostic,* 126 N. C., 421; *Land Co. v. Jennett,* 128 N. C., 4; *Martin v. Buffaloe, ib.,* 308; *Piano Co. v. Spruill,* 150 N. C., 169; *Holmes v. Carr,* 163 N. C., 123.

I. M. PROCTOR AND B. F. MONTAGUE, ATTORNEY OF I. M. PROCTOR, v. GEORGIA HOME INSURANCE COMPANY.

(Decided 28 March, 1899.)

*Necessary Parties—Practice.*

1. Where a mortgagor of land, as additional security, took out a fire insurance policy, on the buildings, containing a clause as follows: "Loss, if any, payable to B. F. Montague, attorney, and assured, as their interests may appear," a loss by fire having occurred, the assured is a necessary party in an action upon the policy to recover the loss.

2. Upon the return of the case, the court below may, in its discretion, permit an amendment, making the assured a party.

(266) ACTION upon a fire insurance policy, to recover a loss by fire, tried before *Timberlake, J.*, at April Term, 1898, of WAKE, on appeal from justice's court.

*Armistead Jones for plaintiff.*
*Edward C. Smith for defendant.*

CLARK, J. One McCullers, having given to the plaintiff a mortgage on realty for $110 as collateral security, took out a policy in the defendant company for $150, expressed to be paid to the plaintiff and insurer "as their interests may appear." A fire occurred and the loss of $150 has been sustained. McCullers has departed the State or keeps his whereabouts unknown, and this action is brought by the mortga-
(267) gee alone, and the question is, Can it be sustained or is McCullers a necessary party?

We are of the opinion that he is. As to the mortgaged property, the mortgagee, being made trustee, can upon proper advertisement sell and receive the proceeds by virtue of the trust expressed in the mortgage, *i. e.*, to pay the debt and to pay the surplus to the mortgagor. But that is not the contract as to the policy of insurance. It is not made payable to the mortgagor, or a trustee. It is made payable to two persons "as their interests may appear." The defendant would not be released by a payment to either one from its obligation to the other. Suppose the mortgagee could not be found, would a payment of the whole to the mortgagor discharge the defendant? It is simply a case of an obligation, irrespective of the relation between the payees, to A and B "as their respective interests may appear," and until that is ascertained, the defendant would not be acquitted if he pay one too much, nor can a judgment ascertaining the amount due to one be a bar upon the other unless

made a party, with opportunity to contest as to the amount of his interest. It may be that a part or the whole of the mortgage debt has been paid.

These principles are so elementary that we presume the question now raised would never have entered the mind of any one but for the practical difficulty in getting service upon McCullers.

There is an historical illustration of the principle in the incident which first brought *Thomas Egerton*, afterwards the famous *Lord Chancellor Ellesmere,* into notice and which is thus given by *Lord Campbell* in his "Lives of the Lord Chancellors": "Three graziers had deposited a sum of money with a worthy old lady who kept an inn in Smithfield, to be returned on their joint application. One of them, pretending he had authority to receive it, induced her to give him the whole sum and absconded with it. The other two brought their action against (268) her and (as the story goes) were about to recover, when young Egerton, then a law student, asked as *amicus curiae* to point out a fatal objection which had escaped her counsel as well as the judge. Said he, 'This money, by the contract, was to be returned *to three,* but *two* only sue; where is the *third?* Let him appear with the others; till then the money cannot be demanded of her.' The result was the plaintiffs were nonsuited" and the young student had taken his first step towards success in a profession in which fame never comes by chance, though accident may furnish opportunities.

Naturally, McCullers should be a party plaintiff, but if he does not come in and make himself coplaintiff, The Code (sec. 185) provides that he may be made a defendant, the reason thereof being stated in the complaint. If the policy has been made payable to the mortgagee alone, then he could have maintained the action, the amount of the loss when paid over to him being held on the same trust as the mortgaged property, *i. e.,* to pay his debt and the surplus, if any, to be paid by him to the mortgagor. But, here, the contract is that the defendant is to pay A and B; neither A nor B is made agent or trustee for the other; and not only that, but the amount made payable to each is left to be determined, if not by agreement, then by an action in which both payees and the defendant must be parties, and The Code [sec. 424 (1)] provides that the judgment in such cases shall be framed "to determine the ultimate rights of the parties on each side as between themselves."

It was error to refuse to sustain the demurrer for failure to make a necessary party. It was not waived by the subsequent agreement as to the facts, presenting the question of the necessity of making McCullers a party, as a question of law to the Court. When the case goes back, it will be in the discretion of the court below to permit (269)

an amendment making McCullers a party. Code, sec. 273; *Plemmons v. Improvement Co.,* 108 N. C., 614; *Bray v. Creekmore,* 109 N. C., 49. Whether sufficient service by publication can be made upon McCullers under The Code, sec. 218, subsecs. 2 and 4, is a question not now before us. We can pass only upon action taken below and exception noted thereto.

REVERSED.

*Cited: Woodcock v. Bostic,* 128 N. C., 246; *Fidelity Co. v. Jordan,* 134 N. C., 244.

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LELIA BLACKWELL v. JOHN B. BLACKWELL.

(Decided 28 March, 1899.)

*Deed, Construction of—Repugnant Clauses.*

If, in a deed, there be two clauses so repugnant to each other that they cannot stand together, the first shall be received, and the latter rejected, differing in this respect from a will.

ACTION for the possession and control of land, subject to the defendant's marital right of ingress and egress, tried before *Timberlake, J.,* at Fall Term, 1898, of CASWELL.

(270) *John W. Graham for plaintiff.*
*J. A. Long and Shepherd & Busbee for defendant.*

FAIRCLOTH, C. J. The plaintiff instituted this action against her husband for possession of certain tracts of land, subject to his marital right of ingress and egress, and for the exclusive control of the rents and profits of these lands. She claims to be the owner in fee, and he claims to have a life estate in them. The whole matter turns upon the construction of a deed from plaintiff's father and wife to her, dated 22 December, 1887.

The deed, in the premises, says, we "give, grant, convey and confirm unto the said Lelia E. Blackwell (plaintiff), her heirs and assigns, two tracts of land . . . to have and to hold the said lands and premises together with all the appurtenances thereto belonging, and we, ....., do warrant, and will forever defend the said title to the above-described land and premises to the said Lelia E. Blackwell, her heirs and assigns, against the claim or claims of all persons whatsoever." The deed then

concludes, "I give, grant and convey unto the said John B. Blackwell (defendant), under any and all circumstances, the above-described land and premises during the term of his natural life, together with all the rents and profits arising therefrom."

After the deed was put in evidence, his Honor expressed the opinion that the defendant was entitled to a life estate and that the plaintiff could not recover. Nonsuit and appeal by plaintiff.

In earlier times the rule of construction was that the first con- (271) veying clause in a deed and the last clause in a will would control the estate. In modern times, the courts, looking through a deed, will transpose words or sentences, if thereby they can effectuate the intention of the grantor, if it can be done without defeating the intent in any other part. But if in a deed there be two clauses so repugnant to each other that they cannot stand together, the first shall be received and the latter rejected, differing in this respect from a will. 2 Bl. Com., 381.

Where exceptions or reservations appear in a deed, they retain in the *grantor* certain interests which do not pass. When, however, the fee is conveyed to A in one part, and the fee or a part thereof is conveyed to B in another part, these provisions are irreconcilable and repugnant, and one must yield to the other. In *Hoffner v. Irwin,* 20 N. C., 433, the whole interest was conveyed in the premises to one person, but in the habendum it was limited to another. Held, that the latter was repugnant to the former, and void. The same conclusion is arrived at in 2 Bl. Com., 381; 4 Kent Com., 468 (5), and in 9 A. & E. (2 Ed.), 139. Applying these principles to the deed before us, the concluding clause is in conflict with the first part. The intention is clear in each case. In the premises, the fee is conveyed to the plaintiff, and afterwards a life estate to the defendant in the same lands. If the first intent in the premises, expressed in apt language and repeated in the warranty clause, is to be observed, then there is nothing left to satisfy the intent in the last clause. Putting either in force, that necessarily defeats the intent in the other; and, as above shown, the first expression is the controlling part of the deed.

We hold, therefore, that the last clause of the deed is void, and that the plaintiff is entitled to judgment in her favor.

REVERSED.

*Cited: Wilkins v. Norman,* 139 N. C., 41; *In re Dixon,* 156 N. C., 28.

(272)

W. J. McDONALD ET AL. V. G. H. INGRAM.

(Decided 28 March, 1899.)

*Landlord and Tenant—Summary Ejectment—Justice's Jurisdiction.*

1. The jurisdiction of a justice of the peace in actions for possession of land is statutory, and is limited to landlord and tenant; where title, legal or equitable, is involved, the jurisdiction is ousted.

2. The mere plea of ownership will not oust the jurisdiction; the trial will proceed until it is apparent from the evidence that the question of title is involved.

3. The only question in this proceeding for trial is: Was the defendant the tenant of plaintiff, and does she hold over after the expiration of the tenancy?

4. A mere offer to sell back at cost—one-third cash and balance on time, not accepted—does not constitute an equitable relation between the parties.

SUMMARY PROCEEDING in ejectment, taken on appeal from the justice's court of CUMBERLAND, and tried before *Allen J.*, at March Term, 1898.

(273) *N. A. Sinclair and N. W. Ray for plaintiff.*
*R. P. Buxton for defendant.*

FURCHES, J. This is a summary proceeding in ejectment commenced in the court of a justice of the peace.

Plaintiff claims that defendant was his tenant, having rented the property from him for which she paid him rent for about fourteen months; that such tenancy had expired, but that defendant continued to hold possession and refused to vacate the property.

Defendant admitted possession, denied the tenancy, and alleged that she was the equitable owner of the house and lot in controversy.

From the evidence, it seems that the defendant had once been the owner of the property, but that she had sold and conveyed it to the plaintiff. Plaintiff testified that after he became the owner of the property, he rented it to defendant at $8 per month, which was afterwards reduced to $7 per month; that defendant continued to occupy the property and to pay rent therefor at the agreed rate for about fourteen months, when she ceased to pay rent and refused to surrender the possession. The defendant admitted the payment of the money but denied that it was paid as rent, and alleged that plaintiff had agreed to let her have the property back, and that the payments were made under that contract, and not as rent.

The defendant offered evidence which she claims tended to show the truth of her contentions, and his Honor being of the opinion that the title to the lot was involved, dismissed the action for want of jurisdiction.

The jurisdiction of a justice of the peace in actions for possession is entirely statutory, and is limited to landlords and tenants. If title is involved, he cannot proceed with the trial for want of jurisdiction. But the plea of ownership by the defendant will not oust the (274) jurisdiction of the court; but it will proceed with the trial until it is made to appear from the evidence that the question of title is involved. The only question the court can try under the statute in this proceeding is: "Was the defendant the tenant of plaintiff, and does she hold over after the expiration of the tenancy?"

It seems that justices of the peace, as between landlords and tenants have concurrent jurisdiction with the Superior Courts. And as justices of the peace have no jurisdiction to declare or to enforce equity, that in such cases as they have justice's jurisdiction, they stand very much as they would have stood in actions of ejectment at law before the joinder of jurisdictions of law and equity in the same court. And if we were to give the statute and the proceedings thereunder this interpretation, it would seem that to oust the jurisdiction, the title so pleaded by the defendant should arise after the tenancy alleged by plaintiff had commenced. This view seems to be sustained as to *legal* titles, but not as to *equitable* titles, in *Davis v. Davis,* 83 N. C., 71, and *Parker v. Allen,* 84 N. C., 466.

Why there should be a difference between legal and equitable titles (if there is) does not plainly appear. But it is held in *Parker v. Allen, supra,* that if there is evidence tending to establish an equitable title in the defendant, and the court finds from such evidence this contention in favor of the defendant, and dismisses the action for want of jurisdiction, his action is final, as this Court has no right to review the court below upon findings of fact. But if there is no evidence to support the findings of the court below, it then becomes a question of law, and this Court has the right to review and reverse the judgment appealed from.

This is the case we now have under consideration. There is no claim that defendant has a legal title to the property. There (275) is nothing to show a parol trust, as plaintiff holds title under a deed from defendant, without any claim that it has any conditions, limitations or defeasance. The only claim the defendant makes, or offers evidence to support, is that the plaintiff promised to sell the property back to her, which, if true, would be insufficient to give the defendant any equitable estate or title to the lot, unless it was reduced to writing and signed by the plaintiff or some one authorized to sign it for him. But the evidence introduced utterly fails to show that there was ever any

contract on the part of plaintiff to sell her back this property. It plainly appears that he offered to sell it back to the defendant for what it had cost him—one-third cash and balance on time. But she did not accept this offer. And while it does not affect the matter before us, we must say that there is nothing in the case that has any tendency to show but what the plaintiff has acted fairly and honorably with the defendant in this whole transaction.

As there is no evidence tending to establish an equitable title in defendant, there was error in dismissing the action. And there must be a new trial, when the matter will be submitted to a jury upon proper issues as to whether the defendant is or was, when this action was commenced, the tenant of the plaintiff, and whether that tenancy had terminated.

NEW TRIAL.

*Cited: McIver v. R. R.*, 163 N. C., 545; *Jerome v. Setzer*, 175 N. C., 393.

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(276)

JAMES H. PURYEAR ET AL., CHILDREN OF DEFENDANT DR. J. D. PURYEAR AND HEIRS AT LAW OF SUSAN ANN PURYEAR, DECEASED, WIFE OF SAID DR. J. D. PURYEAR, AND A. W. GRAHAM v. FANNIE SANFORD ET AL., HEIRS AT LAW OF DR. JAMES L. SANFORD; MRS. REBECCA SANFORD, WIDOW OF DR. JAMES L. SANFORD, AND DR. J. D. PURYEAR.

(Decided 28 March, 1899.)

*Injunctive Relief.*

A Court of Equity will not enjoin a mere trespass, unless irreparable damage is threatened—the remedy at law is more effectual and appropriate, being both preventive and punitive.

APPLICATION for equitable relief, praying for the cancellation of a deed held by defendants; also for an injunction against any conveyance of the land by them, or any interfering with or attempting to enter, or other acts of ownership over the land, or its mineral interests.

The cause was pending in the Superior Court of GRANVILLE. The restraining order was granted by *Timberlake, J.*, and continued to the hearing at chambers, 17 September, 1898. Defendants excepted and appealed.

(278) *Winston & Fuller for plaintiffs.*
*Edwards & Royster for defendants.*

MONTGOMERY, J. The plaintiff, A. W. Graham, claims an interest in the minerals, mineral rights and privileges in the tract of land described in the complaint, by virtue of an alleged contract in writing between himself on the one part, and the other plaintiffs and the defendant, J. D. Puryear, on the other part. As to the plaintiffs' title to the property, the allegations in the complaint are (in substance) that in 1862 the defendant, J. D. Puryear, contracted with Seth D. Pool to purchase the land for his wife, Susan Ann Puryear, and that with her money the land was paid for; that Mrs. Puryear, with her husband, went into possession of the land and the mineral rights incident thereto in the same year, the deed, however, having been executed by Pool to Puryear, the husband; that Mrs. Puryear and her husband remained in the adverse, notorious and continuous possession of the property up to the time of her death, which occurred in 1886, and that since her death the plaintiffs other than Graham, as heirs at law of their (279) mother, Mrs. Puryear, have been in possession of the land, adverse and open, and are still in possession; and that the plaintiff Graham, after his contract in reference to the mineral interests and privileges with the other plaintiffs and the defendant Puryear, went into possession of the mineral rights and privileges. It is further alleged on the part of the plaintiffs that after the registration of the contract between Graham and the other plaintiffs and the defendant Puryear, there was found among the papers of the administrator of Dr. Sanford, father of the female defendants, except Mrs. Rebecca Sanford, who is his widow, a deed purporting to have been made by the defendant, J. D. Puryear, to Dr. Sanford, dated 14 February, 1868, for one hundred acres of land "on the waters of Crooked Fork adjoining the lands of W. M. Hill, Thomas Chandler and others," for the consideration of $150. It is not alleged in the complaint that the one hundred acres above mentioned are a part of the tract of land described in the complaint, but the defendant in his answer admits such to be the fact. That deed was recorded 12 April, 1898, after the registration of the contract between Graham and the other plaintiffs and the defendant Puryear. The plaintiffs further alleged that they had no knowledge of the existence of the last-mentioned deed until after its registration. Another allegation is that the defendants, except the defendant Puryear, set up a claim and ownership to the land and have obstructed a sale contemplated by Graham of his mineral interest in the land, to his irreparable injury, and that by reason of the acts and words of the defendants and the deed from Puryear to Sanford, the coplaintiffs, with Graham, will be prevented from executing their contract, by which they will suffer irreparable injury.

The relief sought by the plaintiffs in this action is that the defendant Puryear may be declared a trustee for the plaintiffs, (280)

and that the alleged parol trust originally created for Mrs. Puryear, as set out in the complaint, when the land was conveyed by Pool to the defendant Puryear, may be established; and for the removal of the alleged cloud on the title to the property caused by the acts and words of the defendants and the deed to Sanford.

The defendants, other than Dr. Puryear, in their answer, deny the allegations of the plaintiffs as to their title to the land and of the plaintiff Graham to the mineral rights and interests therein, and aver that they are the owners of the one hundred acres mentioned in the deed from Puryear to Sanford.

An injunction restraining the defendants from executing any deed or deeds to said land, minerals or mineral rights, or from their attempting to enter upon the lands, as prayed for by the plaintiffs and granted by his Honor, who heard the motion, to be continued till the final hearing. The matter now before us for decision grows out of the appeal of the defendants from the order granting the injunction.

We are of the opinion that his Honor erred in granting the injunction. There was no allegation that the defendants threatened or intended to enter upon the land, but on the contrary, the plaintiffs alleged that the defendants had threatened to bring suit for its recovery. It does not appear that the defendants were unable to answer in damages for any trespass upon the land they might commit. But if insolvency of the defendants had been alleged and they had threatened to enter upon the land, we do not see how they could have been restrained from making such entry, even though the deed under which they claimed was obviously invalid. "Such entry as a court can enjoin is only an entry under force or color of legal process. It will not enjoin a mere
(281) trespass unless irreparable damage is threatened. There are remedies for a mere trespass, both preventive and punitive, as effectual and more appropriate than through the equitable powers of a court." *German v. Clark,* 71 N. C., 420. The defendants were also enjoined from executing any deed or deeds of conveyance to the lands, minerals or mineral rights. There was no allegation that the execution of such deeds would injuriously affect the plaintiffs' title. There was indeed an allegation that the assertion of the claims of the defendants through the deed from Puryear to Sanford would prevent the plaintiffs from selling the land and minerals, thereby causing the plaintiff irreparable damage; but it is apparent that the execution of the deed could not increase the value of the claim already set up under the deed from Puryear to Sanford; nor could the claims of a purchaser under such deed be calculated to diminish the chances of a sale by the plaintiffs. If the plaintiffs should be entitled to their main relief, as prayed for in their complaint, and there should be a decree of the court below grant-

ing them that relief, the rights accruing to the plaintiffs under such a decree could not possibly be affected even if the defendants had, after this action was commenced, sold the one hundred acres of land and made title thereto to the purchaser. The decree would be based upon the findings of the jury, or by the judge if submitted to him by consent, that the plaintiff Graham procured his interest in the land without knowledge of the deed from Puryear to Dr. Sanford (executed before the registration law of 1885), and that the deed was registered after the registration of the contract under which Graham claimed to have obtained his interest in the land. If the plaintiffs should make good on the trial the allegations in their complaint, the claim of the defendants under the deed from Puryear to Dr. Sanford would be of no avail to them, and, of course, it follows that any purchaser from them under that (282) claim of title could get no higher or greater interest or title than the bargainors had. And besides, when the complaint of the plaintiffs was filed, that was *lis pendens,* and all subsequent purchasers would have to take notice of the purposes of the action and of the claim of the plaintiffs. *Collingwood v. Brown,* 106 N. C., 362; *Arrington v. Arrington,* 114 N. C., 151. The injunctive relief prayed for in this case does not rest upon such a condition of facts as appeared in the cases of *Mortgage Co. v. Long,* 113 N. C., 123 and *Jones v. Buxton,* 121 N. C., 285. In *Mortgage Co. v. Long, supra,* the allegation was that the defendants (who were judgment creditors of the mortgagor and who had docketed their judgments since the registration of the mortgage to the plaintiffs) were making efforts to sell the mortgaged land under execution, thereby casting a cloud upon the plaintiffs' title to the land. The claim of the defendants, there, was founded upon an alleged misdescription of the land conveyed in the mortgage, and which it was averred rendered the mortgage void. The plaintiffs, there, prayed for a construction of the deed as to sufficiency of description to the land and for injunctive relief against the defendants until the final hearing. The injunction was allowed, and this Court sustained the order on the ground that the sale of the land under the execution would cause irreparable damage to the plaintiffs by the almost certainty of preventing a full price being offered for the land when it should be sold by the mortgagee for the purpose of satisfying the mortgage debt. As we have shown, though, such consequences could not follow a sale by the defendants in this action under their deed from Puryear. If the plaintiff Graham procured his mining interest in the land with knowledge of the deed from Puryear to the defendants' ancestor, and the description of the land therein contained is sufficiently definite to pass the title (which we do now (283) pass upon for the simple reason that it is not before us, and is a matter which wholly belongs to the trial below) then, the plaintiffs have

no title to the land. If, on the other hand, the plaintiff Graham got his interest in the land without knowledge of the deed from Puryear to the defendants' ancestor and had it registered (it having been executed before the enactment of the law of 1885, ch. 147), before the deed from Puryear to the defendants' ancestor was registered, then his title is good and he would be entitled to the relief he seeks, if he makes good the other allegations of the complaint; and any pretended sale on the part of the defendants would be of no effect, for the reasons we have already given.

It is more than probable that injunctive relief was invoked in this case because of the allegation in the complaint that the defendants' claim rested on a deed—the one from Puryear to Sanford—in which the land attempted to be conveyed (one hundred acres) was described as being "on the waters of Crooked Fork, adjoining the lands of W. M. Hill, Thomas Chandler and others," and that the answer admitted that the boundaries in the deed were accurately set out in the complaint, and that therefore no part of the plaintiff's land had been conveyed by the deed. We think the answer admits that allegation of the complaint, and also that the one hundred acres was a part of the two seventy-six-acre tracts, claimed by the plaintiffs. If that question was before us, we would have no hesitancy in deciding that the description of the one hundred acres was fatally defective and could not be cured by parol evidence. *Allen v. Chambers,* 39 N. C., 125; *Grier v. Rhyne,* 69 N. C., 346. The last two cases were cited and approved in *Perry v. Scott,* 109 N. C.,
374. But that matter belongs to the trial of the case on its merits
(284) when it is regularly called in the court below. Injunctive relief is afforded along certain fixed equitable rules and should never be granted when no equities are involved and when the question for decision is one purely of law, as in this case.

There was error in the order of his Honor granting the injunction.

REVERSED.

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

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M. E. HOBBS AND J. F. SOUTHERLAND v. C. W. BLAND.

(Decided 28 March, 1899.)

*False Warranty—Deceit—Counterclaim.*

1. False warranty and deceit, when growing out of the transaction upon which the action is based, may be pleaded as counterclaims.

2. Where there is an allegation of false warranty it is sufficient to show the warranty and the breach; it is not necessary to show the *scienter*.

3. If there is no warranty, and the defendant relies on the allegation of deceit, he must show the *scienter*.

4. Damages on counterclaim for either false warranty or deceit in the sale of a horse must not be speculative, but actual, and they are to be deducted, if recovered, from the agreed price, and judgment rendered for the balance, if any.

ACTION for the possession of personal property embraced in a chattel mortgage, tried before *Robinson, J.*, at Fall Term, 1898, of DUPLIN.

*Stevens & Beasley for plaintiff.* (285)
*Allen & Dortch for defendant.*

FURCHES, J. On 31 December, 1895, the defendant bought a bay mare from plaintiff at the agreed price of $90, for which he executed his promissory note, payable to plaintiff on 1 November, 1896, and to secure the payment of the note he executed a mortgage on the several articles of personal property therein named, which was duly probated and registered. The defendant took the mare home with him and worked the same, until some time in the latter part of March or early part of April, 1896, when he carried her back to plaintiff, saying that she was unsound and could not do his work. He then took a mule in her place, which he kept but one day, when he carried it back, saying it was old and slow and did not suit him. He then exchanged this mule for an- (286) other bay mare and got a "collar to boot." This last mare he returned to the plaintiff on or about 27 May, saying that she was unsound, and demanded his note and mortgage; but the plaintiff refused to take back this mare, and also refused to give up the defendant's note and mortgage.

The defendant admitted that he bought the mare in December, 1895, and executed the note and mortgage therefor, and that he took the mare and used her; that he took her back and got the mule and took it back, and exchanged it for the other bay mare and collar as stated. But he says that the plaintiff warranted the mare bought in December, when the note and mortgage were given, to be sound; that soon after buying the mare he found out she was not sound, and as soon as he saw the plaintiff (which was a week or two after that) he told the plaintiff that she was not sound, and that was the reason he took her back; that he needed another horse in his crop, and the plaintiff gave him a mule in her place; but the mule was old and slow and he took it back, and exchanged the mule for the second bay mare and collar; that this mare proved to be unsound and he took her back on 27 May and demanded

his note and mortgage; that plaintiff refused to take the mare back or to give up the note and mortgage, but that he left the mare in the lot of plaintiff. And it was in evidence that plaintiff notified defendant, that if he did not take the mare out of his lot he would advertise and sell her to the highest bidder and give him credit for the price, which he did, and credited the note with $30.

The plaintiff denied the warranty, and there was a great deal of evidence as to whether there was warranty or not; and if there was any warranty, where it was not a conditional warranty, to give the
(287) defendant another horse in place of the one he bought, and as to whether the plaintiff had not complied with the terms of the contract. Upon this phase of the case the plaintiff asked several special instructions, which were refused.

We see no error in the court's refusing these prayers for instruction, for the reason that, while some of them contained sound propositions of law applicable to the case, no one of them was correct as a whole.

But when the defendant admitted the trade, the execution of the note and mortgage and that he got the horse for which they were given, that made him liable for the $90. And the mortgage is only a security for the debt, and the property therein named is liable for whatever is still due on the note, if anything is still due.

But the defendant by his answer alleges a breach of warranty and deceit. The allegation of deceit is not very distinctly stated, but we will treat it as sufficiently stated to be used as a ground of defense, if established.

These defenses—false warranty and deceit—are both *ex delicto,* but they might be joined in one action. And as they might be joined in one action (*Bullinger v. Marshall,* 70 N. C., 520) they may be joined in defendant's answer, which is but a cross-action. To entitle the defendant to damages upon the allegation of false warranty, it is not necessary that he should show the *scienter.* It is sufficient if he shows a warranty and defendant relies on the allegation of deceit, he must then show the *scienter.* As these defenses are *ex delicto*—not on contract—they could not be set up by way of counterclaim, recoupment—if they had not originated out of the same transaction, or cause of action, upon which defendant is sued; but growing out of the transaction upon which
(288) action is based, they may be so pleaded and set up. *Benton v. Collins,* 118 N. C., 196.

Then, the matters in controversy between plaintiff and defendant are as follows: The defendant owes the plaintiff this $90 note, less the endorsed credit of $30. But if the plaintiff warranted the mare to be sound, when she was not sound, or, if the plaintiff did not warrant the soundness of the mare, but knew that she was not sound, concealed this

fact from the defendant, and sold her to him as a sound animal and for the price of a sound animal, and the defendant was endamaged by reason of such unsoundness, he is entitled to recover on his counterclaim such damage as he has sustained by reason of such unsoundness, that is, the difference between the value of the mare if she had been sound, and her value in her unsound condition. He could not recover speculative damages. And if defendant recovers damages, this amount should be deducted from the amount of the $90 note, and plaintiff's judgment should be for the balance, if any.

But the matter was not so treated by his Honor on the trial, but upon this status of the case he charged the jury as follows: "The defendant, having admitted the execution of the note for $90 and the mortgage to secure its payment, the burden is on him to prove to the satisfaction of the jury by the greater weight of the evidence that he is not indebted to the plaintiff."

This part of the charge was excepted to by the plaintiff. The exception was well taken, and must be sustained.

There were other exceptions taken to the charge, involving the questions as to the return of the three animals and their exchange, and as to whether this was not a compliance with the contract. But the facts with regard to these matters being somewhat involved, we do not discuss or pass upon them. But for the error pointed out there must be a

NEW TRIAL.

*Cited: Mfg. Co. v. Gray, post,* 327; *S. c.,* 126 N. C., 109.

(289)

JOHN CULBRETH AND WIFE, MARY K. CULBRETH, v. J. B. SMITH, EXR. OF EUPHENIA KEITH.

(Decided 28 March, 1899.)

*Judgment—Amendment—Executors.*

1. It is clearly within the power of the court to alter or amend its judgment during the term at which it was rendered.

2. Where the complaint charged a *devastavit*, and no answer was filed, but it appeared upon the face of the complaint that the balance reported against the defendant was a balance due upon a note executed by himself to the testatrix in her lifetime, a personal judgment for the debt and costs was all that the plaintiff was entitled to as beneficiary under the will.

3. A judgment by default, rendered at an earlier day of the term, adjudging a misapplication of assets and awarding an execution against the person of the defendant, was properly modified into a personal judgment for the debt and costs.

ACTION by legatee against executor for amount ascertained to be due and reported in a proceeding before the clerk, tried before *Bynum, J.*, at November Term, 1898, of CUMBERLAND. Judgment by default for want of answer for debt and costs. Plaintiff excepted to a personal judgment only against defendant, claiming that he was entitled to a judgment adjudging the *devastavit* charged in the complaint and authorizing the issue of execution against the person of defendant. Appeal by plaintiff.

(290) *S. H. MacRae for plaintiff.*
*N. A. Sinclair for defendant.*

MONTGOMERY, J. This action was commenced by the plaintiff to recover of the defendant the sum of $273.02, a balance found to be due to the *feme* plaintiff by the defendant on his final account as executor of Euphenia Keith. It appears from the complaint that the defendant had filed his final account, to which in some way exceptions had been made by the *feme* plaintiff, and that upon appeal the judge had made an order, directed to the clerk of the Superior Court of Cumberland County, to state the account between the defendant and the estate of the testator. The clerk, in accordance with this order, restated the account, and the same is made a part of the plaintiff's complaint.

It appears on the face of the account that the balance found due to the estate by the defendant consists of a balance due upon a note executed by the defendant himself to the testatrix in her lifetime. There was an allegation in the complaint that the defendant had fraudulently misapplied the balance found due on the account by converting the same to his own use, and had refused to pay the same to the plaintiff.

In default of an answer by the defendant, judgment was rendered by the court for the balance found due on the account, and it was adjudged that the defendant had fraudulently misapplied the same to his own use. Execution also was ordered to be issued against the property of the defendant for the amount of the judgment and costs, and on failure of the satisfaction of the judgment under the execution against property, execution was to issue against the person of the defendant. At the same term of the court that judgment was changed and modified by having struck out of its provisions all that part of the same which authorized the issue of execution against the person of the defendant, and also that part which adjudged that the defendant was guilty of fraudulent mis-

application of any part of the estate to his own use. To the (291) modification and alteration of the original judgment the plaintiff excepted and appealed.

His Honor clearly had the power to alter or amend the judgment during the term at which it was rendered. The only question, then, is, "Was the judgment such a judgment as the plaintiff was entitled to, upon the complaint?" We are of the opinion that it was. The complaint, it is true, alleged that the defendant had fraudulently misapplied a part of the assets of the estate. But the final account was made a part of the complaint, and upon its face it appears that the funds alleged to be misapplied and converted by the defendant were a balance due upon a note executed by the defendant himself to the testatrix in her lifetime. If the defendant had collected the note of some other person belonging to the estate, or had used it for himself by assignment or hypothecation, and had been charged in the complaint with a fraudulent misapplication and conversion, and had put in no answer to the charge, then, upon judgment by default, it would have been proper to adjudge the defendant guilty of conversion, and the case of *McLeod v. Nimocks,* 122 N. C., 437, cited us by the plaintiff's counsel, would have been in point.

AFFIRMED.

(292)

## DICEY A. BROWN v. D. G. MORISEY.

(Decided 28 March, 1899.)

*Dower—Adverse Possession.*

1. In a proceeding for dower, when the defendant claims under the husband, as heir or assignee, the estate passes subject to the incumbrance of dower right—inchoate during coverture and consummate at its close. The possession is not adverse to the widow, and the statute does not run against her.

2. The doctrine does not obtain when the defendant does not claim under the husband, but adversely to him by paramount title. The husband's title may be barred, and the right of dower, being but a continuation of the husband's estate, may become barred also.

ACTION for admeasurement of dower, tried before *Robinson, J.,* at August Term, 1898, of DUPLIN.

The action was commenced 8 July, 1896. The plaintiff is the widow of George Brown. They were married in August, 1854. In September, 1854, he bought from A. Best the land located in Duplin County and described in the complaint, and took a fee-simple deed for it, with war-

ranty, proved and registered in January, 1855. He built a dwelling-house on the land, cleared a few acres around the house, and the plaintiff and her husband lived in the house for more than a year; then she and her husband went to Wilmington, and he went on south and died intestate previous to 1861, leaving no children. Plaintiff remained in Wilmington but a few days, and returned to Duplin County. The defendant took possession shortly after her return, and has been there ever since.

The defendant offered no evidence. At the close of plaintiff's evidence he moved for judgment of nonsuit, which was allowed. Plaintiff excepted and appealed.

(293) *Stevens & Beasley for plaintiff.*
*Allen & Dortch for defendant.*

FURCHES, J. This is a proceeding for dower, and defendant denies plaintiff's right, alleges title in himself, and pleads adverse possession, lapse of time, statute of limitations, and release. Upon the trial, the plaintiff showed that she was married to George Brown in 1854; a deed to him, dated in September, 1854, conveying the land in controversy to him in fee simple; that he entered upon said land and built a house and cleared and cultivated a part of the land, and that she and her said husband lived on it for more than a year, when they left the land, and her husband left the State and died in 1860 or 1861; that soon after plaintiff and her husband left the land, the defendant entered and has lived there ever since, clearing, cultivating and using the land as his own. The defendant offered no deed or other written evidence of title, but relied on his long-continued possession, which, he contends, gives him a title in fee simple to the land.

When the plaintiff showed her marriage, a deed in fee simple to her husband, and his death, this gave her *prima facie* a right to dower. And she contends that defendant has shown nothing that rebuts this presumption or *prima facie* right to dower; that he has shown nothing but his long-continued possession, and this is no bar to her right to dower; that the lapse of time and the statute of limitations does (294) not run against a right of dower, citing *Spencer v. Watson,* 18 N. C., 213, and *Campbell v. Murphy,* 55 N. C., 357. This doctrine is announced in these cases, and is a correct application of the law to them, but, as we think, it would not be to this case. In those cases the defendants claimed title under the husband. In this case the defendant does not claim under the husband, but adverse to his title.

Where the defendants claim under the husband (as heirs or assignees) they cannot dispute the title of the husband, as they claim under him.

And while the widow does not claim dower under the husband, she claims it under the same title that the heirs and assignees claim, by force and operation of the law of dower. Upon her marriage she acquired an inchoate right of dower, which the husband could not destroy or defeat. Upon the death of the husband, this inchoate right becomes a right consummate, but she has no estate until dower is assigned, and when this is done she acquires no new estate, but only the possession and enjoyment of the inchoate right she acquired by reason of her marriage ripened into an estate. Her dower right and her dower when assigned are a prolongation of her husband's estate in her for the term of her life. *Norwood v. Morrow,* 20 N. C., 448. The estate descends to the heir, subject to this incumbrance, and as he takes it subject to this incumbrance, he cannot hold or claim the estate adversely thereto; and as he cannot hold adversely to the right of dower when he holds and claims the estate under the same title that she claims dower, the statute does not run. It is the same as a grant in fee simple, reserving a life estate; and as the grantee holds his estate under the grantor, he cannot claim to hold adversely to the estate reserved, and the statute of limitations does not run. *McCormick v. Monroe,* 46 N. C., 13. But this doctrine does not obtain in this case, where the defendant does not claim under the husband as heir or assignee, but claims to hold adversely to the husband of the plaintiff, and by paramount title. (295)

We see no reason why he may not do this. And while this is not directly held in *Norwood v. Morrow, supra,* on page 449, it seems to be conceded.

If the defendant had a deed conveying a title paramount to that of the husband of the plaintiff, it is admitted that this would defeat her right of dower. So, if he had shown a deed from a stranger, and an adverse possession thereunder since he went into possession, it would have ripened into a perfect title as against the husband if he were living. And so would a continued adverse possession, without color of title, from 1857 or 1858 until the commencement of this action in 1896, have ripened into a perfect title against the husband. And there being no reason that we see why the lapse of time and the statute of limitation should not count against the husband (the defendant not holding under him) and the plaintiff's right to dower, being a continuation of the husband's estate, we see no reason why she is not also barred.

It is true, the husband by his own acts could not defeat her right of dower, as already stated. But she cannot be entitled to dower unless her husband was the owner of the land, and the theory of the defense is that, "though he had a deed, he was never the owner of the land"; and as the defendant has shown title in himself, it must be held to be paramount to that of the husband.

It was said on the argument that while the case showed that the defendant had been in possession all this time, cutting, clearing and cultivating the land as his own, it was not shown that he held adversely. This, it seems to us, is the very strongest evidence that he was holding it adversely. But the fact that he was in the sole possession and enjoyment of the land is sufficient in law to constitute adverse possession. *Alexander v. Gibbons,* 118 N. C., 796. The judgment must be

(296)

AFFIRMED.

CLARK, J., concurring: It nowhere appears how or under what title the defendant entered. It may be, and the probability is, that as he went into possession before the husband's death, he entered under a deed from him. If so, as the law then stood, the plaintiff had no claim to dower, except of lands "of which her husband died seized or possessed." Rev. Code, ch. 118, sec. 1. Possibly the deed has been lost or destroyed, or it may even be of record, for the defendant put in no evidence, the plaintiff having been nonsuited at the close of her evidence. If she had wished to raise the interesting question whether the claim for admeasurement of dower would be barred against the heirs, or one claiming under them, she should have shown that the defendant claimed under the heirs. Though I am of the opinion that, even under those circumstances, the defendant would be protected by section 158 of The Code, which provides: "An action for relief not herein provided for must be commenced within ten years after the cause of action shall have accrued." That was intended as a sweeping statute of repose for such cases as this, and all others "not provided for" specially, and to cure omissions in former statutes.

But, however that may be, no *scintilla* of evidence suggests that the defendant claims under the heirs of her husband, and to discuss that question would be purely an abstraction. All that does appear is that the defendant has been in undisturbed adverse possession over forty years, and, nothing else appearing, that gives him a title good against all the world, not under disability. It may be that he had title mediately or immediately from the husband, or that he held adversely to him. If so, the statute would not have ceased to run at his death, and the title, as against the husband and the widow claiming under him, would have ripened. The plaintiff, not having shown that the defendant held under the heirs at law, is simply seeking dower, not in her husband's land, but in some one else's. Like every other plaintiff, she must prove facts entitling her to recover. It is not enough to show merely that at one time, about forty years ago, her husband had title to the land.

(297)

FAIRCLOTH, C. J., dissenting: This is a petition for dower. The plaintiff's husband was in possession of the land more than a year under a fee simple deed registered in 1854. In their absence for a few years, from which the husband never returned, the defendant took possession of the land, using it as his own, and has been in possession ever since. He entered without any deed or color of title, and without any right of entry or right of possession. He entered as an intruder and trespasser, without any pretense of right.

The defendant's counsel in this Court said he would not discuss the title of the husband, but insisted that the defendant's title, growing out of his uninterrupted possession for more than thirty years, was a bar to the plaintiff's claim to dower. This is the question.

At common law, upon the death of the husband, the title, the right of entry and the right to possession, descends to and vests in the heir, and it is his duty to assign dower to the widow, and in certain conditions it is the duty of the sheriff to lay off and assign dower by metes and bounds. If dower is not thus assigned, the widow, having no estate, no right of entry or of possession, is driven to her writ of dower, in the nature of a writ of right. The only limitation on the exercise of this writ was, and is, 60 years. The law favored dower as a means of (298) maintenance of the widow and the nurture of her husband, and the period of limitation at 60 years was adopted on the belief that no widow would live longer, after the death of her husband.

I agree that the defendant's long possession would bar an action by the heir of the land, as it would an action by the husband. This is so because the heir claims by descent under and through the husband, which is not true as to the widow. Her right at the death of her husband, whatever it may be called, is not through or under him, but is an interest *impressed* on the land by the law, in spite of and in theory against his will. This right of dower, as well as that of tenant by the curtesy, is the will of the law, for the encouragement of matrimony. They do not hold by any idea of contract with each other as to their lands, nor by derivation from another, as creditors, heirs or purchasers.

In *Norwood v. Morrow,* 20 N. C., 450, *Ruffin, C. J.,* says: "We have so held in respect to the husband's right to his wife's chattels. *Ligon v. Simmons,* 18 N. C., 13. All the old authorities say that the tenant by curtesy is *in the post,* that is, by operation of law. Coke Litt., 30, b. n. 7. . . . But, however, the argument may be pursued upon the abstruse point of the old law, how the wife is *in* technically speaking, it is certain that such as her estate is, the law makes it without any act of the husband, and even against his will. She claims, therefore, under the statute, which defines her right of dower, and has made no contract with the husband which constitutes her a purchaser or a creditor."

*Randall v. Kreiger,* 23 Wall., 147; *Martin v. Martin,* 22 Ala., 86. Does the reason why the action of the heir is barred apply in this case? No statute in England or in North Carolina, and no decision of any (299) court in either country is cited in support of the defendant's contention, and I know of no limitation except the 60 years limit according to the common law. What reason can be suggested why this cherished right of the widow shall be defeated by the unlawful entry of an intruder without a shadow of right or equitable claim?

The petition for dower is by our act of Assembly substituted for the writ of dower at common law. "We however consider the act of 1715, called the act of limitations, as having been pleaded and relied on in this case. Is that act a bar to this petition? The widow has no estate in the land, for the law casts the freehold upon the heir immediately upon the death of the ancestor. The widow had no right of entry for dower until it had been assigned to her. She had no estate in the land until assignment. It is not until her dower has been duly assigned that a widow acquires a vested estate for life, which will enable her to maintain ejectment. . . . A widow, before assignment of dower, has neither any 'right nor title' to the lands of which her husband was seized; she had only an interest in the lands for dower; therefore, we think the act of 1715 cannot be pleaded as a bar of her action to recover the same. She is not within the provisions of the act." *Spencer v. Weston,* 18 N. C., 14; 4 Kent Com., 60.

Dower is a favorite of the law and cannot be lost or forfeited, except for the causes prescribed by the statute or the common law. *Simonton v. Houston,* 78 N. C., 418.

"The statute of limitation (says *Pearson, C. J.)* to 'a writ of right' is 60 years; to a formedon, 50 years (afterwards reduced to twenty); to a writ of entry, 30 years. The writ of dower is in the nature of a writ of right; there is no statute of limitation in regard to it, for the reason, we suppose, that none was thought necessary; for the right (300) ceased at the death of the widow, which would in most cases happen before the expiration of 60, 50, or even 30 years." *Campbell v. Murphy,* 55 N. C., 360, and many cases in the reports.

It appears to me that the plaintiff is entitled to have dower assigned.

DOUGLAS, J., dissenting: I cannot assent to either of the propositions that what would bar the husband if living would also bar the wife, or that one whose only title is the statute of limitations based upon a naked trespass, is in any better position than the heir or an innocent purchaser for value rightfully in possession *ab initio.* It is conceded that no ordinary statute of limitation ever runs against the right of dower, and that if the defendant held directly or indirectly under the heirs of Brown, the ad-

mitted owner, his title would be subject to the widow's right of dower. But it is said that he has a clear title because he holds under no one, and adversely to all the world by mere occupancy. Why should he be thus preferred? Lord Coke says: "There be three things highly favored in law—life, liberty and dower"; and this is still the spirit of our laws. Under our present law, the husband could not defeat the wife's right of dower, either by direct conveyance or by permitting adverse possession. Under the old law the plaintiff was entitled to dower because her husband died seized of the land. At that time, the defendant had no title, and she would have been entitled to dower as against him. If no statute of limitation runs against that right, what has she done to forfeit it? Nothing that I can see. The view of the Court would, in my opinion, offer too great an opportunity as well as incentive to fraud. I know nothing of the facts except as they appear in the record; but suppose the defendant had entered rightfully under a deed from the heirs, how easy it would be for him simply to hold back his unrecorded deed which may for so many years have been his only muniment of title, but (301) which would now operate as an incumbrance.

Statutes of limitation relating to land were formerly statutes of presumption; that is, they presumed a deed. But from whom was the deed presumed unless from him who held the title? I do not mean to oppose all statutes of limitations or to denounce those who take advantage of them, oftentimes as the only means of defending substantial rights after the necessary evidence has been lost through lapse of time; but he who defends a title, and much less he who acquires a title, through such statutes, can stand in no better position that one whose title has never been questioned.

Giving them, then, their fullest legitimate scope, I do not think we should encourage fraud by permitting a mere disseizor, who, if he had entered by right, would have no defense, to oppose the just claims of the widow with the naked shield of his own wrong.

*Cited: S. c.,* 126 N. C., 773; *S. c.,* 128 N. C., 140; *Graves v. Causey,* 170 N. C., 176.

(302)

MARIA COGDELL, ADMX. OF SAMUEL COGDELL, v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 28 March, 1899.)

*Negligence—Contributory Negligence—Carrier and Consignee—Nonsuit.*

1. Contributory negligence and assumption of risk, being in the nature of pleas in confession and avoidance, are affirmative defenses and cannot be considered on a motion for nonsuit, and upon such motion the evidence must be taken in the light most favorable for the plaintiff; and, when so construed, if it amounts to more than a mere *scintilla* of proof, it must be submitted to the jury.

2. The duty of a common carrier is threefold—to receive, carry, and deliver at some safe and convenient place—and for its negligent performance the carrier will be liable for injuries sustained by any one upon the premises by invitation, express or implied.

ACTION for damages for the death of intestate, occasioned as was alleged by the negligence of the defendant, tried before *Norwood, J.,* at February Term, 1898, of BEAUFORT. At the close of plaintiff's evidence the defendant moved for judgment of nonsuit, which was allowed by his Honor. The plaintiff excepted and appealed. A statement of the evidence appears in the opinion.

*Charles F. Warren for plaintiff.*
*John Small for defendant.*

DOUGLAS, J. This is an action brought by the administratrix to recover damages for the death of her intestate, alleged to have occurred through the negligence of the defendant. The following facts
(303) among others are either admitted in the pleadings or rest on substantial evidence tending to prove them: The defendant had constructed a wharf out into the river, upon which it had built a warehouse and sidetracks for the purpose of connecting with water transportation. This wharf was built upon piles and was so arranged by lowering the track as to bring the floor of the cars on a level with the platform, for convenience in loading and unloading. The scene of the accident was apparently at the end of the wharf farthest into the river, where an open coal car had been left for the purpose of being unloaded into the steamers of the Styron Transportation Company, which habitually obtained its coal in this manner. The width of the platform alongside the car was about four feet, and the open space between the inner edge of the plat-

form and the car was about two feet. This space for several feet was covered by a wooden apron that was hinged on to the platform and rested against the side of the car when in use, or could be turned back so as to lie on the platform when not needed. The cross-ties projected but little beyond the edge of the car, leaving the remainder of the space open between them and the timbers supporting the platform. The main beams went across this space, but they were about eight or ten feet apart.

One of the witnesses testified as follows: "There was no planking under the platform over the water and none from the side of the warehouse to the end of the cross-ties over the water. There was room for a man to drop between the side of the car and edge of the platform, and if he should fall, there was nothing to catch him and prevent his falling into the river. The water at this point was eight or ten feet deep."

No one saw the accident, but all the circumstances tend to show that he fell or was standing upon the apron which broke beneath him, and let him drop between the platform and car into the river, at the bottom of which his body was soon afterwards found.

The apron was made of inferior lumber and was partly rotten. (304) After the accident one plank was found broken and two of its three hinges broken or pulled out, so that it was held to the platform only at one end. The dangerous condition of the apron, which was used to keep loose coal from falling into the water and for a man to stand on while unloading, was not apparent before the accident. At the close of plaintiff's evidence the defendant moved to nonsuit the plaintiff. The court granted the motion.

The defendant alleged that the apron was built there by the consignee of the coal, and was not intended to stand on, and that, therefore, the deceased, being employed by the consignee, assumed the risk, and was also guilty of contributory negligence; contributory negligence and assumption of risk, being in the nature of pleas in confession and avoidance, are affirmative defenses and cannot be considered on a motion for nonsuit. *Bolden v. R. R.*, 123 N. C., 614. It is equally well settled that in such cases the evidence must be taken in the light most favorable for the plaintiff, and that if, when so construed, 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. *Spruill v. Ins. Co.*, 120 N. C., 141; *Cable v. R. R.*, 122 N. C., 892; *Cox v. R. R.*, 123 N. C., 604.

The plaintiff contends that there were three distinct acts of negligence on the part of defendant directly contributing to the death of the deceased: (1) Leaving the apron in its unsound and dangerous condition, so as to become a death-trap instead of a protection; (2) so constructing the wharf as to leave, without any necessity, so large a space

(305) between the platform and the car, which was in itself dangerous to any one engaged in unloading the car; (3) failing to cover the open space between the end of the cross-ties and the platform. It may be that none of these acts would be negligence *per se,* but they are all evidence tending to prove negligence. In the absence of any one of them, the deceased would not have lost his life. If there had not been so large a space between the platform and the car, the deceased would not have fallen through. If the apron had been sound, it would not have broken, and the deceased would simply have rolled on to the platform. If a plank had been placed on the cross-beams at the end of the ties, even if the apron had broken and the deceased had dropped between the car and the platform, he would have landed on the plank only four feet below. In either event, the probability of serious injury would have been slight. At least two of these precautions, either one of which would have saved a human life, could have been taken at trifling expense and without any apparent inconvenience. A new apron and a few planks at the end of the cross-ties would have cost but little. We see no necessity for the wide space between the platform and the car, which has proved to be dangerous. It is common knowledge, at least with those who have any knowledge of railroads, that freight cars do not vary in width to any such extent. It may be said that it was necessary to have this space to permit employees to walk beside the car; but if so, on what would they walk? If a plank had been there for them to walk on, then, in all probability, the deceased would have caught on that plank and would not have been drowned. It should be borne in mind that the location of the accident was not along the main track where the trains were in the habit of running, but was at a terminal point where the cars were carried only to be unloaded. As unloading the car was the object of its loca-
(306) tion, then it was the duty of the carrier to give the consignee a reasonable opportunity of unloading, essentially including a safe and convenient place.

The duty of a carrier is three-fold—to receive, carry and deliver. The common-law requirement of *personal* delivery has been necessarily relaxed in favor of railroads, but the duty still remains of delivery at some safe and convenient place. If the goods are such as can be conveniently unloaded by the carrier and placed in an ordinary depot warehouse, then it is its duty to do so; but if the freight is such as by necessity, custom or contract must be unloaded by the consignee, he has a right to demand of the carrier that the car be placed so that it can be unloaded with reasonable safety and convenience. Hutchinson on Carriers, sec. 378a; 3 Wood on Railways, p. 1909, sec. 444; 4 Elliott on Railroads, secs. 1519, 1521. Until this duty is performed, there is no delivery, and for its negligent performance the carrier will be liable. *Independence Mills Co. v. R. R.,*

72 Iowa, 530, 539. The liability of common carriers and those in the nature of such, for negligent injuries to those upon their premises by invitation, express or implied, is well settled. 4 Elliott, *supra,* sec. 1590; 2 Wood, *supra,* secs. 310, 310a; Wharton Negligence, secs. 349, 821, 823; 1 Thompson on Negligence, p. 316; 1 Fetter Car. Pas., sec. 46.

The general rule is well laid down by Judge Cooley in his work on Torts, in the following words, quoted with approval in *Bennett v. R. R.,* 102 U. S., 577, 580: "Where one expressly or by invitation invites others to come on his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

For error in the direction of a nonsuit, a new trial must be (307) ordered.

NEW TRIAL.

*Cited: Gates v. Max,* 125 N. C., 141; *Powell v. R. R., ib.,* 374; *Cowles v. McNeill, ib.,* 388; *Brinkley v. R. R.,* 126 N. C., 92; *Winkler v. R. R., ib.,* 373; *Neal v. R. R., ib.,* 653; *Meekins v. R. R.,* 127 N. C., 36; *Moore v. R. R.,* 128 N. C., 457; *Thomas v. R. R.,* 129 N. C., 394; *Coley v. R. R., ib.,* 413; *Smith v. R. R.,* 130 N. C., 310; *Cogdell v. R. R., ib.,* 323; *S. c.,* 132 N. C., 852; *Seawell v. R. R., ib.,* 859; *Bessent v. R. R., ib.,* 946; *Meeder v. R. R.,* 173 N. C., 72; *Smith v. Elec. R. R., ib.,* 493.

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GEORGE M. LINDSAY v. W. M. DARDEN, ADMR. D. B. N. OF R. C. D. BEAMAN.

(Decided 28 March, 1899.)

*Attorney and Client—Executors and Administrators.*

1. If an administrator employs counsel to assist him in his administration, the contract is personal and is not a debt against the intestate's estate. The administrator must pay it, and if the disbursement is proper it will be allowed him in the settlement of his account with the estate.

2. No debt of the *estate* can be created after the death of the intestate or testator.

ACTION by the plaintiff, an attorney at law, upon an account of professional services rendered R. J. W. Beaman, administrator of R. C. D. Beaman in the management of the estate, tried before *Robinson, J.,* at August Term, 1898, of GREENE.

(308) *George M. Lindsay for plaintiff.*
*Battle & Mordecai for defendant.*

FAIRCLOTH, C. J. This action was referred, and upon the findings of the referee and the court, judgment was entered for the plaintiff.

The facts are, that R. C. D. Beaman died in 1884, and R. J. W. Beaman qualified as his administrator, and before the estate was fully administered the administrator died, and in 1897 the defendant
(309) qualified as administrator *d. b. n.* on said estate. Said administrator contracted with plaintiff, as his attorney, to aid him in administering and settling the estate of his intestate. The plaintiff now sues the administrator *d. b. n.* for services rendered the first administrator, and defendant declines to pay the account on the ground that it is not a charge on the estate in his hands.

It is very well settled that if an administrator employs counsel to assist him in his administration, the contract is personal, and is not a debt against the intestate's estate. The administrator must pay it, and if the disbursement is proper, it will be allowed him in the settlement of his account with the estate. The Court will allow such commissions, charges and expenses as it may deem reasonable and just, whether it is equal to or less than the contract price. *Devane v. Royal,* 52 N. C., 426; *Kessler v. Hall,* 64 N. C., 60.

Plaintiff does not seriously dispute the above rule, but falls back on the equity of his case. He contends that inasmuch as the courts will allow the administrator's voucher, the court ought to coerce the payment out of the assets of the estate. The fallacy is that it is not a debt of the estate, as no debt of the *estate* can be created after the death of the intestate or testator. He relies on *Edwards v. Love,* 94 N. C., 365. That case was upon a state of facts unlike the present. The testator directed his executor to employ the plaintiff as agent to sell lands and the executors contracted with him in obedience to such directions, and it was held that the executors were personally liable on the contract, but as it was entered into under the directions of the will and the services were for the benefit of the estate, payment might be coerced out of the assets of the estate. It was as if the testator had made the contract and the services were rendered after his death, in the course of administering the
(310) estate. The law must fit the facts.

The plaintiffs emphasized the fact that legal and equitable remedies are now allowed in the same action. That is true, but the distinction between legal and equitable principles is the same as it was before the Constitution of 1868. This fact seems frequently to be overlooked or misapprehended.

We think plaintiff's remedy is against the representative of the administrator with whom he contracted and not against the estate of the defendant. There was error.

REVERSED.

*Cited: Kelly v. Odum,* 139 N. C., 282; *Craven v. Munger,* 170 N. C., 427; *Cropsey v. Markham,* 171 N. C., 46; *In re Stone,* 176 N. C., 344.

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ASA JONES v. CITY OF GREENSBORO.

(Decided 28 March, 1899.)

*Negligence—Defect in Street—Burden of Proof.*

The burden of showing defects and dangers in the public streets, causing injury, and also notice thereof, express or implied, rests upon the plaintiff.

ACTION for damages for personal injuries, occasioned by reason of a dead limb falling on plaintiff from a shade tree on sidewalk of a street in Greensboro, tried before *Robinson, J.,* at February Term, 1898, of GUILFORD.

*J. A. Barringer for plaintiff.* (311)
*A. M. Scales for defendant.*

FAIRCLOTH, C. J. The defendant is a duly organized municipal corporation, and derives its powers and duties from its charter and the general statutes, Code, chap. 62. By The Code, sec. 3803, it is required to keep the streets and the bridges in the town in proper repair, in the manner and to the extent it may deem best, and by The Code, sec. 3802, as well as by the common law, it may abate or prevent nuisances of any kind, and by section 60 of its charter, the board of aldermen shall macadamize and pave the streets and sidewalks . . . protect the shade-trees of the city; and an ordinance provides that the trees shall be trimmed only with the permission of, and under the direction of the street committee.

The plaintiff was walking on one of the sidewalks, when a limb fell from a tree standing on the edge of the sidewalk and injured him. The limb fell from fifteen to twenty-five feet out of the top of the tree. It is not alleged that the limb was dead, but it seems to have been treated as a dead limb during the trial. There was no evidence to show

(312) whether the limb was decayed or whether it fell of its own weight or fell in a storm. There is no evidence that any citizen or any one else had ever noticed the limb before it fell. One of the plaintiff's witnesses testified that he never saw the dead limbs in this tree prior to the time plaintiff was injured, although he had frequently passed it.

The general duties, powers and liabilities of municipal corporations, as to keeping their streets and sidewalks in good repair, have been recently fully stated by this Court in *Bunch v. Edenton,* 90 N. C., 431; *Russell v. Monroe,* 116 N. C., 720; and in *Dillon v. Raleigh, ante,* 184, and it seems unnecessary to repeat them again so soon.

Quite a diversity of opinion on these questions has been written by different courts. They agree that the corporation is not an insurer against all defects; that the corporation, however, will be held to a strict performance of its duties, within limits that are reasonable and just. The health, safety, comfort and convenience of the public require this much and the corporation is vested with the power and means necessary to perform its duties.

The liability grows out of the power conferred on the city over its streets, including sidewalks, and its duty to keep them in reasonable repair, having the power to raise means for that purpose.

Each case must depend upon its exact facts and upon the circumstances of the particular case, in view of the statutory provisions of the State. Upon notice of defects and dangers in the streets, the city must remove them in a reasonable time, and failure to do so is negligence, and such negligence is the basis of an action by any one injured by reason thereof.

(313) The corporation, however, is not liable without notice of the defect which caused the injury. This notice may be actual or implied. Implied notice may be from facts, from which it may be reasonably inferred, or from proof of circumstances from which it appears that the defect ought to have been known and remedied. Not only patent facts must be remedied, but reasonable care must be exercised to discover defects. For it has been well said that "negligent ignorance is no less a breach of duty than willful neglect." So, whether constructive notice will be attributed to the city must depend upon the circumstances of each case. Nothing more than reasonable care to discover the defects will be required of the corporation. Notice will be inferred from the notoriety of the defect, open to reasonable observation, but if it be concealed or obscured in any way so as to escape the attentive observation on the part of the defendant, notice will not be attributed to it.

The burden of showing a defect and notice rests upon the plaintiff. The defendant asked for this instruction to the jury: "That if the jury shall find that the defendant had no notice, actual or implied, of the

alleged defect, they should answer the first issue, 'No.'" This should have been given, but was refused. We have read the whole charge in the record to see if this instruction was substantially given, and we think it was not; and it is not improbable that the jury were misled, and they probably consider that the prayer was improper, as it was directly refused.

If we assume that the limb was a defect, there is no evidence in the case that it was decayed materially, or how long it had existed. No witness saw it before the accident, and there was no evidence that any one had seen it, or that any city officer knew of it or could by reasonable diligence have seen it before the accident. *Stanton v. Salem,* 145 Mass., 476. "A city is not charged with notice of a defect in a sidewalk which is not apparent to the ordinary observer, and whose existence is not known to the inhabitants of the city generally, and especially those in the immediate vicinity. *Cook v. City of Anamosa* (314) 66 Ia., 427. "It is certainly true, as a general proposition, that before the corporate authorities can be held liable in this class of cases, it must be shown that they knew of the existence of the cause of injury, or had been notified of it, or such a state of circumstances must be shown that notice would be implied." *Mayor v. Sheffield,* 4 Wallace U. S., 195, 96. "Where a decayed tree, being struck by a heavy truck, fell upon and injured the plaintiff, it was held that if the tree was dangerous, but appeared safe, to outward observation, the defendant was not liable, and that the defendant was not bound to examine a hole which had existed on one side of the tree, although by so doing it would have discovered the decay." *Gubasco v. N. Y.,* 14 Daly, 559.

We think the plaintiff failed to meet the burden of proving his case, and a new trial is necessary, for the error already pointed out.

NEW TRIAL.

*Cited: Fitzgerald v. Concord,* 140 N. C., 114; *Revis v. Raleigh,* 150 N. C., 353; *Bailey v. Winston,* 157 N. C., 267.

(315)

## MATTIE A. KENDRICK v. MUTUAL BENEFIT LIFE INSURANCE COMPANY.

(Decided 4 April, 1899.)

*Life Insurance Policy—Construction—Premium—Estoppel—Issues.*

1. Possession of the policy, at the death of the insured, makes out a *prima facie* case.

2. An acknowledgment in the policy of the receipt of the premium estops the company, so far as payment of premium is concerned, to contest the validity of the policy, in the absence of fraud, although as a mere receipt for money it is only *prima facie*, and like other receipts is rebuttable by proof to the contrary. In analogy to the same rule as to deeds, the receipt of the consideration money expressed therein may be shown to be untrue—but paid, or not paid, the title passes all the same.

3. The uniform rule of construction of insurance policies is, that if reasonably susceptible of two constructions, that one will be adopted which is most favorable to the insured.

4. Instruction to agents, that if the first premium was paid more than thirty days after due there must be a health certificate, is evidence against the company, recognizing that indulgence on the payment is allowable, but is not evidence against the insured, who may rely upon a provision in the policy itself that such payment must be made during life.

5. Where every phase of defendant's contention could be and was presented without prejudice, under the issue submitted by the court, a refusal to submit other issues asked for is not error.

ACTION upon the insurance policy on the life of John F. Kendrick, taken out by him for the benefit of the plaintiff, his wife, tried before *Starbuck, J.*, at October Term, 1898, of MECKLENBURG.

(316) *Jones & Tillett for plaintiff.*
*Burwell, Walker & Cansler for defendant.*

CLARK, J. John F. Kendrick applied for insurance on his life in the defendant company for the benefit of his wife, the plaintiff, and on 15 July, 1897, the defendant issued its policy in accordance with the terms of the application, which was delivered by its agent to him, a few days thereafter. He was afterwards taken ill with typhoid fever and died on 15 September, 1897. The policy recited the payment of the premium, though in fact it was not paid until a few hours before, and in fact on the same day on which the insured died, the payment being then made for him by a friend and accepted by the local agent with full knowledge of Kendrick's critical condition. This agent had theretofore indulged

the payment, stating that it would be sufficient if the payment was made during Kendrick's life. The policy contained a provision: "This policy does not take effect until the first premium shall have been actually paid during the lifetime of the insured." There was (317) in the instructions of the company, in the hands of its agents, a further provision, that "When a premium is paid more than thirty and within sixty days after due, a certificate of good health, signed by the applicant, will be required." It was not shown that John F. Kendrick had notice of this instruction.

These in substance were the facts. The plaintiff, to whom the policy was payable, was in possession of the policy, and the death of the insured being admitted, this made out a *prima facie* case. In the absence of evidence, the policy is presumed to have been delivered at the time it bears date. *Meadows v. Cozart,* 76 N. C., 450; *Lyerly v. Wheeler,* 34 N. C., 290. The authorities are numerous and quite uniform that the acknowledgment in the policy of the receipt of the premium estops the company to test the validity of the policy on the ground of nonpayment of the premium. In so far as it is a mere receipt for money, it is only *prima facie* like other receipts, and will not prevent an action to recover the money if not in truth paid; but in so far as it is a part of the contract of insurance, it cannot be contradicted by parol to invalidate the contract, in the absence of fraud in procuring the delivery of the policy. The rule is thus stated in 2 Biddell on Insurance, sec. 1128: "As a general rule it has been held in the United States that while such a receipt will prevent the insurer from proving the premium was unpaid in order to show the policy was void from its inception, it may be contradicted in order to show, on a suit for premium, that no payment had been made," citing numerous cases in the note. To same effect the law is summed up and stated in 19 A. & E., 1126; *Bosch v. Ins. Co.,* 35 N. J., Law, 429, in a very clear statement by *Beasley, C. J.,* citing *Provident Ins. Co. v. Fennel,* 49 Illinois, 180; *Ins. Co. v. Ins.* (318) *Co.,* 20 Barb., 471. *Chancellor Kent* says (3 Com., 260): "The receipt of the premium in the policy is conclusive of payment and binds the insurer unless there is fraud on the part of the insured." To like purpose, *Ins. Co. v. Gilman,* 112 Ind., 7; *Goit v. Ins. Co.,* 25 Barb., 189, 192; *Ins. Co. v. Cooker,* 9 Heisk, 606; *Ins. Co. v. Wolf,* 37 Ill., 354, 356; *Ins. Co. v. Mueller,* 77 Ill., 22, 24; Phillips on Insurance, secs. 514, 515; *Farnum v. Ins. Co.,* 17 Am. St., 240 (83 Cal., 246); *Michael v. Ins. Co.,* 10 La. Ann., 737; *Ins. Co. v. Cashow,* 41 Md., 60, 76. In striking analogy is the same rule as to receipts in deeds. In 3 Washburn R. P., 614, the fourth rule applying to receipts in deeds is as follows: "Although it is always competent to contradict the recital in the deed as to the amount paid, in an action involving the recovery of the purchase-

money, or as to the measure of damages, in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid, in order to affect the validity of the deed in creating or passing a title to the estate thereby granted." This is quoted and approved in *Barbee v. Barbee,* 108 N. C., p. 584, and it may be said in passing, that the difficulty in reconciling opinions expressed in that case was due to the failure to note the double aspect of a recital in a deed of payment as being a mere receipt for money, and, therefore, only *prima facie,* in an action to recover the money, and as being sometimes also a part of the contract and, therefore, not to be impeached, except for fraud, etc., when the validity or effect of the contract depends on prepayment, a distinction which is clearly pointed out by *Ashe, J.,* in *Harper v. Dail,* 92 N. C., 394, citing *Wilson v. Derr,* 69 N. C., 137.

The above proposition being true even when the policy is made payable to the estate of the insured, *a fortiori* the defendant company is estopped when the beneficiary is a third party. *Kline v. Benefit Asso.,* 60 Am. Rep., 706 (111 Ind., 462).

(319) Certainly it is not the defendant who can except because the court charged the jury: "If when the policy was handed to Kendrick by the agent it was not the understanding that it should then take effect as a policy, then Kendrick could not, by sending this amount as a payment, create or put in force a contract of insurance, although the agent during Kendrick's sickness may have agreed and directed that he should do so. On the other hand, although defendant may show that as a fact the recital of the payment of premium was not true, yet if the policy was delivered to operate as a contract of insurance, it cannot contend that the policy was invalid because the premium was not paid" (at time of delivery). If it be conceded contrary to authorities above recited that the proviso in the policy that it shall not be effective "unless the first premium shall have been actually paid during the lifetime of the insured," removed the estoppel arising from the acknowledgment of the receipt of the money, the condition was complied with by the actual payment of the money in the lifetime of the insured, which related back to the date of the policy. The instruction to agents as recited in the letter of the general agent, that if the premium was paid more than thirty days after due there must be a health certificate, is evidence against the company, that credit, or indulgence on payment was allowable, but the terms that after thirty days delay a health certificate is required is not binding on the insured, who is not shown to have had knowledge of it, and who (even if he had) might well rely upon the simple provision in the policy itself that the payment must be made "during life" and the assurance of the agent that if it was done it would be sufficient. *Horton v. Ins. Co.,* 122 N. C., 498; *Ins. Co. v. Wilkinson,* 80 U. S., 222.

It is true in *Whitley v. Ins. Co.*, 71 N. C., 480, it is held that (320) the representation of good health continues up to the consummation of the contract. There, the policy was not delivered till more than a month after the death of the insured, and the agent was ignorant of the condition of the insured. In the present case, the contract was consummated by the unconditional delivery of the policy acknowledging receipt of payment, and if that acknowledgment can be varied by the provision that the policy was not valid unless the premium was "actually paid during life," this condition was complied with. There was no suppression of information or fraud, for the agent knew the condition of the insured when he received the premium. The authorities cited in *Whitley's case, supra,* do not support the construction sought to be placed on that opinion by the defendant. It would be contrary to every rule of construction to restrict the obligation of a promisor beyond the plain meaning of his words. On the contrary, the uniform rule of construction of insurance policies is that if reasonably susceptible of two constructions, that one will be adopted which is more favorable to the insured. *Bank v. Ins. Co.*, 95 U. S., 673.

In *Hoffman v. Ins. Co.*, 32 N. Y., 413, the rule is laid down by the New York Court of Appeals as follows: "It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was *understood* by the promisee. *Potter v. Ins. Co.*, 5 Hill, 147, 149; *Barlow v. Scott,* 24 N. Y., 40. It is also a familiar rule of law that if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee. Coke Lit., 183; Bacon's Law Maxims, Teg. 3; *Doe v. Dixon,* 9 East, 16; *Marvin v. Stone,* 2 Cowen, 806. This (321) rule has been very uniformly applied to conditions and provisos in policies of insurance on the ground that, though they are inserted for the benefit of the underwriters, their office is to limit the force of the principal obligation."

In *Goodwin v. Assurance Society,* 97 Iowa, 226, the Supreme Court of Iowa state the rule as follows: "The tenets established for the guidance of the courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a clear necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted." The Court cites a large number of authorities to sustain the proposition, and indeed the authorities seem uniform.

Besides, the agent of the company put the same construction upon the policy and said that it would be sufficient if the payment was made "during lifetime," and if this had misled the insured it would have been fraud for the company to avail itself of a forfeiture thus procured. *McMasters v. Ins. Co.,* 78 Fed. Rep., 36 (C. C. A.); *Ins. Co. v. Chamberlain,* 132 U. S., 304. The agent directed the "check to be mailed," and the time of the mailing was the time of payment (the check being honored on presentation). *Whitley v. Ins. Co., supra.*

Every phase of the defendant's contention could be and was presented without prejudice under the issue submitted by the court, and, therefore, refusal to submit other issues, though asked, is not error. *Pretzfelder v. Ins. Co.,* 123 N. C., 164.

No ERROR.

*Cited: Doggett v. Golden Cross,* 126 N. C., 480; *Vanderbilt v. Brown,* 128 N. C., 499; *Grier v. Ins. Co.,* 132 N. C., 545, 547; *Kerr v. Hicks,* 133 N. C., 176; *Deaver v. Deaver,* 137 N. C., 244; *Rayburn v. Casualty Co.,* 138 N. C., 381; *Jones v. Casualty Co.,* 140 N. C., 264; *Faust v. Faust,* 144 N. C., 387; *R. R. v. Casualty Co.,* 145 N. C., 116; *Perry v. Ins. Co.,* 150 N. C., 145; *Annuity Co. v. Forrester,* 152 N. C., 625; *Powell v. Ins. Co.,* 153 N. C., 128; *Hardy v. Ins. Co.,* 154 N. C., 437; *Pender v. Ins. Co.,* 163 N. C., 102; *Gardner v. Ins. Co., ib.,* 373; *Britton v. Ins. Co.,* 165 N. C., 152; *Price v. Harrington,* 171 N. C., 133; *Torrey v. Cannon, ib.,* 521; *Lyons v. Knights of Pythias,* 172 N. C., 410; *Trust Co. v. Ins. Co.,* 173 N. C., 563, 566; *Smith v. Ins. Co.,* 175 N. C., 318; *Duffy v. Phipps,* 180 N. C., 214.

(322)

## HUYETT & SMITH MANUFACTURING COMPANY v. S. H. GRAY.

(Decided 4 April, 1899.)

*Purchase with Warranty—Breach—Damages.*

1. If property, purchased with warranty, is present and subject to inspection, the title passes and the warranty is collateral to the contract, and if false the purchaser's redress is an action for damages upon it.

2. If the property is not present, where it might be inspected, the warranty may be treated as a condition precedent, as well as a warranty. If it turns out not to be as warranted, the purchaser may refuse to receive it, and so notify the seller, and decline to pay for it; or if he has paid the price, or any part of it, he may recover the money paid.

3. If the article purchased is machinery, the purchaser has a reasonable time to operate it, for the purpose of testing it; if, when this is done, the machinery does not come up to contract, he may abandon the contract and refuse to receive and use the property. Unless he does this, and continues its possession and use, he will be deemed to have accepted it, and will be restricted to an action for damages upon breach of the warranty, or to a counterclaim if sued for the price, the measure of damages being the difference between the price paid, or agreed to be paid, and the real value of the property when received.

4. When the title is retained by the seller as security for payment, his lien is in the nature of a mortgage for the agreed price, and he is entitled to judgment for the debt, less any payment made, and the difference between the agreed price and the true value of the property when received, and he is also entitled to foreclosure, sale, and application of the proceeds of sale to the judgment.

ACTION for recovery of a No. 80 Smith dry-kiln hot-blast appa- (323) ratus and machinery, tried before *Brown, J.*, at May Term, 1898, of CRAVEN, being the same cause heretofore tried and reported, 111 N. C., 87 and 92, on appeal of both plaintiff and defendant.

The contract price was $2,337, to be paid in different installments. The sale was with warranty that the apparatus and machinery, with proper management and careful usage, would perform well, and thoroughly dry 25,000 feet of 1-inch green sap pine lumber every twenty-four hours. The machinery was to be delivered at New Bern and a competent workmen be sent out to put it in running condition, the title to be retained until payment in full. Claim and delivery proceedings were taken out for the possession of the property, with damages for detention. It was replevied and possession retained by defendant. The complaint alleged full compliance by plaintiff with his part of the contract, and failure on the part of the defendant, who had only paid $400 of the price.

The answer alleged a breach of warranty that the machinery and apparatus would not dry 25,000 feet of lumber as warranted, and by reason of breach of contract on the part of plaintiff the defendant claimed damages to the amount of $4,464.96. The contract was in writing, dated 11 April, 1888. Suit commenced on 20 January, 1890.

The following issues were framed and submitted by the court:

1. Did the dry-kiln apparatus, delivered by plaintiff to defendant, come up to the specifications and requirements of the written contract? Answer: "No."

2. What was the difference between the value of the said dry-kiln apparatus as delivered to defendant and its value had it come up to contract? Answer: "$2,000."

3. What amount of deterioration and damage has said dry-kiln apparatus sustained since the commencement of this action? Answer: "$1,400."

The defendant withdrew all claims for special damage.

(324) Upon considering the admissions and findings of the jury, his Honor was of opinion that the defendant should be charged with the unpaid purchase-money, to wit, $1,937, and that the plaintiff is to be charged with $2,000, as found by a jury in response to second issue, leaving a balance in favor of defendant of $63, for which sum judgment was rendered in favor of defendant, together with costs, to be taxed by the clerk. The plaintiff excepted and appealed.

*W. D. McIver for plaintiff.*
*Simmons, Pou & Ward, and O. H. Guion for defendant.*

FURCHES, J. It seems to us that this action was brought without a very clear conception of the rights of the plaintiff, and the complaint is so defective in stating the cause of action that it would have been difficult to reach the merits of the case but for the aid received from the defendant's answer, which makes the contract between plaintiff and defendant, under which defendant purchased the property in controversy, a part of his answer.

From this contract it appears that on 11 April, 1888, the defendant purchased of the plaintiff a "No. 80 Smith dry-kiln hot-blast apparatus," at the price of $2,337, to be paid for in different installments. The plaintiff warranted this machine to dry 25,000 feet of green sap pine lumber of a specified thickness in twenty-four hours. The defendant, before this machinery was shipped from plaintiff's shops in Detroit, Mich., paid plaintiff $400 as a part of the purchase-money and failed and refused to pay anything more thereon, but continued to hold and use the kiln and apparatus. The defendant failing and refusing to pay plaintiff the balance of the purchase-money, this action was com-

(325) menced, 11 April, 1891, for the possession of the property. But the defendant, by his answer, set up a contract between the parties, which, as we have said, gives point and vigor to plaintiff's action, and enabled the court to go to the merits of the controversy.

It seems that the law governing purchases with warranty and the rights of the parties may be correctly stated as follows: That if the property purchased is present and may be inspected, the warranty is collateral to the contract, and the title to the property immediately passes to the purchaser. And if the warranty is false, the purchaser's redress is an action for damages upon the warranty. But if the property is not present, where it might be inspected, the warranty may be treated

as a condition precedent, as well as a warranty. And if the property purchased is not what it was warranted to be, the purchaser, upon delivery of the property, may treat the warranty as a condition precedent and refuse to receive or accept the property, and notify the party from whom he purchased; and if he has not paid for the property, he need not do so; and if he has paid the purchase-money, or any part of it, he may recover the money so paid from the seller. The purchaser is not compelled in all cases to reject the property, at once, upon its receipt; if it is machinery, he has a reasonable time to operate the machinery for the purpose of testing it. But when this is done, and it is found that the machine or the machinery does not fill the specifications of the contract and warranty, he must then abandon the contract and refuse to accept and use the property; and if he does not do this, but continues the possession and use of the property, he will be deemed in law to have accepted the property, and his relief then will be an action for damages upon the breach of the warranty. 2 Benjamin on Sales, p. 1147. In this case, the property not being present at New Bern, N. C., where the trade was made, the defendant might have treated the warranty as a condition precedent, and, after he tested the machine, refuse (326) to accept or pay for the same. 2 Benjamin, *supra,* p. 1153. But as he continued to hold and use the machine until he was sued for it, and then denied the plaintiff's right to it, and replevied and held the same, he must be deemed to have accepted the property and to have held and used it as his own. His only remedy, then, was one for damages for breach of warranty. This remedy he might have by a separate action, or he might have it by way of counterclaim and recoupment, as he has done in this case. But when he does this, the measure of damages is the difference between the price paid, or agreed to be paid, and the real or true value of the property received.

This is the only rule by which damages may be assessed upon breach of warranty, unless there are special damages pleaded as resulting from the breach of warranty, and these must be such as might have been within the contemplation of the parties and the natural result of the breach. *Alpha Mills v. Engine Co.,* 116 N. C., 797; *Ashe v. DeRosset,* 50 N. C., 301; *Hadley v. Baxendale,* 9 Exc. Rep., 341. But we need not pursue this line of thought further, as all claim for resulting damages is expressly abandoned in this case, and had it not been, it has been held by this Court, when the case was here on a former appeal, that such damages were too remote and could not be sustained (111 N. C., 93).

When the defendant retained the possession of this machine and used and claimed it as his own, he became liable to plaintiff for the purchase-money, $2,337. But the plaintiff retained the naked legal title, which was a lien on the property—an equity, in the nature of a mortgage—as

(327) a security for its debt. The plaintiff, therefore, was entitled to judgment for the amount of his debt against the defendant, less the amount he had paid, and the difference between the price he agreed to pay and the true value of the property when he received it. *Hobbs v. Bland, ante,* 284. And the plaintiff is also entitled to a foreclosure and sale of the "dry-kiln and apparatus," and an application of the proceeds to the satisfaction of his judgment, if he recovers judgment, as it seems from the facts stated in this appeal he should do.

There was error in the rule of damages laid down by the judge below in stating that defendant was entitled to recover of plaintiff on his counterclaim, upon a breach of his warranty, the difference between the value of a "dry-kiln" that would dry 25,000 feet of green sap pine lumber in twenty-four hours and the price he was to pay for the "dry-kiln" sued for.

This error led to an erroneous finding and judgment, in which the jury found that the defendant had sustained $2,000 damages in the purchase of a "dry-kiln" for which he agreed to pay $2,337, and which is admitted by the answer and found by the jury to have been worth $1,500 when it was received by defendant. In fact, it seems that the case was tried without any true conception of the real matters at issue between the parties.

There were some exceptions as to evidence in giving the declarations of Cunliffe which should have been sustained, as they do not seem to have been a part of the *res gestæ,* and, therefore, only what is called hearsay evidence. But as these objections will not likely be presented on a new trial, we do not discuss them further.

NEW TRIAL.

*Cited: S. c.,* 126 N. C., 108, 113; *S. c.,* 129 N. C., 439; *Food Co. v. Elliott,* 151 N. C., 396; *Sandlin v. Kearney,* 154 N. C., 603; *Robinson v. Huffstetler,* 165 N. C., 462.

(328)

## CHARLOTTE J. GORRELL v. GREENSBORO WATER SUPPLY COMPANY.

(Decided 4 April, 1899.)

*Contract—Parties and Beneficiaries—Right to Sue.*

1. One not a party or privy to a contract, but who is a beneficiary thereof—who furnishes the consideration money of the contract—is entitled to maintain an action for its breach.

2. Where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damage sustained by a citizen and taxpayer by the destruction of buildings, by the failure to so furnish such water, is a natural and proximate consequence of such breach of the undertaking, and entitles him to sue.

ACTION for recovery of damages by fire, through negligent failure of defendant to furnish water to extinguish the same, heard by *Robinson, J.*, upon complaint and demurrer, at February Term, 1898, of GUILFORD.

The demurrer was overruled and defendant required to answer. The defendant excepted and appealed. The grounds of the demurrer controverting the merits of the action and the plaintiff's right to sue are considered in the opinion.

*Boyd & Brooks for plaintiff.*
*King & Kimball for defendant.*

CLARK, J. This cause is presented upon complaint and demurrer. The complaint avers authority conferred upon the city of Greensboro by its charter to provide water supplies, either by erecting waterworks itself or by contract, and that in pursuance thereof the city contracted with the Greensboro Water Company to furnish said city (329) "with pure and wholesome water for the use of its citizens, and of force at all times sufficient to protect the inhabitants of the city against loss by fire," giving to said company exclusive rights of eminent domain over its streets, alleys, sidewalks and public grounds for the purpose of laying and operating water-mains, pipes, hydrants, stands, etc.; that subsequently all the rights and property of said water company passed by sale to the defendant, who at the same time assumed all the duties and obligations imposed by the aforesaid contract, and both the defendant and the city had acquiesced in the same; that by virtue of said contract it was stipulated and agreed *inter alia* that the water company should supply the city and inhabitants with "pure, good and wholesome water, suitable for all domestic, sanitary and fire purposes and for individual use"; should "erect and maintain settling basins, filtering galleries, reservoirs, water-towers, pump-houses and other appurtenances and attachments necessary or expedient for the proper conducting and carrying on said waterworks, so as to afford at all times the most adequate supply for all domestic uses and the greatest protection against fire." The remainder of the complaint is as follows:

"8. That it was also stipulated and agreed by and under said contract that the said water company should use only first-class machinery, pipes, hydrants, valves, pumps, etc., in connection with said waterworks, and

that the said works should be complete in all its details, with a capacity to furnish one and a half million gallons of water every twenty-four hours against a pressure of 200 feet head. And should erect a storage water-tank whose top water level should be 100 feet above the surface of the ground at the center of the public square, and to be of a
(330) capacity of 100,000 gallons of water, and that the same shall be filled by the said water company to its top every day an hour before sundown. And for the extinguishment of fire in said city the company shall erect a pump-house and put therein a pumping engine which shall be kept ready at all times to supply the needed fire pressure.

"9. That it was further stipulated and agreed by and under said contract that the said water company should erect and put in seventy-five hydrants at such places as the city might designate, and for the rents of which said city of Greensboro was to pay them annually $2,875. And in pursuance of such agreement and compliance therewith on the part of the city, the water company did erect, and their successors, the Greensboro Water Supply Company, had in possession and use at the times hereinafter mentioned two hydrants—one a hundred and the other about two hundred feet distant from plaintiff's storehouses which were destroyed by fire on the date hereinafter mentioned.

"10. That by the terms of said contract it was further stipulated and agreed that the said water company should keep a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants to a vertical height of 100 feet in still air, each stream being taken from one hydrant and with 100 feet of hose and a 1-inch ring nozzle, and the said company shall constantly, day and night, except from unavoidable accidents, keep all the said hydrants supplied with water for fire service, and shall keep them in good order for said service.

"11. That said contract was made with the said Greensboro Water Company and extended to and acquiesced in by their successors, the defendant, Greensboro Water Supply Company, for the use and benefit of all its property owners and inhabitants, among which was the plaintiff, who was a property owner in said city at the times herein-
(331) after referred to, and for several years prior thereto, in common with that of other citizens of said city, which said property was taxed at its full value to raise money with which to pay said hydrant rents.

"12. That on the night of the.....day of June, 1897, a fire broke out in a building some 30 feet distant from plaintiff's storerooms on the south side of South Elm Street in said city; that the fire alarm was at once turned on, and in less than 10 minutes thereafter the Greensboro fire company arrived at said fire with their hose, fire engine and other appurtenances necessary for the ready extinguishment of said fire; that

the said fire company attached its hose, which were in every respect adequate and sufficient for the demands of the occasion, as plaintiff is advised and believed, to the two hydrants above mentioned, one 100 feet from said storerooms and the other about 200 feet distant, each of which said hydrants was sufficiently near to said store and lot to have afforded water adequate for the ready extinguishment of said fire if the proper pressure had been on same.

"13. That notwithstanding the promptness of the fire company in reaching said fire, and the perfect sufficiency of its equipments to convey the water to same, the defendant, as plaintiff is advised and believes, persistently, carelessly and negligently refused to furnish said hydrants above described and referred to, with a sufficient pressure of water to extinguish said fire, and by reason of such tortious and negligent conduct on the part of the defendant the said fire spread from the building in which it originated and ignited the storeroom of the plaintiff.

"14. That after the fire had spread to and caught on flames the building of the plaintiff, the said fire company, as plaintiff is advised and believes, was still present with its hose, ladders, buckets, engine, etc., ready to use its every effort to extinguish same, and while the said fire company had its hose attached to said hydrants suf- (332) ficiently near, with the proper pressure, to have quickly extinguished same and saved plaintiff's property from burning, the defendant persistently refused, neglected and omitted to have the fire pressure agreed to and required by its contract, and only furnished pressure sufficient to throw a stream 10 feet from end of said regulation hose, by carelessly, negligently and wrongfully failing to keep any water in its water-tank, or even its hydrants and pipes full, and not having its pumping engine at work; by reason of which negligent, wrongful and tortious conduct on the part of the defendant the plaintiff's property was totally destroyed by fire, and by reason of such loss she has been damaged in the sum of $5,000.

"15. That the said fire originated in an adjacent building to plaintiff's, and that the destruction of her property by same was not occasioned by any mistake, carelessness or negligence on her part, but solely on account of the careless, willful and wanton neglect on the part of the defendant to furnish the hydrants, above referred to, with the water which they were required and had obligated themselves to do, and upon their doing of which plaintiff confidently relied.

"16. That, as plaintiff is advised and believes, defendant's failure to provide sufficient water for the extinguishing of said fire was not occasioned by any unavoidable accident or lack of water in the reservoir from which they originally take same, but was the result of a wanton,

careless and willful neglect and disregard for their duties and obligation contracted and owed to the several inhabitants of the city of Greensboro, including the plaintiff.

"Wherefore, plaintiff demands judgment against the said Greensboro Water Supply Company for the sum of $5,000 damages and the cost of this action; and for such other and further relief as the court may deem plaintiff entitled."

(333) The demurrer admits the allegations of the complaint to be true. Those grounds of demurrer which allege omission of technical or formal averments in the complaint we deem not well taken and to require no discussion. The demurrer, so far as it relates to the merits of the case, is substantially that the complaint has stated no cause of action:

(1) Because the plaintiff, though a citizen and taxpayer of Greensboro (as alleged in the complaint), is neither a party nor privy to the contract, the breach of which is the foundation of the action.

(2) The failure of the defendant to furnish water was not the proximate cause of the plaintiff's loss.

It is true, the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease and security from fire of the people, the citizens of Greensboro. This is alleged by the eleventh paragraph of the complaint, and is admitted by the demurrer. The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and, taken alone, would never have justified the grants, concessions, privileges, benefits and payments made to the water company. Upon the face of the contract the principal beneficiaries of the contract, in contemplation of both parties thereto, were the water company on the one hand and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named, and furnishing the individual citizens with adequate supply of water and the protection of their property from fire was the largest duty assumed by the company. One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. This has been sustained by many decisions elsewhere. *Tillis v. Harrison,* 104 Mo., 270; *Lawrence v. Fox,* 20 N. Y., 268; *Simpson v. Brown,* 68 N. Y.,

(334) 355; *Vrooman v. Turner,* 69 N. Y., 280; *Wright v. Terry* 23 Fla., 160; *Austin v. Seligman,* 18 Fed. Rep., 519; *Burton v. Larkin,* 36 Kan., 246. And even when the beneficiary is only one of a class of persons, if the class is sufficiently designated. *Johannes v. Ins. Companies,* 66 Wis., 50. It was considered, though, without decision by this Court in *Haun v. Burrell,* 119 N. C., 544, 548, and *Sams v. Price, ib.,*

572. Especially is this so when the beneficiaries are the citizens of a municipality whose votes authorized the contract and whose taxes discharge the financial burdens the contract entails. The officials who execute the contract are technically the agents of the corporation, but the corporation itself is the agent of the people, who are thus effectively the principals of the contract. The acceptance of the contract by the water company carries with it the duty of supplying all persons along its mains. *Griffin v. Water Co.*, 122 N. C., 206; *Hangen v. Water Co.*, 14 L. R. A., 424.

In *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky., 340 (1189), it is held: "If a water company enter into a contract with a municipal corporation whereby the former agrees, in consideration of the grant of a franchise and a promise to pay certain specified prices for the use of hydrants to construct waterworks of a specified character, force and capacity, and to keep a supply of water required for domestic, manufacturing and fire protection purposes for all the inhabitants and property of the city, a taxpayer of the city may recover of the water company when, through a breach of its contract, he is left without means of extinguishing fire and his property is on that account destroyed"; and it is therein further held: "Where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by the destruction of buildings by the failure to so furnish such water is a natural and proximate consequence of such breach of the (335) undertaking." This opinion is based upon sound reason and is adopted by us. It is conclusive of both points raised as to the merits of the controversy by the demurrer. Indeed, it could not be doubted that if the city buildings were destroyed by fire through failure of the defendant to furnish water for the protection as provided by the contract, the city could recover. *New Orleans v. Waterworks*, 72 Fed., 227. Besides, the complaint, in paragraphs 13 and 14, alleges that the defendant's failure to furnish water as per contract was the direct and sole cause of the loss, and this is admitted by the demurrer. Thus, the question really narrows down to the question whether the beneficiaries of a contract, who furnish the consideration money of the contract, can maintain an action for damages caused by its breach.

*Paducah v. Water Co.* is exactly in point, was reaffirmed on a hearing, and is followed by *Duncan v. Water Co.*, in the same volume, making three decisions altogether. The decisions, however (twelve in number), in other States where the question has been presented, are the other way. But this is a case of the first impression in this State, and decisions in other States have only persuasive authority. They have only the con-

sideration to which the reasoning therein is entitled. They are to be weighed, not counted. We should adopt that line which is most consonant with justice and the "reason of the thing."

Did the people of Greensboro have just cause to believe that by virtue of that contract they as well as the corporation were guaranteed a sufficient quantity of water to protect their property from fire, and did the water company understand it was agreeing, for the valuable considerations named, to furnish a sufficient quantity of water to protect private as well as public property from fire? The intent is to be drawn from the instrument itself, and on its face there can be no doubt (336) it was contracted that the water supply should be sufficient to protect private as well as public property. If so, it follows that when by breach of that contract private property is destroyed, the owner thereof, one of the beneficiaries contemplated by the contract, is the party in interest, and he, and he alone, can maintain an action for his loss.

As is said by *Judge Freeman,* the learned annotator of the American State Reports, in commenting on the fact (29 Am. St. Rep., at p. 863), that the majority of decisions so far rendered were adverse to the position taken in the Kentucky case, above cited and approved by us: "As none of the courts have fairly faced what seems to be the logical result of these decisions, viz., that the injured person is left without any remedy at all, it must be admitted that the subject is left in an extremely unsatisfactory position. It seems to be universally agreed, and on the soundest reasoning, that the city itself is not liable for failing to protect the property of taxpayers from fire, unless made liable by express statutory provisions. *Wright v. Augusta,* 78 Ga., 241 (6 Am. St. Rep., 256). And it seems equally clear that the city would have no right of action in such case in behalf of the taxpayer, for the basis of all the (adverse) decisions is, that there is no privity of contract between the taxpayers and the water companies. If the contract is not made for the benefit of the taxpayers in such a sense that they can sue upon it, it can hardly be maintained that the same contract is made for one of those taxpayers in such a sense that the city can recover damages in his name. . . . If, then, neither the taxpayer himself nor the city on his behalf can sue the company, the conclusion seems to be that the loss by fire in these cases is regarded by the law as damage for which there is no redress." This is a complete reduction *ad absurdum,* and we prefer not to concur in cases, however numerous—there are probably a dozen scat- (337) tered through half a dozen States—which lead to such conclusion. All these cases (when not based on reference to the others) rest upon the narrow technical basis that a citizen, because not a privy to the contract, cannot sue, whereas authorities are numerous that a

beneficiary of a contract, though not a party or privy, may maintain an action for its breach. 7 A. & E. (2d Ed.), 105-108. Here, the water company contracted with the city to furnish certain quantities of water for the protection of the property of the citizens as well as of the city, and received full consideration, a large part of which comes in the shape of taxation, paid annually by those citizens. On a breach of the contract, whereby the property of a citizen is destroyed, he, as the beneficiary of the contract, is entitled to sue, and, under our Code, requiring the party in interest to be plaintiff, he is the only one who can.

Whether there was a breach of the contract, and whether it was the proximate cause of the loss, regarded as matters of fact, will be determined by the jury, if, when the case goes back, the defendant shall file an answer, as it has a right to do (The Code, sec. 272), raising those issues. But in overruling the demurrer to the complaint there was no error. As was said by the Supreme Court of Kentucky, when affirming, on a petition to rehear, the decision in the *Paducah case, supra,* "The water company did not covenant to prevent occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the standpipe, and if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of the plaintiff's property, which involves issues of fact for determination by a jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other (338) breach of contract."

AFFIRMED.

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

*Cited: Lacy v. Webb,* 130 N. C., 546; *Gastonia v. Engineering Co.,* 131 N. C., 366; *Wadsworth v. Concord,* 133 N. C., 594; *Duval v. R. R.,* 134 N. C., 332; *Voorhees v. Porter, ib.,* 602; *Jones v. Water Co.,* 135 N. C., 554; *Kernodle v. Tel. Co.,* 141 N. C., 445; *Helms v. Tel. Co.,* 143 N. C., 393; *Wood v. Kincaid,* 144 N. C., 395; *Hardware Co. v. Schools,* 151 N. C., 509; *Clark v. Bonsal,* 157 N. C., 275; *Brady v. Randleman,* 159 N. C., 436; *Supply Co. v. Lumber Co.,* 160 N. C., 431; *Hartsell v. Asheville,* 164 N. C., 195; *Withers v. Poe,* 167 N. C., 374; *Morton v. Water Co.,* 168 N. C., 584, 590, 598; *Lowe v. Fidelity Co.,* 170 N. C., 448; *Powell v. Water Co.,* 171 N. C., 295; *R. R. v. Accident Corp.,* 172 N. C., 637; *McCausland v. Construction Co., ib.,* 711; *Chandler v. Jones,*

173 N. C., 429; *Crumpler v. Hines,* 174 N. C., 285; *Scheflow v. Pierce,* 176 N. C., 92; *Geitner v. Jones,* 176 N. C., 544; *Lumber Co. v. Johnson,* 177 N. C., 47; *Joyner v. Fiber Co.,* 178 N. C., 636; *Rector v. Lyda,* 180 N. C., 578; *Dixon v. Horne, ib.,* 586.

L. W. MOORE v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 4 April, 1899.)

*Railroads—Injury by Fire—Negligence.*

1. Where it is admitted that defendant's engine was in good condition and had a proper spark-arrester, and was skillfully operated, the question of negligence in having defective machinery is eliminated.

2. If sparks should escape from such an engine, thus managed, and ignite combustible matter along the right of way, the defendant would be liable for injuries resulting, not because the sparks escaped, but for allowing inflammable matter to remain on its premises.

3. If, however, sparks from such an engine go beyond defendant's right of way and ignite such matter over which defendant has no control, the defendant would not be chargeable with negligence, nor would it be so chargeable if the fire originated outside the right of way from some other cause, communicated itself to the right of way and then to plaintiff's premises.

(339) ACTION to recover damages for injury to land by fire alleged to have originated from sparks from defendant's engine, through negligence, tried before *Adams, J.,* at February Term, 1898, of DUPLIN.

*Allen & Dortch for plaintiff.*
*Junius Davis and H. L. Stevens for defendant.*

FAIRCLOTH, C. J. This action is for damages in burning the plaintiff's timber trees, wood, undergrowth and other property adjoining the defendant's right of way. The allegation is that sparks, emitted from defendant's engine, fell upon its right of way and fired combusti-
(340) ble and ignitable matter on the right of way, which fire was communicated to the plaintiff's premises, and that the fire was produced as a result of the defendant's negligence. There was no direct evidence as to the origin of the fire. There was conflicting evidence as to the place where, and the time when, the fire broke out. The plaintiff's evidence tended to show that the fire originated on the right of way, and

he contends that it came from sparks thrown out by defendant's engine. The defendant's evidence tended to show that on the same day, at a later hour, a pile of cross-ties off the right of way, but near by, was burnt, except the ends of the ties, and it contends that *there* was the origin of the fire which burned the matter on the right of way and the plaintiff's property. Of course, these contentions and the evidence were submitted to the jury.

During the trial the defendant asked the court to give the following instructions to the jury: "That if the jury shall believe the fire that burned the land of the plaintiff originated in a pile of cross-ties, and that the pile of ties were off the right of way, then the burden of proof is upon the plaintiff to satisfy the jury, by a preponderance of the evidence, that the fire was communicated to the pile of ties by the engine of the defendant; [and even if the jury shall believe that the fire was communicated to the pile of ties by the engine of the defendant, then the plaintiff cannot recover if the engine of defendant was in good order and repair and equipped with an approved spark-arrester for preventing the escape of sparks, and was managed and operated in a careful manner by a skillful and competent engineer, and the evidence on the part of defendant, as to this, is uncontroverted and not contradicted."] His Honor refused to give that part of the prayer embraced within brackets.

"It is admitted by the plaintiff that the engine was in good condition and had a proper spark-arrester and was skillfully operated."

With this admission, the question of negligence in having defect- (341) ive machinery is eliminated.

If sparks should escape such an engine as the above, properly handled, and should set on fire combustible matter along the right of way, the defendant would be liable for injuries resulting therefrom, not because the sparks escaped, but for allowing inflammable matter to remain on its premises; but if sparks from such an engine go beyond the defendant's right of way and ignite such matter, over which the defendant has no control, it would not be guilty of negligence in that respect, nor for the escape of the sparks. Or, if the fire originated outside the right of way from some other cause and communicated itself to the right of way and then to the plaintiff's premises, the defendant would not be chargeable with negligence.

The prayer refused embraced an inquiry for the jury, how and where the fire originated, and as it was not substantially given in any part of the charge, we think it was error to refuse it.

The plaintiff's brief says the pile of ties is not referred to in plaintiff's evidence. We do not know what that statement means. In the record we find several witnesses who speak of the burning ties in the edge of the woods outside of the right of way.

From our view, there is no need to examine into other questions made in the record until another hearing below.

NEW TRIAL.

*Cited: Ins. Co. v. R. R.,* 132 N. C., 78; *Williams v. R. R.,* 140 N. C., 625; *Bowers v. R. R.,* 144 N. C., 688; *Thomas v. Lumber Co.,* 153 N. C., 354; *Aman v. Lumber Co.,* 160 N. C., 373; *Meares v. Lumber Co.,* 172 N. C., 294; *Moore v. R. R.,* 173 N. C., 317; *Bond v. R. R.,* 175 N. C., 611; *Denny v. R. R.,* 179 N. C., 535.

(342)

## J. G. TEDDER v. WILMINGTON AND WELDON RAILROAD COMPANY AND W. J. SIKES.

(Decided 4 April, 1899.)

*Laborer's Lien—Common Law and Statute.*

1. At common law, continued possession is necessary to the existence of the lien; when possession is voluntarily surrendered, the lien is gone.
2. So far as the Legislature has provided, a lien only when the service or labor is for the betterment of the property on which it is bestowed, leaving the laborer in all other cases to secure himself, as at common law.

ACTION tried before *Adams, J.,* at August Term, 1898, of COLUMBUS, on appeal from a justice of the peace.

(343) FAIRCLOTH, C. J. In August, September, and October, 1897, the plaintiff, at the request of the defendant Sikes, hauled from the swamp and delivered, on the right of way of the railroad, cross-ties, for which service, and no other, Sikes is due him $140.85. On 11 December, 1897, plaintiff filed and had recorded a lien on said cross-ties.

(344) Before 11 December, 1897, Sikes sold and delivered said cross-ties to one Wade, who sold and delivered the same to the defendant railroad without notice of plaintiff's claim, and Sikes had no interest in the cross-ties when said lien was filed. The court held that the plaintiff was entitled to recover.

At common law, laborers engaged in cutting, hauling and driving timber had no lien thereon. A lien may be acquired by continued possession. The moment that possession is voluntarily surrendered, the lien is gone. 1 Jones on Liens, sec. 702. So, where a laborer repaired a

wagon and surrendered it to the owner before payment, the laborer had no lien. Possession is absolutely necessary to the existence of the lien. *McDougald v. Crapon,* 95 N. C., 292.

The Constitution, Art. XIV, sec. 4, declares: "The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." Accordingly, the Legislature has enacted (The Code, sec. 1781) that for every building built, rebuilt, repaired, or improved, together with the necessary lots on which said building may be situated, etc., shall be subject to a lien for material furnished or for work done on the same. The Code, sec. 1782, secures a lien for work on crops or farms. The Code, sec. 1783: "Any mechanic or artisan who shall make, alter, or repair any article of personal property at the request of the owner or legal possessor of such property shall have a lien on such property," etc., and may retain possession until his reasonable charges are paid. If, however, he surrenders possession of the same, he loses his lien. *McDougald v. Crapon, supra.*

The Code, sec. 1796, provides that servants' and laborers' share of the crops for wages by contract shall not be subject to sale under execution against their employers or the owners of the land cul- (345) tivated.

Applying the law, as above stated, to the facts in the present case, the plaintiff has no lien, either at common law or statutory. It seems, so far, that the Legislature has provided a lien only when the service or labor is for the betterment of the property on which the labor is bestowed, leaving the laborer in all other cases to secure himself as at common law.

ERROR.

*Cited: Glazener v. Lumber Co.,* 167 N. C., 679; *Thomas v. Merrill,* 169 N. C., 627.

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W. J. BRAFFORD v. JOEL REED.

(Decided 4 April, 1899.)

*Appeal, When Docketed in Supreme Court.*

An appeal is deemed docketed when the transcript is received by the clerk of this Court. It then becomes a record of the Court, not subject to the control of parties or their counsel.

*Jones & Tillett for appellant.*
*H. S. Puryear for appellee.*

FURCHES, J. The transcript of appeal in this case was received by the clerk of this Court on Tuesday morning, a short time before 10 o'clock, and in time to have been docketed before the call of the Eighth District. When the package containing the transcript was received by the clerk, the attorney of the appellant was present and said to him: "Give me the case; I don't want it docketed." The clerk handed him the case and he took it out with him. In a few moments the counsel for the appellee inquired of the clerk if he had received a transcript (346) in this case, and he told him that he had, and stated to him what had taken place between him and the appellant's counsel. Counsel for the appellee insisted that the case should be docketed, and the clerk sent to the appellant's counsel for the transcript and put it on his docket. When the docket for the Eighth District was called, the matter was brought to the attention of the Court, and the appellee's counsel contended that the case was docketed, and moved to dismiss the appeal, for the reason that the record had not been printed, while the appellant's counsel contended that it was his appeal and he had a right to control the matter and did not want it docketed at that time, as he would not have time to have the record printed before the case would be called; that as he had a right to control it and had directed the clerk not to docket the case, it was not, in fact or in law, docketed.

As this point had not been directly before the Court, it reserved the question for consideration in conference, where it was held that when a case on appeal comes into the possession of the clerk it is his duty to docket it at once, and it will be deemed to be docketed from that time; that when the transcript reaches the clerk it then becomes a record of this Court, and neither the counsel of the appellant nor of the appellee has any control over it. While the question is not directly decided, it is strongly sustained in *Caldwell v. Wilson,* 121 N. C., 423.

The Court having held that the case was docketed, the appellee's motion to dismiss for the reason that the record had not been printed, as required by Rule 30, would have been allowed but for the fact that the counsel for the appellee failed to comply with Rule 45 by filing his motion in writing. The case will therefore stand continued for such further action as the parties may be advised and as the Court may deem proper.

MOTION DENIED.

*Cited: S. v. Neville,* 175 N. C., 740.

(347)

W. J. LEDUC, RECEIVER, v. A. H. SLOCOMB.

(Decided 4 April, 1899.)

*Notice—Judgment—Motion to Set Aside.*

1. Parties to an action, when brought in, must take notice of all orders and judgments made therein.

2. A motion to set aside a judgment must be based upon evidence of a meritorious defense if the judgment should be set aside, and should be made before the rights of innocent third parties intervene.

MOTION to set aside judgment, heard before *Bynum, J.*, at November Term, 1898, of CUMBERLAND. Motion disallowed, and defendant appealed. The facts found by his Honor are stated in the opinion.

*N. W. Ray and N. A. Sinclair for plaintiff.*
*H. L. Cook for defendant.*

FAIRCLOTH, C. J. The law of this case must be applicable to the following facts: This cause coming to be heard, upon motion of defendant Slocomb to set aside the judgment obtained in the action, the matter being heard upon affidavits submitted by both sides, the court finds the following facts:

1. That summons issued, returnable to the January Term, 1891, of the Superior Court of said county, on 11 December, 1890, and was duly served on 15 December, 1890.

2. The action was brought upon a note for $390, dated 15 March, 1889, due thirty days after date, with interest at eight per cent from maturity, signed by A. H. Slocomb, E. F. Moore, Thomas McDaniel, G. Rosenthal and D. Rose, administrator of Murphy, deceased.

3. That shortly after the service of the summons, to wit, 20 December, 1890, and before the commencement of the court to which it was returnable and before the plaintiff bank went into the (348) hands of the receiver as hereinafter stated, the defendant A. H. Slocomb and G. Rosenthal paid to the plaintiff bank $221.38 as their proportionate part of the note upon the understanding at the time of the payment that the bank would not take judgment in the case as to them at the term of the court to which it was returnable; that said agreement was made with and assented to by F. W. Thornton, president of the bank, and G. P. McNeill, its cashier, in the presence of its attorney, Thos. H. Sutton, who had charge of the case, and the said attorney, in the presence of said parties, drew a certain paper-writing or bond,

embodying the terms of the said agreement, as follows, to wit: "I, A. H. Slocomb, hereby bind myself unto the People's National Bank, in the sum of $300 for the payment to them of the balance of the judgment to be obtained in the suit against myself, G. Rosenthal, Lucy McDaniel, administratrix of Thos. McDaniel, and D. Rose, administrator of David Murphy, deceased, now pending in the Superior Court of Cumberland County. The purpose and condition of this bond is that said bank will not take judgment against said A. H. Slocomb and G. Rosenthal on the $390 in suit, and if they shall fail collecting out of the other parties the amount due by them, the said A. H. Slocomb is responsible for the balance. This is done upon the said A. H. Slocomb and G. Rosenthal paying an amount which would be their proportionate share in the event that the other parties are solvent, and if the said bank shall find it necessary to pursue said A. H. Slocomb and G. Rosenthal further in the collection of the balance, then this amount, $221.38, is to be credited upon the judgment *vs. claim.*

"Witness: D. D. HAIGH. A. H. SLOCOMB."

4. That upon the payment of the amount aforesaid and the
(349) signing of said bond the said president and cashier instructed the attorney, Thos. H. Sutton, to nonsuit said case as to said Slocomb and G. Rosenthal, and he promised Slocomb that he would do so, and said officers promised Slocomb that said case should be so nonsuited as they agreed to do.

5. That, notwithstanding said agreement at the May Term, 1891, of said court, judgment was entered against Slocomb and the others for the entire amount of the note without the credit even of the amount paid as alleged.

6. That said Slocomb did not learn or actually know that said judgment was rendered against him until a long time after it was taken, namely, in July, 1893; did not know that said judgment was still standing against him, and he caused notice of a motion to be made at November Term, 1896, of this Court to be served upon said Ray, the purchaser of the judgment, that he would move that said judgment be set aside upon the ground that it was rendered through mistake, inadvertence, excusable neglect and in the face of an agreement on the part of the plaintiff that judgment would not be taken but the case nonsuited, at first term, upon the ground set out in the bond or agreement signed by said Slocomb to said bank, a copy of said bond being attached to said Slocomb's affidavits on file in the hearing of this motion.

7. That the notice of motion for leave to issue execution before the clerk was continued by him to the said November Court and by the judge thereof from time to time.

8. That after the issuing of the summons the plaintiff bank was placed in charge of W. G. LeDuc, receiver, by the comptroller of the currency, and said Slocomb, after learning that at the return term that judgment was rendered against him a short time before the sale of assets and purchase by N. W. Ray, went to said receiver and he promised that said judgment should not remain against him, but that said agreement would be carried out as far as possible by cancellation of (350) the judgment as to him.

9. That at the sale of the assets of the bank by the receiver the said judgment on the $390 note executed by Slocomb and others was purchased by N. W. Ray for value without notice of any agreement or understanding between the bank and Slocomb or the receiver and Slocomb, and the said judgment was duly transferred and assigned to said Ray, who is now the owner thereof.

10. That the defendant Slocomb has shown no meritorious defense to the action on the said note.

11. That the bank did not pursue its remedies by seeking to collect the balance of the note or judgment out of the other defendants.

Upon the foregoing facts the court refuses the motion to set aside the said judgment because (1) there was no mistake or excusable neglect in the taking of said judgment; (2) because, even if there had been an agreement between the bank and Slocomb that the bank would nonsuit the case as to him, the purchaser of this judgment is not affected by any such agreement; (3) the application to set aside said judgment is not made in due time.

Leave to issue execution is granted. The defendant Slocomb excepts to this judgment and appeals to the Supreme Court. The facts found by the court and the judgment shall constitute the case on appeal.

W. P. BYNUM, JR., J. S. C.

Parties to an action, when brought in, must take notice of all orders and judgments made therein, and this case is an illustration of the consequence of failure to attend and take actual notice of the proceedings.

The defendant failed to answer the complaint, and judgment final by default was entered. The judgment is regular in all respects and has no infirmity in it. The defendant had a private written (351) agreement with the bank that no judgment should be entered at that term of the court. This agreement was not filed or brought to the attention of the court. There was then only a breach of said contract, which in no way affects the regularity of the judgment. The defendant has no equitable ground for his motion to set the judgment aside, because it is admitted the defendant owed and was liable for the

debt and that the judgment was entered for the true amount, and the plaintiff agrees to credit the judgment with the amount paid by the defendant, before judgment. There was then no equity to follow the judgment into the hands of the assignee or purchaser of the judgment, who took it without notice of said agreement between the original parties.

There is another ground fatal to the defendant's motion, that he does not in his affidavit or otherwise allege that he has any meritorious defense to the action if the judgment should be set aside. The mover in such cases must at least set forth a case amounting *prima facie* to a valid defense, to be determined by the court and not the party. *Mauney v. Gidney,* 88 N. C., 200. The party aggrieved must move to vacate a judgment before the rights of innocent third parties have intervened. *Vick v. Pope,* 81 N. C., 22.

The same principle is declared and the subject discussed at length by *Merrimon, J.,* in *Stancell v. Gay,* 92 N. C., 155.

AFFIRMED.

*Cited: Norton v. McLaurin,* 125 N. C., 190; *Ferrell v. Broadway,* 127 N. C., 406; *Arthur v. Broadway, ib.,* 410; *Ditmore v. Goings,* 128 N. C., 332; *Stockton v. Mining Co.,* 144 N. C., 599; *McKeithen v. Blue,* 149 N. C., 99; *Miller v. Curl,* 162 N. C., 4; *Estes v. Rash,* 170 N. C., 342; *Cahoon v. Brinkley,* 176 N. C., 8, 9, 10.

(352)

## BANK OF FAYETTEVILLE v. R. M. NIMOCKS AND ALEXANDER McARTHUR.

(Decided 4 April, 1899.)

*Note—Accommodation Endorser—Collateral Security.*

1. Where there is material conflict in the testimony introduced, as it would be impossible for the jury to believe *all* the testimony, what part they shall believe and what they shall reject is for their exclusive determination.

2. Where a note with an accommodation endorser is discounted at bank for the maker, who subsequently lodges with the bank, as collateral security, his note, with another solvent endorser, which note the bank, without the knowledge and consent of the accommodation endorser, surrendered without placing any credit therefor on the first note: *Held* to be a discharge *pro tanto* of the liability of the accommodation endorser.

BANK *v.* NIMOCKS

ACTION tried by *Bynum, J.,* and a jury, at November Term of CUMBERLAND. The defendant R. M. Nimocks made no answer, and judgment by default was rendered against him.

*R. P. Buxton for plaintiff.* (358)
*N. W. Ray, N. A. Sinclair, and D. H. McLean for defendant.*

DOUGLAS, J. The plaintiff brought this action upon a promissory note for $3,000, executed by the defendant Nimocks to the defendant McArthur, and by him endorsed to the plaintiff. There were certain admitted credits upon the note. The defendant McArthur, hereinafter called the defendant, as Nimocks made no defense, alleged that the plaintiff discounted the note for Nimocks, well knowing that the defendant was only an accommodation endorser; "that, for his protection and to save himself against loss by reason of said accommodation endorsement on said note, he procured Nimocks to lodge with the plaintiff bank collaterals ample in value to secure the payment of the note, the net proceeds of which were to be applied by the bank to the payment of said note, and the bank well knew of the arrangement and purpose for which the collaterals were so deposited with it, and this defendant is informed and believes that the credits on the note were the proceeds of part of the collaterals which the plaintiff collected and applied the net proceeds in accordance with said agreement. The bank still held as part of the collaterals, so deposited with it to secure the note, a note or obligation for payment of $1,000 and interest, amounting to more (359) than the balance due on the $3,000 note, on which collateral note or obligation said Nimocks and one Slocomb were liable, and said collateral note was solvent and ample to secure the payment of the balance due on the $3,000; that thereafter the plaintiff so holding the collateral note, without any notice to this defendant and without his knowledge, surrendered said collateral note to said Slocomb without making any credit therefor on the $3,000 note, and refused to account for any proceeds of the same or the value thereof, and as this defendant is informed and believes, said collateral note has been destroyed."

In its replication the plaintiff denied that the note for $1,000, made by Nimocks and Slocomb, was deposited with or held by it as collateral security to the note sued on.

The issues and answers thereto were as follows:

1. Was defendant McArthur an accommodation endorser and surety for Nimocks on the note sued on? A. "Yes."

2. Did the bank have knowledge of that fact when it took the note? A. "Yes."

3. Did the plaintiff agree with defendant McArthur to hold the Slocomb note of $1,000 as collateral security and to apply it to the note sued on? A. "Yes."

4. Did the plaintiff surrender and part with the Slocomb note without the knowledge and consent of McArthur and without placing any credit therefor on the note sued on? A. "Yes."

5. Is defendant McArthur indebted to the plaintiff, and if so, in what amount? A. "Nothing."

The plaintiff excepted to the submission of the first, second, third and fourth issues, but as it states no ground of exception, and none suggests itself to our minds, it cannot be sustained.

The only exception seriously pressed was that to the refusal (360) of the court to instruct the jury that "if they believed the whole evidence there was nothing tending to show that the bank agreed with McArthur to hold the Slocomb note as collateral security to the note sued on, and they should answer the third issue 'No.'" As this instruction could not properly have been given, there was no error in its refusal. It is well settled that no such instruction can be given where there is any material conflict in the testimony, as it would be impossible for the jury to believe *all* the testimony, and what part they shall believe and what they shall reject is for their exclusive determination. Of course, this rule applies only to admitted evidence, as the jury cannot consider evidence excluded by the court or withdrawn from their consideration. The competency or mere existence of the evidence is a question of law for the court, but its weight is a question of fact for the jury. In all such cases the request for such an instruction presumes the truth of the evidence as construed in the light most favorable to the adverse party. *Cable v. R. R.*, 122 N. C., 892; *Cox v. R. R.*, 123 N. C., 604.

In the case at bar there was ample evidence to go to the jury. The defendant testified that the president of the bank, shortly before Nimocks' assignment, told him that the Slocomb note was all right. Witness McKethan testified in part as follows: "In May, 1897, I was director in, and vice-president of, the bank. McArthur told me some time before 1897 that he was liable to the bank for $3,000, for Nimocks, and was uneasy about it. After the conversation with McArthur I looked at the books of the bank and found this entry in the collection book: '15 January, 1897, Bank of Fayetteville credit to discount 15 757, A. H. Slocomb, R. M. Nimocks, 31 December, 60 days, 4 March, $1,000.' I asked one of the officers of the bank what 15 757 meant, and he said it was Alexander McArthur's note." It is a common custom among banks to enter all bills receivable, whether dis- (361) counts or collections, in the proper books, under consecutive num-

bers, and a reference to this serial number identifies the paper. The jury might well conclude that this entry meant that the proceeds of the Slocomb note had been credited to the note now in suit.

The plaintiff contends that the so-called Slocomb note, which was executed by Nimocks as principal and Slocomb as surety, was placed in the bank by Nimocks merely for collection. In nearly all transactions there are certain inherent probabilities, which are strongly marked in the case at bar. It seems scarcely reasonable to suppose that the maker of a note, remaining still its owner, should place his own note in bank to be collected from himself and placed to his own credit. It seems more probable that the surety was willing to endorse for only a thousand dollars and that the maker, needing a greater sum, was willing to relieve his principal endorser *pro tanto* by the deposit as collateral security of the smaller note. This view was undoubtedly taken by the jury.

Cases often complicated by the testimony of witnesses, who however honest may be their intentions, testify to assumed facts which are in reality merely conclusions of law.

Viewing the Slocomb note as collateral security to the note in suit, its surrender to Slocomb without the consent of the defendant operated as a release *pro tanto,* and as it was for an amount greater than the balance due on the note in suit, the judgment must be affirmed. *Cooper v. Wilcox,* 22 N. C., 90; *Nelson v. Williams, ib.,* 118; *Pipkin v. Bond,* 40 N. C., 91; *Bell v. Howerton,* 111 N. C., 69.

NO ERROR.

*Cited: Henry v. Heggie,* 163 N. C., 527.

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(362)

STATE PRISON OF NORTH CAROLINA ET ALS. v. W. H. DAY.

(Decided 11 April, 1899.)

*Public Office, Abolishing—Act of 26, January, 1899—Superintendent of Penitentiary—Appointment by Governor.*

1. A public office is an agency from the State, and the person whose duty it is to perform this agency is a public officer.

2. The place of superintendent of the State Prison, with its attendant duties, is a public office, not created by the Constitution, but by a statute.

3. While the General Assembly has the power to abolish an office created by legislative authority, it cannot by a mere transfer to others of the duties connected with an institution, necessary and useful to the public, to be exercised by them, oust the incumbent from an office belonging to him under a contract with the State.

4. The act of 26 January, 1899, is in conflict with the Constitution of North Carolina, Art. I, sec. 17.

5. The Governor never makes a nomination to the Senate to fill vacancies; he simply appoints.

CLARK, J., dissenting.

ACTION for the possession, custody and control of the State Prison, the convicts and all the property and accessories belonging thereto, tried before *Brown, J.*, at February Term, 1899, of WAKE.

This action was brought under a special act of 15 February, 1899, to assert the right claimed by plaintiffs by virtue of the act of 26 January, 1899, abolishing the office of superintendent of the penitentiary and transferring to them the custody, the property and management of the institution from the defendant, who had been appointed superintendent by the Governor.

The defendant resists the demands of plaintiffs, averring that the act of 26 January, 1899, set out in the complaint, is unconstitu-
(363) tional and void, in that its object is to deprive him of his office of superintendent of the State's Prison, and to continue the functions of said office to be performed by others. His Honor sustained the validity of the act and rendered judgment against defendant, who appealed.

*R. O. Burton and Shepherd & Busbee for plaintiffs.*

*Joseph B. Batchelor, James C. MacRae, C. F. MacRae, Argo & Snow and Thos. N. Hill for defendant.*

MONTGOMERY, J. This action was brought under section 1 of an act of the General Assembly, ratified 15 February, 1899. The language of the section is as follows: "That in addition to the remedy prescribed by The Code, secs. 603 to 621, inclusive, the board of directors of the State's Prison of North Carolina, or the executive board thereof, or both, with or without the jointure of the State, shall have the right, in an action for injunction or *mandamus,* to test in the courts the claims of any claimant or claimants to the possession, custody and control of the property of the State's Prison, and of the convicts therein confined."

The object of the statute, then, was simply to have a decision by the courts of this question: Who of the conflicting claimants is or are

entitled by law to the possession and custody of the property (364) of the State's Prison and of the convicts therein confined? The claimants (so far as this record shows) are the plaintiffs on the one side, and the defendant on the other. The rights of any other person or persons that may be connected with the conduct and management of the State's Prison are not now before us for consideration. This Court will not anticipate litigation between rival claimants for office, and if such litigation should occur, each case must be heard and decided on its merits on cases properly constituted in the courts.

The Governor of the State, under the provisions of chapter 219, Laws 1897, appointed John R. Smith superintendent of the State's Prison for the term of four years, and his nomination was consented to by the Senate. The compensation attached to the office was a salary of $2,500. After the adjournment of the General Assembly of 1897 Smith resigned the superintendency, and J. M. Mewborne was appointed by the Governor in Smith's place. On 1 January, 1899, a few days before the General Assembly of that year convened, Mewborne resigned, and the defendant W. H. Day was appointed superintendent to fill the vacancy. Day's nomination by the Governor was never sent to the Senate, nor did that body confirm the appointment. Day, under his appointment, took possession of all the property of the State's Prison, and the control of the convicts. This action was brought by the plaintiffs to recover of the defendant the property in his possession belonging to the State and appertaining to the State's Prison, and to get the control of the convicts and to have the rights of the parties declared. In that way the plaintiffs seek to get a decision by the court on the matter which it was desired to have settled by the act of February, 1899.

The plaintiffs' alleged right of recovery is founded on the provisions of an act of the General Assembly ratified 26 January, 1899, to go into effect on 10 February, 1899, as to its requirement for the delivery of the State's Prison and the convicts therein by the persons then (365) in charge of the State's Prison to the board of directors provided for in the act. As to the other provisions, they went into effect from the date of ratification of the act.

Under the provisions of the last mentioned act the plaintiffs, claiming to be a board of directors, duly elected and appointed by the General Assembly, allege that the office of superintendent has been abolished; that the property of the State's Prison, the control of the convicts and the conduct of the prison were vested in them by the act of January, 1899, and that therefore they are entitled to the possession of the property and the control of the convicts, to the end that they may properly execute their trust.

And again, the plaintiffs allege that if it be so that the office of superintendent was not abolished by the act of 1899, yet the defendant Day's tenure ceased upon the ratification of the act because he was not nominated by the Governor nor his appointment confirmed by the Senate.

The defendant avers that the act of January, 1899, though on its face it purports to abolish the office of superintendent of the State's Prison, does not in law have that effect; that it simply transfers the duties and functions of the office of superintendent to the three plaintiffs, who allege that they compose an executive board, to be performed by them, and that such an attempt to deprive the defendant of his office on the part of the General Assembly is contrary to the provisions of our State Constitution, Art. I, sec. 17 (Bill of Rights), and to those of the Constitution of the United States, Art. XIV, sec. 1. The defendant further avers that the whole act of 1899 is void.

The great public importance of the matter involved and the appearance on both sides of counsel eminent in the profession and learned in the philosophy as well as in the details of the law, naturally
(366) prepared the Court for elaborate and discursive argument (oral and by brief), and we were not disappointed in our anticipations.

A great deal of the learning which was displayed, however, was not new. Many of the questions discussed had been so often and so consistently decided by the adjudications of this Court that they could not be held to be open questions, as, for instance, that such a place as that of superintendent of the State's Prison, with its attendant duties, is a public office (*Clark v. Stanley,* 66 N. C., 59; *Hoke v. Henderson,* 15 N. C., 1; *Wood v. Bellamy,* 120 N. C., 212): That an office is property and the incumbent has the same right in it as he has to any other property except that he cannot sell or assign it (*Hoke v. Henderson, supra; King v. Hunter,* 65 N. C., p. 603; *Cotton v. Ellis,* 52 N. C., 545; *Wood v. Bellamy, supra*): That the General Assembly has the power to abolish an office created by legislative authority (*Cotton v. Ellis,* 52 N. C., 545; *S. v. Smith,* 65 N. C., 369; *Wood v. Bellamy, supra; Ward v. Elizabeth City,* 121 N. C., 1): That the Legislature can, except in those instances prohibited by the Constitution, take away some parts of the duties of an officer and make a not inequitable reduction of the officer's salary (*Cotton v. Ellis,* 52 N. C., 545; *Bunting v. Gales,* 77 N. C., 383; *King v. Hunter,* 65 N. C., 603. But in those cases it is also held that the officer's entire salary cannot be taken from him and thereby starve him, nor could the Legislature select a particular officer and by a special law applicable to him alone deprive him of any material part of his duties and emoluments): That the words, in section 10, Article III of the Constitution of 1868, viz.: "That the Governor shall nominate . . . and appoint all officers whose offices are established by this Constitu-

tion, *or which shall be created by law, and* whose appointments (367) are not otherwise provided for, *and no such officer shall be appointed or elected by the General Assembly,"* meant appointments not otherwise provided for in *that Constitution;* and, therefore, the Governor had under that Constitution the general power of appointing to office (the exceptions being in cases where the appointments were otherwise provided for in that Constitution) to the exclusion of the Legislature (*McKee v. Nichols,* 68 N. C., 429); *but,* that the words which we have quoted from Article III, section 10 of the Constitution, and which appear in italics in the quotation, being omitted in the present Constitution, it is clear that the Convention of 1875 intended to alter the Constitution as interpreted in *McKee v. Nichols, supra,* on that point, and to confer upon the General Assembly the power to fill offices created by statute. *Ewart v. Jones,* 116 N. C., 570.

Having disposed of all the above-mentioned collateral questions which were the subject of argument in the case, interesting more as matters of constitutional and judicial history than as strictly applicable to the controversy before the Court, by the citations of repeated decisions of this Court, we can now come down to the discussion of the point, the real controversy in the case; that is, was the office of superintendent of the State's prison abolished by the act of Assembly ratified January, 1899? We may say *in limine* that we have had no trouble in arriving at the conclusion that the office of superintendent is not an office created by the Constitution. Section 3 of Article XI of the Constitution ordained: "That the General Assembly shall, at its first meeting, make provision for the erection and conduct of a State's prison or penitentiary," . . . and that provision, in our opinion, imposes upon the Legislature the duty of attending to the details as to the erection of the necessary buildings, the purchase of such property, real and personal, as may be necessary for the uses of the prison; and also (368) to form such regulations for the government and conduct of the prison as may seem proper. The officers or placemen, their salaries and the distribution of their duties are all left with the General Assembly.

On the real question in controversy, the contention of the plaintiff is that the office of superintendent of the prison was abolished by the act of 1899, because (1) The act declared in so many words that the office was abolished; because (2) the responsibility and actual management of the prison are placed upon the board of directors and taken from the one-man power—that of the superintendent, and that the incumbent had an implied notice that the General Assembly might, when it saw fit, take that course; because (3) the act incorporated the State's prison; because (4) it increased the number of directors; because (5) it transferred the duties attendant upon the office to the board of directors for performance.

To aid us in arriving at a correct conclusion in this case a recurrence to the true idea of the nature and character of a public office has been useful to us. In the text-books it is taught that the word *office* in its primary signification implies a duty or duties, and, secondarily, the charge of such duties—the agency from the State to perform the duties. The duties of the office are of the first consequence, and the agency from the State to perform those duties is the next step in the creation of an office. It is the union of two factors, duty and agency, which makes the office. In *Clark v. Stanley,* 66 N. C., 59, the Court said that "A public office is an agency from the State, and the person whose duty it is to perform this agency is a public officer. . . . The oath, the salary or fees are mere incidents, and they constitute no part of the office." With that idea, then, of what an office is, has the office
(369) of superintendent been taken from the defendant and given to others by the act of Assembly? If the duties of the office were necessary and useful to the public, and they have been transferred to others who are exercising them as still necessary and useful to the public, and the State's prison, in behalf of which those duties are performed, is substantially the same institution as it was before the act of Assembly of January, 1899, was ratified, then, under all the decisions we have cited in this case bearing upon the point, the office of superintendent (defendant's property) has been taken from the defendant contrary to the law of the land—contrary to the provisions of the Constitution of North Carolina, Article I, section 17. If the institution, the State's prison, is the same substantially that it was before the passage of the act, if the purposes for which it was established are the same now as then, and if the subject-matter over which the management and conduct extend be the same, then there is existing a contract between the State and the defendant as to his office, and it cannot be violated during his term. The State, through the General Assembly, might be satisfied that the management under the executive board created by the directors under the act is the better plan and the safer one for the public, yet that is only a matter of method of management, a choice between two modes (that is, whether it is better for three to control than for one), and such a choice cannot be made until defendant's term has expired. A new method of distributing the powers and duties of the government and conduct of the State's prison may be desirable, and the method undertaken to be adopted in the act of 1899 may be the best, and yet such changes cannot be made until the expiration of the contract with the incumbent. It has been suggested that if the State has not the power when it sees fit to abolish an office and transfer its duties to others, that an incumbent might get into an office for a very long term of years
(370) (a term not amounting to a perpetuity, however, which would

be illegal), and indifferently execute the duties of the office, but not so poorly as might amount to incapacity, and thereby inflict a great injury on the interest of the public. The answer to that is that if such should be the case it would be the fault of the legislative branch of the government in fixing an unusual term of office, and not a matter reviewable by this Court.

Then, the conclusion of the case turns upon whether the State's prison is substantially the same institution that it was before the act of 1899, whether the purposes for which it was established are the same now as then, and whether the duties performed by the defendant were the same duties substantially which are transferred to board of directors and now being performed by the executive board under the act of 1899.

It is ordained in the Constitution that the State's prison is to be used for the purposes of reformation and of punishment, and that is the object of the institution now. The incorporation of the institution, if it be conceded that it was incorporated by the act of 1899, can in no sense affect the defendant's office if it has not otherwise abolished it. The bare incorporation of the institution would not affect or alter in any way the duties of the superintendent or any other of the officers or placemen or employees. With the exception of the power given in the act of 1899 to the directors to sell or lease the lands or other property of the State's prison, the duties and the powers in all respects of the board of directors, acting through the executive board as their head, are in all respects the same as the duties required of and the powers conferred upon the superintendent under the act of 1897, as the following analysis and comparison will show. Under the various subsections of section 5 of the Laws of 1897, the duties of the superintendent are specified in detail, as follows: (1) Under this subsection he is to receive (371) and to have the custody of the convicts. That responsibility and duty are upon the new board of directors and their agents under section 7 of the act of 1899. (2) Under this subsection it was made the duty of the superintendent to keep employed the convicts in the prison and on the farms, and to hire them to others. Under section 7 of the act of 1899 that duty was devolved on the board and their agents. (3, 4 and 5). Under these subsections the superintendent was authorized and required to purchase necessary articles of food and clothing for the convicts and to employ and take care of them; to sell the products and manufactured articles; to receive and account for the proceeds of sale of articles produced and manufactured, and to make a deposit of the same and to check it out. Those duties are transferred to the board of directors and their agents by section 6 of the act of 1899. (6) This subsection makes it the duty of the superintendent to take custody of the property of the State's prison and to protect the same. This duty is transferred to the

board and their agents by sections 6 and 8 of the act of 1899. (7) The superintendent is authorized under this subsection to appoint the subordinates, such as wardens, physicians, supervisors, overseers, guards and employees. These subordinates, designated under the act of 1899 as wardens, physicians, managers, supervisors or overseers, are to be appointed by the board of directors through the executive board by sections 5 and 9 of the act of 1899. (8) Under this subdivision there is imposed upon the superintendent the duty of rendering at the end of each year to the board of directors a statement of all financial transactions of the State's prison for the preceding year, together with an inventory of all property on hand and its value. Those duties are required to be
(372) performed by the agents of the directors, the executive board, under sections 5 and 6 of the act of 1899. Under chapter 219, Laws 1897, the board of directors were a general supervisory power; by the act of 1899 the board of directors through the executive board are clothed not only with a general supervisory authority, but with all the functions and with all the duties of the superintendent and with the power to distribute those functions and duties amongst themselves or others.

If we have not fallen into error in the above analysis and comparison, and we feel confident that we have not, then, no new duties for the government of the State's prison have been imposed, nor have any new powers been granted to any persons except the power granted to the board of directors to sell or lease the land of the State's prison, and which additional power we think does not alter the nature or the character of the institution. No function or duty that was formerly performed or imposed upon the superintendent is abolished. The functions and duties of that office are still necessary to the public welfare. They have not been abolished; they have been simply transferred to others. That cannot be done according to the law of the land. *Wood v. Bellamy* and *Hoke v. Henderson, supra; Cotton v. Ellis,* 52 N. C., 545. That three of the directors have been made the governing head of the institution under the name of executive board, and that to them the duties and functions of the office of superintendent have been transferred, does not change the application of the law. It is the same as if the duties of the office had been transferred to one person. It is not a valid argument to contend that the executive board can conduct the State's prison in a better and more satisfactory manner than can one man. It may be true in point of fact, and that plan can be tried at the end of defendant's term of office. The contract of the State with the superintendent must be kept. In Throop on Public Officers, sec. 21, it is said: "Nor can the Legislature take from the officer the substance of the office
(373) and transfer it to another, to be appointed in a different manner

and to hold by a different tenure, although the name of the office is changed, or the office divided and the duties assigned to two or more officers under different names." That principle of law was announced in *Warren v. People,* 2 Denio, 272, and also in *People v. Albertson,* 55 N. Y., 50. The section in Throop, and the decisions in *Warren v. People* and *People v. Albertson, supra,* are in connection with offices created by constitutional provision. But that makes no difference in North Carolina. Under our decisions, you cannot oust an incumbent of an office and continue the office afterwards, and this rule applies to offices created by the Constitution as well as those created by the Legislature.

It was not necessary for the appointment and nomination of the defendant to have been confirmed by the Senate. There was a vacancy due to the resignation of Mewborne. The Governor never makes a nomination to fill vacancies in office. He does that alone in all cases, as was decided in *People v. McIver,* 68 N. C., 467.

The defendant is entitled to the possession of the property of the State's prison, to the control of the convicts as under the law of 1897, and to the right to execute the duties of the office of superintendent of the State's prison.

REVERSED.

FURCHES, J., concurring: While I fully concur in the opinion of the Court, I hope I will be pardoned for briefly expressing my views upon this important question.

It is too plain for argument that the position the defendant held was a public office. I do not think this is denied by plaintiff. This being so, he had a property in this office that could not be transferred to another or to others. This is the law of this State, and it has (374) been so held by this Court in every case involving this question from *Hoke v. Henderson,* 15 N. C., 1, to the present time, without a single exception. It is true that it is argued for plaintiff that *McDonald v. Morrow,* 119 N. C., 666, and *Ward v. Elizabeth City,* are not in accord with *Hoke v. Henderson,* but upon examination it will be found that this is not so. *Hoke v. Henderson* is cited with approval in both these cases.

The act under discussion in *McDonald v. Morrow* was the Election Law of 1895, and in that act it was provided that such appointments as those under consideration were void, and the Court in considering the case stated that as they claimed to hold under that act, it must be held that they took subject to the terms of the act they claimed to hold under. There was no question presented in that case as to the repeal of the statute or the abolition of the offices claimed by the defendants.

In *Ward v. Elizabeth City,* 121 N. C., 1, the plaintiff failed in his action upon two grounds: that the corporation under which he claimed to hold office had been abolished, and a new corporation created out of new territory and new population to a very great extent, and for the further reason that he had abandoned his claim to the office. *Justice Clark* wrote the opinion of the Court in *Ward v. Elizabeth City,* in which he cited with approval both *Hoke v. Henderson* and *McDonald v. Morrow,* and distinguished that case from *Wood v. Bellamy.* So I repeat that there is not a case to be found in our reports that does not recognize the doctrine laid down in *Hoke v. Henderson,* to be the law in this State. It has been held ever since it was delivered in 1833 to be the leading case on this subject, and is styled by *Chief Justice Pearson* as "that great mine of learning."

(375) That case, and every case since that case, discussing the right of an incumbent to hold his office, recognizes the right of the Legislature to abolish a legislative office, and that when the office is abolished the right of the incumbent to hold it is gone, because there is no office to hold. But all the reported cases from *Hoke v. Henderson* down to and including *Wood v. Bellamy,* 120 N. C., 212, hold that to have the effect of ousting the incumbent before his term expires, the office must be *abolished.* That it is not sufficient to declare that it is abolished when it is not abolished. That the office is intangible, and consists in the duties of the office, and while these duties are continued the office is continued. The discussion then comes down to this: Are the duties of the office the defendant held *abolished* or are they transferred to others?

In discussing this question I do not expect to enter into a discussion of policies that might influence me if I were acting as a legislator. Nor do I expect to count the number of lawyers in the Legislature that passed this act; nor do I expect to impugn their motives, as it seems to be thought I will if I am of the opinion that the act is unconstitutional. This kind of argument should have no weight with an independent judiciary. If this suggestion is true it convicts every judge that has ever occupied a seat on this Court of being guilty of impugning the motives of the Legislature—Taylor, Henderson, Ruffin, Pearson and all their associates. If this were so, I suppose there would never be another act of the Legislature declared unconstitutional. I hope that I may never be influenced in the discharge of what I consider my duty by such considerations. I propose to regard this Legislature just as I would any other Legislature, and to deal with its legislation just as I would any other Legislature—just as I did the Legislature of 1895, and I agreed with the Court in an opinion declaring a similar act passed by that Legislature unconstitutional. And in doing so I did not im-

(376) pugn their motives nor do I suppose any other member of the

Court did. I suppose that Legislature thought the act of 1895, reviewed by this Court in *Wood v. Bellamy,* constitutional; and I suppose the Legislature of 1899 thought this act constitutional. But when it comes before us for review I cannot be governed in my opinion of the law by what they may have thought.

It is contended that if we sustain the defense and restore the defendant to his office there is danger ahead of us: That we might get a Legislature that would extend the terms of office to ten and even to twenty-five years. I do not think we are likely to have a Legislature that would be so revolutionary as that. But what if we should, is this the forum to be appealed to for relief? The leading case of *Hoke v. Henderson,* in which *Chief Justice Ruffin* delivered his great opinion, was a case in which Henderson, the defendant, claimed to have an office for life; and the Court sustained his claim.

It seems to me that defendant's claim is looked upon with disfavor as resting upon an act passed by the Legislature of 1897. I don't know that it should be discredited on that account. But when it appears that the act of 1897 was but the reënactment of the act of 1893, under which the party in possession of the penitentiary in 1895 (the same party that passed the act of 1893) held over in violation of the act of 1895, it does not seem to me that it should be discredited because it was passed by the Legislature of 1897.

If the object of the act of 1899 was simply to get rid of the office of superintendent, as contended, why was it that the Legislature did not simply abolish that office and leave the institution to the management of the board of directors? They were there, and were substantially the same they were before the passage of the act of 1893, which (377) created the *office* of superintendent.

If the object was simply to abolish the office of superintendent, why did they not do this and let the matter stand there? Why did they appoint *twelve* new directors and establish an executive board of three to do the same thing the superintendent had to do?

Great stress is laid on the fact that *three* are to do what *one* did, and the "one-man power" is appealed to. Is this "one-man power" the question before us? It seems almost to be conceded that if the duties of the superintendent have been transferred to *one* man that the act would have been unconstitutional. What difference does it make to the defendant whether his office is given to *one* or to *three?*

While we do not propose to discuss policies, this kind of legislation has a history in this State, to be learned from the records of this Court and its reported cases. In 1871-72 the legislative power and the executive power of the State were in the hands of different political parties. The legislative power undertook to take charge of the penal, charitable and

beneficent institutions of the State before the terms of those in office had expired. But they failed, as may be learned from *Battle v. McIver,* 68 N. C., 467; *Badger v. Johnson, ib.,* 471; *Nichols v. McKee, ib.,* 429; *Welker v. Bledsoe, ib.,* 457.

In 1895 the legislative power of the State was in the hands of one political party and the executive power in the hands of another political party; and the legislative power undertook to take charge of the institutions before the terms of the officers in charge had expired. And they failed. *Wood v. Bellamy,* 120 N. C., 212. In 1899 the legislative power of the State is in the hands of one of the political parties and the executive power is in the hands of another political party; and the
(378) Legislature has again undertaken to take charge of this institution before the terms of the officers have expired, and they must fail. The act considered in *Wood v. Bellamy,* in express terms, abolished the office of superintendent; the board of directors created a new corporation, provided for the reception of patients from Durham and Robeson counties, established an insane division in the penitentiary, and repealed all laws in conflict with that act. In fact, every substantial question involved in this case was involved and considered by the Court in that case. The Court, constituted then as it is now, declared that the act was unconstitutional by a full bench and without a dissenting voice. I must hold now as I did then, and I do this without impugning the motives of any one, as I suppose they thought the act constitutional.

CLARK, J., dissenting: The management and control of the State's prison is essentially a governmental function. It is an indispensable part of the administration of the criminal laws of the State. No Legislature can denude the State of that power by giving it away or bargaining it away. It is a startling contention of the defendant that, because the Legislature of 1897 placed the control of the State's prison in a superintendent with vast powers and privileges, accompanied by a salary of $2,500, therefore, a subsequent Legislature is powerless to resume control and change the management because that would deprive him of his pay. This is to make the incident of greater importance than the subject, and the inalienable right of the State to control its own institutions subordinate to an office-holder's demand for a salary. If the Legislature could by creating a four years term of office put it out of the power of the next Legislature to assert State control of its most important institution, and a branch of its administration of the criminal laws, it could, by making the term ten years, twenty-five or fifty years, have forbidden the people of North Carolina from touching the institution during those periods. If the Legislature of 1897 could
(379) confer the great powers they did upon the superintendent, without

power of repeal, they could have conferred greater powers, the sole and absolute control in every respect. To change this would necessarily continue the same duties in the hands of other parties, and the defendant's contention is that would be to substantially continue his office in other hands, and illegal. That is the proposition before us. The defendant claims control of more than 1,000 of the State's convicts, possession of $200,000 of the State's property and to receive $100,000 annually from sale of the products of the State's farms with the appointment of 169 place-holders in the State's service, and to fix their salaries and other large powers, with no security to the State but a bond of $5,000, and it is gravely argued to us that the Legislature could not, in discharge of its governmental functions, change that system of government, because under the new act necessarily the same duties would be discharged by the directors and executive board and others, and the defendant would lose profitable employment. But governments are established for the benefit of the people, and not that office-holders may receive compensation—the last is purely incidental and only to be rendered when the State desires and receives the services. The office of superintendent of the State's prison or penitentiary was created by legislative enactment (Laws 1897, ch. 219, sec. 4), and therefore it can be abolished in the same mode and at the will of the Legislature. "The Legislature (of 1899) had the same power to abolish it that the Legislature (of 1897) had to create it." *S. v. Walker,* 65 N. C., 461. The only question before us should be, has the office been abolished. The act of 26 January, 1899, "To provide for the government of the State's Prison," provides (sec. 12): "The office of superintendent of the penitentiary is (380) hereby abolished, and all laws and clauses of laws providing for the appointment of or imposing any duties upon, or providing for, any compensation for such officer are hereby expressly repealed." As the Legislature had power to abolish the office, the above would seem a clear-cut unmistakable expression of their will that the office has been abolished. Two late decisions of this Court are decisive of the point. In *Wood v. Bellamy,* 120 N. C., 212, after a careful review of our authorities, it is said by *Montgomery, J.:* "It is undoubtedly the law in North Carolina that an office (not created by the Constitution) can be abolished, and that as a result the officer loses his office and the property in it. This is no breach of the contract on the part of the State. The holder accepted the office subject to this contingency. No one would contend that because an office was in the estimation of the Legislature useful and necessary at the time of its creation, such an office would continue to be forever a public necessity. If an office once useful should become useless and an unnecessary charge upon the people, it is not only a right of the Legislature to abolish it, but it is its duty to do so. And, as we have

said, every man elected or appointed to an office created by the Legislature takes it with the implied understanding that the continuance of the office is a matter of legislative discretion, the office depending upon the public necessity for it. In *Hoke v. Henderson,* 15 N. C., 1, it is said that it may be quite competent to abolish an office and true that the property of the office is thereby of necessity lost. Yet it is quite a different proposition that, although the office be continued, the officer may be discharged at pleasure and his office given to another; the office may be abolished because the Legislature deems it necessary."

The latest case, *Ward v. Elizabeth City,* 121 N. C., 1, says:
(381) "The city attorney authorized for the new corporation is an entirely distinct office from, and is not a continuation of, the office of city attorney of the corporation which was extinguished by act of the Legislature. This case differs from *Wood v. Bellamy,* 120 N. C., 212, in that, there the new charter was so nearly a repetition of the old one that it was held to be merely an amendment of the former one, not a destruction of it, and hence the offices under such charter were not vacated. Every one who accepts an office created by legislative enactment takes it with notice that the Legislature has power to abolish his office, and is fixed with acceptance of all provisions in the act creating the office." *Furches, J., in McDonald v. Morrow,* 119 N. C., 666 (top of page 677) says: "The only restriction upon the legislative power is that after the officer has accepted office upon the terms specified in the act creating the office, this being a contract between him and the State, the Legislature cannot turn him out by an act purporting to abolish the office, but which in effect continues the same office in existence."

*McDonald v. Morrow, supra,* and other cases to like purport are cited in *Caldwell v. Wilson* (by *Douglas, J.*), 121 N. C., 425, see pp. 468, 469, especially lines in italics on p. 468.

So that the only question is, whether the office of superintendent has been actually abolished, as the law-making power unequivocally has said, or shall we hold that it has been guilty of subterfuge and has really continued the office, in another name, and in fact and in truth merely transferred its duties and emoluments to another? Is the office of superintendent today in existence under another name? If not, judgment must go against the defendant.

In *Wood v. Bellamy, supra,* there was no radical change in the method of management, no destroying and repeal of previous acts as in the present case, but the new legislation on its face purported to be,
(382) and was in fact, a mere amendment to previous legislation; the name of the institution and of the offices somewhat changed, but it was clear that there was the same system of management, and the same offices with the same functions, the labels being changed. This

being so, the Court held, following *Hoke v. Henderson,* that the office, being in truth continued in existence, the officer could not be dispossessed. In *Ward v. Elizabeth City, supra,* a still later case (September Term, 1897), it was held that where a city charter was abolished and a new corporation created with enlarged territory, it was such a change that the city attorney under the old charter could not claim his salary under the new. The change made by the act before us is far more searching and complete than that sustained in *Ward's case.* The entire government of the penitentiary, as provided by the act of 1897, is abolished root and branch, not only the "one-man power" which dominated under the act of 1897 is swept away, but a new system of government thereof is established by a board of twenty-one directors, in which the old office of superintendent not only does not exist, but such office is totally incompatible in every particular with the new form of government provided by the legislative will.

A review of the methods of government provided for the penitentiary will be instructive. Under Laws 1879, ch. 333, and 1881, ch. 289, the penitentiary was governed by a board of five directors. In 1885, ch. 524, the number was increased to nine. In 1889, ch. 524, the number was again reduced to five, and this continued until 1893. So that from 1879 to 1893 the office of superintendent was not a *sine qua non* in penitentiary management. It simply did not exist. Just as the Legislature of 1899 has declared, it does not exist today. In 1893, ch. 283, a new system was inaugurated. The office of "Superintendent of State's Prison" was created. In 1895, ch. 417, this system was abolished (383) and a return had to the old system, but it failed to take effect because the board of nine directors therein provided for were elected by the Legislature when no quorum was present, and in consequence of the decision in *Stanford v. Ellington,* 117 N. C., 158, there was no contest over the matter and the superintendent held on for the lack of any one to succeed him. In 1897, ch. 219, there was a return to the "one-man power" provided by the act of 1893. In 1899 this system, not having worked satisfactorily, the Legislature returned to the old system which had obtained from 1879 to 1893, and abolished by express enactment, root and branch, the opposite method of government which had been attempted by only two Legislatures (1893 and 1897) the other nine Legislatures, from 1879 to 1899, inclusive, having approved the system of government by a board.

The argument for the defendant is that the penitentiary must be governed by the discharge of substantially the same duties by some person or persons, and, therefore, though the office of superintendent is abolished and not reëstablished either in form or in any other name, yet as those duties must be performed by the board itself, and agents appointed by

it, therefore the office of superintendent is still in existence, no matter how it is divided up; that as the duties exist therefore the office exists, and the defendant must have it and its emoluments. This is the fallacy of his argument. The office does not exist either potentially or colorably. No one exercises it or draws its emoluments. The Legislature had power to abolish it, and it has done so in unmistakable language, and we must take it that they have done so in good faith. *Wood v. Bellamy* says the officer is entitled "so long as the office exists," not so long as the same duties must be performed by some one in some way. The duties of management remain and the Legislature has apportioned those
(384) duties as it thought best. If the office of superintendent is necessarily beyond annihilation unless the penitentiary itself is annihilated, where was it in hiding from 1879 to 1893? There is a wide distinction between the office of superintendent with certain fixed duties prescribed by the Legislature which cannot be taken from the incumbent as long as the office is continued (or if it is only colorably, not truly abolished) and the duties of managing the penitentiary which remain substantially the same under every form of government, however much the Legislature as representatives of the sovereign people may change the method of its government. The functions of government remain substantially the same under an absolute monarchy in Russia as in a free country like ours, but should Russia come to be administered by the elected representatives of its people, the office of Czar would cease to exist. The powers and duties of absolute sovereignty would remain.

By the act of 1897, ch. 219, creating the office of superintendent of the State's Prison, under which the defendant claims, there was a board of nine directors, who had (sec. 3) "general supervision of the State's prison or penitentiary, and of the employment of all convicts sentenced to imprisonment therein by the courts of the State." Then, by section 4, there was created a middle-man, a superintendent, with large powers, which he was to exercise under the general supervision of the directors, as provided by section 2, including the power to appoint all subordinates (169 in number it seems) and fix their salaries, but his appointments and adjustment of salaries were subject to approval or rejection by the board (section 7) and he was required to make itemized reports which were subject to their approval, and he was allowed a salary of $2,500.

The experience of this system of government, not having made it acceptable to the Legislature, the act of 1899 abolished the middle-man and his salary of $2,500, and required the board of directors to
(385) govern the penitentiary by direct contract with the subordinates and not, as under the act of 1897, through the medium of a superintendent with powers prescribed by the Legislature not to be changed by the board and he himself not removable by them. No such

office or powers now exist. The board of directors are to appoint all subordinates themselves and fix their salaries in the first place and discharge all other duties of general supervision directly, instead of at second-hand, by approving or rejecting the appointments, actions and reports of a superintendent, as under the act of 1897. The office of middle-man or superintendent, having proved expensive and unnecessary *(Wood v. Bellamy, supra)*, the Legislature in its wisdom abolished it, and no vestige of it remains. It is true the penitentiary must be governed, but not necessarily by a superintendent. It is none the less abolished because the board shall discharge their duties hereafter directly instead of supervising the discharge of them through a superintendent. To provide for the increased burden of direct supervision, the board was increased from 9 to 21, and an executive committee of three was provided, to be selected by the board among its own members, who are to meet twice a month, to act for and in behalf of the full board between its sessions, with its acts subject to approval by the full board. In all this, there is surely no indication that there has been any subterfuge practiced by the Legislature or that the office of superintendent is still in existence. If we were disposed to charge a coördinate department with subterfuge, we must recall that there sat in that body fifty-five lawyers, among them many of the most eminent members of the profession, thoroughly acquainted with the decisions of the courts, and that if there had been subterfuge it was not unintentional, but deliberate. (386) Certainly it does not appear upon the face of the statute, and we cannot presume bad intentions in the Legislature. *Angle v. R. R.*, 151 U. S., 18. In *Wood v. Bellamy* the act on its face was an amendatory act, and there was no subterfuge, but simply a naive attempt to vacate offices by merely changing their titles. The Court held that would not do, and the Legislature of 1899 had knowledge that nothing less than an actual abolition of an office would vacate it. The office of superintendent is not only expressly abolished, but, as above said, its very existence is incompatible with the very essence of the new government prescribed, which is by the board itself without any intermediary, as heretofore, to make contracts, appointments and regulations. It is not the case of "the same old horse under a new blanket." Admittedly, the Legislature had power to abolish this office. It could not possibly have done so more completely, unless it had abolished the penitentiary itself.

If because the penitentiary must continue to be managed, the office of one who formerly discharged some of the functions of management cannot be abolished, then if he had been charged with the full and entire management he could not be touched during his term, however long, since those functions would necessarily be performed by those placed in charge, and the unbroken line of decisions that all offices created by

the Legislature can be abolished by the Legislature is misleading, except as to those minor places which are held in institutions which can themselves be abolished. This is to make an office which is purely an incident in carrying out the legislative will in managing State institutions, the chief thing to be protected at all hazards, and makes the legislative judgment as to the best interests of the institution a secondary consideration. As to the State's prison, the asylums, the university,
(387) schools, and the like, which the Constitution or the public necessities require to be continued in existence, an officer once in, no matter how unsatisfactory the system or the officer himself, would be protected as fully as if appointed under, and his term fixed by, the Constitution. The rat can only be gotten out by burning down the barn.

We know not from the record what mismanagement, if any, caused the Legislature to abolish the system of governing the penitentiary through a superintendent, nor is it necessary there should have been any. The Legislature, representing the sovereignty, could change the method of governing any State institution at will. It does appear upon the face of the complaint that the defendant has in possession $200,000 of State's property; that he will (if still in office) handle $100,000 of State's funds annually; that he is insolvent and has given only a $5,000 bond. None of these allegations are denied in the answer, and some of them are expressly admitted. While there is no charge of maladministration against the defendant (who came in less than a month before the act abolishing the office), the Legislature may well have thought that a system which admitted of that method was not business-like or safe, and, if they did, it was in their power to abolish it, and it is not for the courts to forbid it and take the responsibility of restoring that state of things.

If the defendant is protected in a four-years term, unless the penitentiary itself is abolished, then, as has already been pointed out, a Legislature which is elected to sit sixty days may fill all the institutions of the State, which from their nature cannot be abolished, with officers holding not four years, but ten years, or twenty-five years, or fifty years, or for life, and thus tie the hands of future generations and prevent any betterment, as is attempted by this act, in the mode of administering our great State institutions. Nay, more—it may elect boards for
(388) life and provide that they may themselves, from time to time, fill vacancies in their own body—a right which would be a part of their offices, and thus take the government of the State institutions entirely out of the hands of the people, who will be powerless to free themselves "from the body of this death" through future Legislatures. It is true, it may be said that if the Legislature acts thus unadvisedly and extremely, the courts cannot correct its faults. That is true. If

the Legislature acts unadvisedly, its errors must be corrected, not by the courts, but by the people in the election of subsequent Legislatures, and it is not for the courts to limit the corrective process in the hands of subsequent Legislatures. If the act of 1897 seemed evil to the people, it was for them to send a Legislature here in 1899 to correct it, and if this act of 1899 is not approved by popular opinion, a Legislature will be sent here in 1901 to change it. The courts have no supervisory power, nor veto, upon legislation.

The theory of all free government is, that the people are to administer their own affairs in their own way. No Legislature elected for two years can pass any act whatever which is not revocable by a future Legislature, and this is as true when it creates an office as in any other case. When the Supreme Court of the United States, in an unfortunate hour, held in the *Dartmouth College case* that a charter of a corporation was not a privilege, but a contract, and therefore irrevocable, the immense, the overshadowing danger that one weak or corrupt Legislature could bankrupt a Commonwealth for all time and tie the hands of unborn generations, caused every State, including our own, to revert to first principles by placing in its Constitution the provision that all charters should be revocable at the will of any future Legislature. When the decision by the same tribunal of the case of *Chisholm v. Georgia* showed the danger of a State being sued by reason of (389) contracts made by its Legislature through unwisdom or corruption, *Judge Iredell,* of North Carolina, then on the Supreme Court of the United States, gave the alarm through his dissenting opinion, and there was forced through with great promptness the Eleventh Amendment to the United States Constitution, whereby any future Legislature could say whether it would be bound by the acts of its predecessor by forbidding any suit against a State to enforce rights accruing under any legislation by the State—an amendment which alone saved North Carolina from the terrible oppression of an indebtedness of $36,000,000, incurred without consideration in 1868. When the Legislature of 1833, without deep foresight into the future, attempted to give immunity from taxation for all time to the Wilmington and Weldon Railroad Company, and the company claimed that thereunder it could build lines into every county in the State, and be everywhere and forever exempt from contributing by taxation to the support of the State, it was this Court, in *R. R. v. Allsbrook,* 110 N. C., 137 (at pp. 145-148), which protected the public from a great and lasting injustice by declaring the incompetence of one Legislature thus to bind future generations, and thus placed the vast property of that corporation on the tax list—a decision which was affirmed on writ of error, 146 U. S., 279.

In all our sister States it is held that legislative offices are not contracts, but mere agencies of the State, and revocable by the Legislature without any restrictions. Meechem Pub. Offices, sec. 463; 19 A. & E., 562c; Black Const. Law, 530; Black Cons. Prohibitions, sec. 95; Cooley Const. Lim. (6th Ed.), p. 331, and numerous cases cited by each. Our State alone, of the forty-five, modifies this (*Hoke v. Henderson, supra*), but only to the extent that while the Legislature can at will
(390) abolish such offices, or reduce the salary, or increase the duties, it cannot remove the incumbent while the office is continued—a modification which has entailed upon this State a large class of litigation which is unknown everywhere else. That case, however, also distinctly holds (bottom of p. 21) that "property" in the office is the right to its compensation, and that in offices without pay the incumbent can be removed and a new officer installed, though the office be not abolished. It logically follows that if the incumbent of a paying office is removed while the office is unrepealed, his remedy is not reinstatement in the office, but damages for the loss of his property rights—"the transfer of the emoluments" of the office, as it is there styled. As to offices not placed under the protection of the Constitution, as to their terms and compensation, the organic law has purposely left them to be made, modified or unmade, as the people through their Legislature may deem best for the public interest. Neither *Hoke v. Henderson* nor any subsequent case has come within sight or hailing distance of the defendant's contention, that an office created by one Legislature can, in no exigency, whatever the urgency or the manifest wisdom of the step, be abolished by another, unless the institution to which it is attached is abolished, for this is his naked contention, stripped of its superfluities, if it is true that, inasmuch as essentially the same duties in carrying on the institution must be performed, therefore the office is still in existence.

If this be sound doctrine, it is an absolutely new doctrine, and there is a paradise ahead for legislative officeholders, who, like Milton's fallen angels—

"Can only by annihilation die."

The decision in this case is the opposite of the civil service which obtains in the Federal Government and in many of the States. That permits the removal of the heads of departments, through which
(391) means the policy of government is changed at will, but protects the subordinates, who are appointed and retained for merit. This forbids the change of the heads and leaves the subordinates removable at will. Besides, civil-service laws are sustained so long only as the people endorse that system by reëlecting Legislatures and Congresses in

its favor. It is not beyond legislative action, as the defendant contends that he is. If the office is abolished, of course, the defendant is entitled to no salary, but even if the Court could hold that the defendant is still in office after the Legislature has decreed its abolition, "no money can be drawn out of the State Treasury except by authority of law." There is no law allowing the defendant any salary. It is expressly repealed. In *Hoke v. Henderson* it is said that unless it could be seen that the object was to starve the officer out, the act could not be held unconstitutional, and no such intent is here shown, for if it is true, as defendant contends, that his office has been divided among twenty-one directors, who are discharging, as he says, the functions he formerly discharged, and he must reassume it from them, then he is only entitled to the salary allowed them as his substitutes, and it would take an expert accountant to state how much of the salary allowed them is for the duties devolved upon them before the abolition of the middle-man, and how much is added by reason of dispensing with his services, for it is unquestionable law that the Legislature can at will reduce the salary of any officer, the reduction of whose compensation is not forbidden by the Constitution. In *Hoke v. Henderson* it is further said (15 N. C., at bottom of page 27) that if the Legislature should refuse salaries to officers elected by it, the office remaining still in force, "while such act would be unconstitutional, the courts could give no remedy, but it must be left to the action of the citizens to change unfaithful for more faithful representatives." Even if the Court could hold that the (392) removal of the defendant was unconstitutional, it is expressly held in the late case of *Garner v. Worth,* 122 N. C., 250, that no court could enforce the payment of any salary to him, most especially when, as here, the sovereign acting through the Legislature has forbidden it. This is true as to an admittedly valid State bond under the Great Seal, which is certainly of as high dignity as a salary which the Legislature has expressly forbidden to be paid, which, therefore, the treasurer can have no power to pay, and the courts can give him none. He holds the people's money, to be paid out only when the Legislature directs. The courts can only issue a *mandamus* to the treasurer when the statute directs payment—never when the statute is silent, and certainly not when it forbids payment.

In *Cotten v. Ellis,* 52 N. C., 545, the Court puts its decision expressly on the ground that the office was created by the United States Government, and, therefore, unlike a legislative office, the State could not abolish it, and added, that if they were to give a *mandamus* to pay the salary, they were not sure they could enforce it. In *Garner v. Worth, supra,* it is held, the Court cannot, except where the salary is prescribed

by the Constitution. In *Bailey v. Caldwell,* 68 N. C., 472, also, the decision rested upon the ground that, the office having been created by the Constitutional Convention, the Legislature could not abolish it.

If the defendant is entitled to any salary, it is an equitable part of that allowed those he asserts are the incumbents placed in his office. It is the new salary, not the old one, to which he is entitled.

Besides, if the defendant had been superintendent of a private corporation under a four-years contract, and he was, without cause, discharged therefrom, no court would reinstate him in office; his remedy would be to recover as damages the salary for the unexpired time, reduced
(393) by whatever he made, or ought to have made, at his regular vocation during that time. There is no decision holding that this is not the remedy of a legislative officeholder who is evicted illegally. It must be so, for the ground of his right is placed by *Hoke v. Henderson* expressly on contract, and the contract in his favor is only as to emoluments, and for breach of contract the measure of damages is the same as to an individual and the State, the difference being solely in the procedure, which in the latter case must be by petition in the Supreme Court. The State cannot be at greater disadvantage than a private corporation or an individual. It is different as to an office created by the Constitution, for that does not rest on contract (Cooley Const. Lim. and Black Const. Law, *supra*), but the Legislature is simply prohibited from meddling with it. Except where restrained by the Constitution, the Legislature is all-powerful as the representative of the people. As was well said by *Faircloth, C. J.,* in *Ewart v. Jones,* 116 N. C., 570 (since cited with approval by *Douglas, J.,* in *Caldwell v. Wilson,* 121 N. C., 470): "Under our form of government, the sovereign power resides with the people and is exercised by their representatives in the General Assembly. The only limitation upon this power is found in the organic law as declared by the delegates of the people in convention assembled." There is no constitutional inhibition upon one Legislature abolishing an office created by the Legislature, except the restraint read into the Constitution by *Hoke v. Henderson,* that while the Legislature can abolish, it cannot give the emoluments of the office to another if it is continued in existence. This rests solely upon the ground that to do so would be a breach of contract. As such, there can logically be no remedy by reinstatement, but simply by a proceeding for damages, the measure thereof to be ascertained as in case of any private individual or corporation.

The line of decisions, like *McKee v. Nichols,* 68 N. C., 429,
(394) that all appointments to office must be by the Governor, was rendered null and is now obsolete as to offices created by statute, by virtue of the amendment to the Constitution in 1875. *Ewart v. Jones,* 116 N. C., 570.

In making the laws, the Legislature is acting within their exclusive province and discharging a duty for which they have been elected. It is a cardinal principle that the courts cannot enter the legislative department and set aside a law they have made, unless it is clearly in conflict with the Constitution. "If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Sutton v. Phillips,* 116 N. C., 502. To do more than this would be usurpation by the courts.

On a careful review it would seem that the ruling of his Honor below was in every particular a just and true declaration of the law under all our previous decisions, to wit, "That the office of the Superintendent of the Penitentiary, created by the act of 1897, has been abolished by the act of 26 January, 1899; that said office has not been substantially reëstablished in another form, nor has its emoluments, powers and duties been conferred on others for the purpose of ousting the defendant; that by the act of 26 January, 1899, the General Assembly has made a radical change in the method of managing and conducting the penal institutions of the State, which it was clearly within the scope and power of the legislative department to do, and that said act creates a corporation with all necessary and sufficient powers to carry into effect the purpose of the act," and should be affirmed.

*Cited: Cunningham v. Sprinkle, post,* 641; *Bryan v. Patrick, post,* 661, 663; *R. R. v. Dortch, post,* 664, 675, 679; *Wilson v. Jordan, post,* 692, 694; *Cherry v. Burns, post,* 765; *Nichols v. Edenton,* 125 N. C., 16; *Greene v. Owen, ib.,* 215, 225; *McCall v. Webb, ib.,* 248; *Abbott v. Beddingfield, ib.,* 263, 287; *Dalby v. Hancock, ib.,* 327; *White v. Auditor,* 126 N. C., 589, 607, 613; *Taylor v. Vann,* 127 N. C., 251.

*Overruled: Mial v. Ellington,* 134 N. C., 159, 163, 166, 168; *Salisbury v. Croom,* 167 N. C., 228; *S. v. Knight,* 169 N. C., 350.

(395)

ROMULUS R. ROSS, ADMR. OF J. M. PICKETT, v. NEW YORK LIFE INSURANCE COMPANY.

(Decided 11 April, 1899.)

Where the application for life insurance contained the statement, "That the company shall incur no liability under this application until it had been received, approved, the policy issued thereon by the company at the home office, and the premium has been actually paid to and accepted by the

company or its authorized agent during my lifetime and good health," the application was not accepted, no policy issued, and the first payment was not made: *Held*, that the contract of insurance was not complete, as the minds of the parties never met.

ACTION upon a money demand, tried before *Allen, J.*, at July Term, 1898, of RANDOLPH.

The facts are undisputed and appear in the opinion.

On motion of defendant, the plaintiff was nonsuited, and appealed.

*No counsel for appellant.*
*Jones & Tillett for defendant.*

FAIRCLOTH, C. J. Plaintiff's intestate, on 27 September, 1895, made application for life insurance with defendant's agent, and gave his note for the first payment. The application and note, which was accepted as cash, were forwarded to the home office. The application contained this statement: "That the company shall incur no liability under this application until it has been received, approved, the policy issued thereon by the company at the home office, and the premium has been actually paid to and accepted by the company or its authorized agent during my lifetime and good health." Plaintiff's intestate became sick with fever in November and died on 15 December, 1895. The application was not accepted, no policy issued, nor was the first payment made. On next January the defendant tendered the note to plaintiff, who refused to receive it, and after its maturity demanded the payment of the policy. When plaintiff rested, his Honor, on motion, held that plaintiff could not recover, and ordered a nonsuit. There was no error, as the facts did not show a contract, and as the facts were undisputed, there was nothing for the jury. The minds of the intestate and defendant never met. *Ormond v. Ins. Co.*, 96 N. C., 158; *Whitley v. Ins. Co.*, 71 N. C., 480. Even long delay by the defendant could not presume an acceptance. The natural and legal inference is to the contrary. *Moore v. Ins. Co.*, 130 N. Y., 537. The student may read on this question *Jacobs v. Ins. Co.*, 71 Miss., 656-8; *Paine v. Ins. Co.*, 51 Fed., 591; *Elason v. Hinshaw*, 4 Wheat., 227; *Carr v. Duval*, 14 Peters, 81; *Steinle v. Ins. Co.*, 81 Fed., 489, and *McCully v. Ins. Co.*, 18 W. Va., 782.

(396)

AFFIRMED.

(397)

SLINGLUFF, JOHNS & CO. v. HALL & PEARSALL AND W. A. HOUSTON.

(Decided 11 April, 1899.)

*Attachment—Mortgage—Bill of Sale—Continuance—Nonpreference Act of 1895 (repealed).*

1. Granting or refusing a continuance is a matter of discretion and not reviewable, unless the discretion is palpably abused.

2. Where an insolvent debtor, on 6 December, 1895, executed a mortgage to secure $500, money then loaned to him, and also to secure $923.86, prior indebtedness to the same party, and on 19 December, 1895, executed a bill of sale on a portion of the mortgaged property to the same party in payment of said $923.86, both instruments being registered on the latter date, and on 9 January, 1896, another creditor had an attachment levied on part of the same property, contending that both instruments were mere securities for the preëxisting debt, and therefore void under the Nonpreference Act of 1895, the true issue, decisive of the case, was submitted to the jury: Was the bill of sale an absolute sale of the property to pay the preëxisting debt of $923.86?

ACTION with warrant of attachment, tried before *Robinson, J.*, at December Term, 1897, of DUPLIN.

*Stevens & Beasley and Armistead Jones for plaintiffs.*
*Simmons, Pou & Ward for defendants.*

(398)

FAIRCLOTH, C. J. The plaintiffs attached certain property in the hands of defendants which had been conveyed to them by W. A. Houston, intestate of defendant Sandlin.

On 6 December, 1895, said Houston executed a mortgage to defendants Hall & Pearsall to secure $500 cash and $923.86 of prior indebtedness, conveying certain property therein mentioned, and on 19 December, 1895, sold and conveyed by a bill of sale a part of the same property to said Hall & Pearsall in payment of said $923.86. Both of said instruments were recorded on 19 December, 1895. The attachment was levied on some of said property.

On 18 February, 1896, the plaintiffs filed their complaint, alleging, among other things, that said Houston was insolvent and that said conveyances were made with intent to cheat and defraud the plaintiffs and other creditors of said Houston. Hall & Pearsall, on 12 February, 1897, filed an answer, denying the allegations of fraud, etc.

On 13 December, 1897, the defendant Sandlin filed his answer, substantially the same as the answer of Hall & Pearsall, denying the allega-

tion of fraudulent intent in said conveyances. Sandlin's answer was filed on the first day of court at December Term, 1897, and the trial was had on the same day.

(399) Plaintiffs' counsel moved for a continuance of the cause, on the ground that Sandlin's answer was just then filed, and for time to answer the same. The court refused the motion and proceeded with the trial, and plaintiffs excepted.

Issues:

1. Was the bill of sale executed to secure a preëxisting debt of $500? Answer: "No."

2. Was the bill of sale intended as a further or continuous security for the debt secured in the mortgage of 6 December, 1895? Answer: "No."

3. Was the effect of the bill of sale and the mortgage executed by Houston to Hall & Pearsall on 19 and 6 December, respectively, an assignment of defendant Houston's property? Answer: "No."

4. Did the defendant Houston assign, dispose of, and secrete his property with the intent to defraud the plaintiffs and other creditors? Answer: "No."

5. Did the defendants, Hall & Pearsall, participate in the intent of Houston to defraud his creditors? Answer: "No."

6. Was the bill of sale to Hall & Pearsall, on 19 December, 1895, an absolute sale of the property to pay the preëxisting debt of Hall & Pearsall of $923.86? Answer: "Yes."

(400) Plaintiffs requested his Honor to charge the jury as follows: "That if the jury shall believe from the evidence that the bill of sale was given to secure the amount or any part of the original debt intended to be secured by the mortgage, the relation between the parties would not be changed, and the bill of sale is void, or rather in effect it was a security for the debt, and void."

In lieu of the above prayer for instructions the court charged the jury, that if they should find that bill of sale of 19 December was not a *bona fide* sale of the property therein described in payment of the $923.86, but was intended by the parties as a further security to any of the debts mentioned in the mortgage of 6 December, they should answer the first issue "Yes."

For that his Honor erred in giving the instruction in lieu of the one asked.

The plaintiffs, in their sixth prayer, requested the court to charge, that if the bill of sale was intended for further security, the relation of mortgagor and mortgagee was not changed, and that the bill of sale was void under the Nonpreference Act of 1895. This was fully given in the

fifth prayer and other parts of the charge, and there was no error in failing to give the sixth prayer. Judgment was entered for the defendants, and the plaintiffs excepted.

Granting or refusing a continuance is a matter of discretion and not reviewable (*Bank v. Mfg. Co.,* 108 N. C., 282) unless the discretion is palpably abused. *McCurrie v. McCurrie,* 82 N. C., 296.

In the case before us the answer of Sandlin was in substance the same as that of Hall & Pearsall, which had been on file for several months, and Sandlin's answer raised no additional and material issue. The plaintiffs must be presumed to have come prepared to meet that issue, and it seems that a continuance was unnecessary, and his Honor so held. That exception is not well taken.

The sixth instruction was given, not in words, but in substance. (401)

The plaintiffs' contention is, that the mortgage was void, under the act of 1895, and that the bill of sale was of the same character and likewise void, as they were recorded on the same day and made with the same intent. Whether the bill of sale, 19 December, 1895, was an *absolute* sale of the property to pay the preëxisting debt, was submitted to the jury, and the answer was "Yes." That finding determined against the plaintiffs the substance of their contention.

Whatever might have been the result, if nothing but the mortgage had appeared, the verdict on the sixth issue establishes the defendants' right to the property. *McKay v. Gilliam,* 65 N. C., 130.

The registration of these instruments on the same day, i.e., 19 December, 1895, was an incident and does not affect the character of the contracts set out and so registered. The attachment issued 27 December, 1895.

On the above we see no error, and a discussion of other exceptions would not change the result.

NO ERROR.

*Cited: S. v. Dewey,* 139 N. C., 560.

(402)

HALL & PEARSALL v. A. J. COTTINGHAM AND G. B. PATTERSON.

(Decided 11 April, 1899.)

*Assignment—Schedule—Preferred Debts.*

1. A schedule of preferred debts, properly verified and filed within the five days limited by law, is good as to all preferences therein sufficiently described, and if any such preferences are valid, the schedule itself is sufficient to support the assignment. *Brown v. Nimocks*, at this term.

2. Debts invalid for want of proper description are simply eliminated from the schedule and fall back into the class of unpreferred debts. While the requirements as to name of the creditor, amount, date and consideration of his debt are *mandatory*, they will be reasonably construed in carrying out the law. Preference as to taxes is valid, as it does not come within the intent of the law.

ACTION to vacate an assignment and for injunction and receiver, heard before *Robinson, J.*, at February Term, 1899, of ROBESON.

(403) *McLean & McLean for plaintiffs.*
*Patterson & McLean for defendants.*

DOUGLAS, J. This is an action brought to set aside a deed of assignment, executed 1 November, 1897, by the defendant Cottingham to his codefendant, Patterson, as trustee, and for injunction and receiver. The assignment provided for certain preferences which were set out in the schedule filed by the assignor in the office of the clerk of the Superior Court on 5 November, 1897, within the five days prescribed by the statute. On 18 January, 1899, a temporary injunction, or restraining order, was issued by his Honor, *Judge Robinson,* but on the hearing at February Term of Robeson Superior Court judgment was rendered dissolving the temporary restraining order theretofore granted, and refusing the motion for receiver and injunction.

There appears to be no dispute as to the facts, and the only question argued by counsel was as to the sufficiency of the schedule of preferred debts, and the effect thereon of the invalidity of certain preferences. These questions have been fully considered in *Brown v. Nimocks, post,* 417, and the principles therein laid down govern the case at bar. We are of the opinion that a schedule of preferred debts, properly verified and filed within the five days limited by law, is good as to all preferences therein sufficiently described, and that if any of such preferences

are valid, the schedule itself is sufficient to support the assignment. Those debts, invalid for want of proper description, are simply eliminated from the schedule, and fall back into the class of unpreferred debts. They lost nothing of their previous character as debts, but acquire no preference whatever under the assignment.

It remains for us only to classify the preferences in the schedule before us. Such a preference, to be valid, must set forth the name of the creditor, with the amount, date and consideration of his debt. All of these requirements are *mandatory,* but they will be reasonably construed in carrying out the true intent and spirit of the law. (404) We think that the preference as to taxes is valid, as it does not come within the intent of the law. Any creditor can easily ascertain their amount and all particulars therewith by reference to a *public record,* and it would be difficult ever to bring public taxes under the head of feigned or collusive debts. We think that the second preference is also good, which is as follows: "J. A. Eddie, $206; note, date 16 June, 1897, due and payable 16 December, 1897, being the amount due for material for dry-kiln." We hold that, in the absence of any statement to the contrary, the date of the note is presumed to be the date of the transaction, not as an arbitrary rule of law, but because we think the ordinary business man would so regard it, and we would feel that he had complied with the law by giving the date of the note, when the entire transaction took place at the same time. The object of the statute is not to defeat preferences, but to regulate them by requiring the assignor to file in a public office, accessible to all, under the sanctity of his oath, a statement giving such description of the preferred debt as will enable any creditor to conveniently ascertain its *bona fides.* Neither the schedule nor the deed itself adds anything to the inherent honesty or dishonesty of a debt, but affects only its order of payment. Neither is conclusive of its validity, which can be attacked by any interested party, and, if showed to be feigned or illegal, it would have neither preference nor existence. If properly set out in the schedule, it has only a *prima facie* right of preference, subject to attack; but if excluded from the schedule, either in fact or by implication of law, its preference is forever lost. There are several preferences which appear to us sufficiently described, but we have shown enough to sustain the schedule and therefore the assignment.

As the judgment of the court below simply dissolved the (405) restraining order theretofore granted, and taxed the plaintiff with the costs of the action, the question of the validity or invalidity of each particular item of the schedule is not properly before us.

As the schedule is good, at least in part, it is sufficient to support the assignment, and his Honor properly refused to interfere in its execution. The judgment is

AFFIRMED.

*Cited: Sutton v. Bessent,* 133 N. C., 564, 565.

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J. B. SPRINKLE v. KNIGHTS TEMPLAR AND MASONS LIFE INDEMNITY COMPANY.

(Decided 11 April, 1899.)

*Insurance—Application—False Representation—Fraud.*

1. It is required of an agent that he be found faithful in the performance of duty and the protection of the interests of the principal committed to his charge.

2. Where the replication alleges, and there is evidence on the part of the plaintiff tending to prove, that the application contained a false representation in regard to a material matter, knowingly inserted by the insurance agent, and signed by the insured—such false representation was a fraud upon the company and vitiated the policy.

3. Knowledge of the fraud by the agent in such case is not constructive notice to the principal—nor does the receipt of the premium amount to a waiver in the absence of actual notice. The premium, however, should be returned.

ACTION upon an insurance policy on the life of G. R. Sprinkle, in which plaintiff was the beneficiary, tried before *Greene, J.,* at Fall Term, 1898, of MADISON.

(406) *W. W. Zachary and George A. Shuford for plaintiff.*
*J. M. Gudger, Jr., and J. H. Merrimon for defendant.*

MONTGOMERY, J. On 15 October, 1896, a policy of insurance was issued by defendant company to George R. Sprinkle, the beneficiary named being the father of the insured and the plaintiff in this action. On 24 February, 1897, a little more than four months after the date of the policy, the insured died. This action was brought by the plaintiff, the beneficiary, to recover the amount specified in the policy. It is not denied that the statements and representations embraced in the answers of the insured, as they appear in the writing called the application, con-

cerning his health prior to and at the time when the application was made, were material to the risk to be assumed by the company, and that the insurance was issued upon them, and upon his agreement at the end of the application and answers, that if the same are in (407) any respect false the policy to be issued upon them to be void. The defendant, in its answer, averred that the policy was void, because the insured, in his application, made and signed false and fraudulent answers and representations to questions put to him concerning his health prior to and at the time of the application, and particularly as follows: In answer to the question, "Have you had or been afflicted since your childhood with any of the following complaints: disease of the lungs or pulmonary complaints, spitting or raising of blood, bronchitis, asthma, rheumatism, general debility, or any serious disease?" he answered "No," when, in truth and in fact, he had had serious pulmonary complaints with hemorrhage and also pleurisy. In his replication the plaintiff alleged that the insured made truthful answers to the questions in the application, stating at the time to Parker, the defendant's agent, that he had had the measles, spitting or raising of blood, pleurisy, and grippe, and that he had had a serious illness, but that in the face of that statement, Parker, the agent, wrote in the application the answer to the question, "No"—that is, that the insured had had no such diseases.

On the trial the plaintiff testified that he was with his son, the insured, when the application was made and signed by the insured, and that he knew the insured had had the measles, pleurisy, and grippe, and that the insured had told him that he had had hemorrhages. The physician who made the physical examination (Dr. Jay) was present when the application was made, and testified on the trial that he heard the insured say, in the hearing and presence of the agent who was filling up the application for the insured to sign, that he (the insured) had had hemorrhages, had coughed and spit up blood, and that he had had the measles and also pleurisy; that he (Dr. Jay), in the course of the examination of the insured, when he came across the ques- (408) tion, "Has the person had any serious illness?" stopped to discuss the question with the agent, he knowing that the applicant had had serious diseases, when he was told by Parker not to write down the true answer, because the policy would be rejected by the company if he did, but to write down a false answer—the answer that the insured had had no serious disease; that the insured heard all that Parker said; that he wrote down the falsified answer and knew that it was false when he wrote it.

Now upon the pleadings and that evidence and a great deal more on the condition of the health of the insured at and before the time when the application was made, his Honor instructed the jury in substance

that if they should find that at the time the insured made application that informed Parker, the agent of the defendant, that he had had before that time a serious case of measles, grippe, pleurisy and spitting of blood, and that Parker instead of writing truthful answers to the questions concerning the health of the insured, falsified the answers of the insured, then there would be no fraud on the part of the insured; that the knowledge of Parker became the knowledge of the company, and that if the company received the premiums it waived all objection with regard to those matters of which it had implied knowledge. That instruction, as a whole, was misleading and erroneous. The testimony of Dr. Jay tended to prove that the agent Parker practiced a fraud, originated it, on the defendant in his procurement of the policy. Parker testified that he wrote the answers in the application truthfully and as they were made by the insured, and evidence of his good moral character was introduced. The testimony of Dr. Jay, though, however suspicious it might appear, was evidence in the cause and it tended to prove fraud (409) and deceit on the part of Parker. The evidence of Jay tended to prove that himself the examining physician, Parker, the agent, and the insured all engaged in a plan to cheat and defraud the defendant. Parker professed to be acting as the agent of defendant, and the law required of him that he should be faithful to his trust and to do no act that would result designedly to the injury of his principal. If Jay's evidence was to be believed, Parker was acting directly and purposely against his principal's interest. He must have known that if the company could have knowledge of his conduct it would have repudiated the entire transaction, for according to Jay's evidence, the whole scheme was based on fraud and intended from the start to deceive and defraud the defendant. Parker was acting entirely against the interest of the company, and for himself or some one else, and by no rule of law could he be the agent of the defendant in such a transaction. The evidence of Jay tended to prove that Parker, the professed agent of the defendant, set deliberately to work to have his principal issue a policy of insurance upon the life of a man whom he knew had diseases which debarred him from the benefits of insurance in the defendant's company.

The plaintiff's counsel cited here and relied on the cases of *Bergeron v. Ins. Co.,* 111 N. C., 45, and *Follette v. Accident Asso.,* 110 N. C., 377; but we think that there is a substantial difference in the nature of the facts in those cases and the facts of this case. In those cases there was no actual fraud charged by the company upon either the insured or the agent. In the first cited case it was stipulated in the policy that the insurance should be void if the building stood on leased ground and it appeared that that fact was known to both the agent and the insured, but that the agent said it made no difference. Although the company

itself had no actual notice of the facts, it was held that in such (410) case the company had implied knowledge of the acts of the agent and that it had waived the condition in the policy or was estopped by the act of its agency. No bad faith was charged and the irregularity was treated in the opinion of the Court as a mistake or blunder of the agent, and for which the insured should not be made to suffer. In the other case the local agent who had knowledge of the deafness of the applicant sent on to the company the application in which the applicant had stated that he had never had any bodily or mental infirmity except an attack of rheumatism. The knowledge of the agent of the deafness of the insured was held to be impliedly known to the principal, and that the company had waived the condition.

In the case before the Court the evidence, a part of it, went to show a conspiracy to cheat and defraud the company, and that the leader of the conspiracy was the professed agent of the company. This case does not fall within any of our decisions in reference to the largely increased powers of local agents of insurance companies, growing out of changed business conditions on their part. The view of the law which the plaintiff's counsel contend that we should take in this case would result in the destruction of all business which is conducted through the means of agency, and in the overturning of one of the chief purposes for which all agencies are allowed to be constituted—the faithful performance of duty by the agent and the protection of the interests of the principal, committed to his charge.

We stand by the decisions in *Bergeron v. Ins. Co.* and *Follette v. Accident Asso., supra,* but we can go no further in that direction. This view of the case makes it unnecessary to consider the other questions involved. There was error and there must be a new trial. The defendant must return the premium before he will be allowed to enter upon a new trial.

NEW TRIAL.

*Cited: S. c.,* 126 N. C., 679; *Grier v. Ins. Co.,* 132 N. C., 546; *Fishblate v. Fidelity Co.,* 140 N. C., 596; *Underwood v. Ins. Co.,* 152 N. C., 275; *Powell v. Ins. Co.,* 153 N. C., 128; *Gardner v. Ins. Co.,* 163 N. C., 378; *Collins v. Casualty Co.,* 172 N. C., 548; *Trust Co. v. Ins. Co.,* 173 N. C., 563.

(411)
ELIZA J. MITCHELL v. JOHN R. SIMS, SHERIFF OF PERSON COUNTY.

(Decided 11 April, 1899.)

*Evidence—Claim and Delivery—Attachment—The Code, Section 322.*

1. Under section 322 of The Code there is no limitation or restriction put upon a plaintiff who seeks to recover personal property and have the same immediately delivered to him, except that the same has not been taken for tax, assessment or fines pursuant to a statute, or seized under an execution or attachment against the property of plaintiff, or if so seized, it is by statute exempt from such seizure.

2. As between a judgment creditor and the defendant, the latter will not be allowed to obstruct the execution by a writ of replevin—but in the case of a third person, the right of property is an open question, and there can be no reason why a third party, alleging ownership, should not have the same remedy against one wrongdoer as against another.

3. In the law regulating attachments under The Code, the creditor has no right to seize property in the hands of an officer under process of the court, or to take it out of the possession of such officer, as is given to claimants for the recovery of personal property under the provisions of The Code in claim and delivery proceedings.

4. Declarations of a husband, in possession of personal property, as to the right of his wife thereto, is competent evidence in a controversy between her and a party claiming under him.

CLAIM AND DELIVERY proceedings for a mule, tried before *Timberlake, J.*, at August Term, 1898, of PERSON.

(412) *Kitchin & Kitchin and J. W. Graham for plaintiff.*
*Boone & Bryant for defendant.*

MONTGOMERY, J. The husband of the plaintiff, after he had left his home and was on the eve of leaving the State, exchanged a horse, and some other personal property admitted to be his own, with Satterfield and Lunsford, for a mule and $40 to boot. The mule was levied on by the defendant as sheriff of Person County under attachment proceedings sued out by the creditors of the husband. Afterwards this action was begun by the plaintiff against the defendant for the recovery of the mule, alleging that the same was her property. On the trial she
(413) testified that the horse was her property, and that when she heard of the trade by the husband with Satterfield and Lunsford, she notified them and claimed the mule. She offered to prove by both Satterfield and Lunsford that at the time of the exchange the husband directed them to send the mule to the plaintiff unless it could be sold

for $60, and in that case to send the $60 to the plaintiff. His Honor refused to admit the evidence. We think it competent and that it should have been received. The husband was in possession of the property, and what he said at the time of the exchange was some evidence that the plaintiff had some right or interest in the property and was entitled to the possession of it. The defendant in his answer averred that he had held the mule under the levy of attachment until it was taken from him by the plaintiff under the proceedings in this action, and he insisted that this action could not be maintained by the plaintiff for the reason that at the time when it was seized by the plaintiff it was *in custodia legis.* This case, then, presents again for consideration the construction of the chapter of Code (Claim and Delivery of Personal Property) in respect to the cases that come within its operation.

In *Jones v. Ward,* 77 N. C., 337, the Court held that the words of the statute, Code, sec. 322, were as broad as they well could be, and included any case that could be imagined, with the specified exceptions in subdivision 4 of that section. In that case there had been a levy under personal property by a constable, and he had taken the same under an execution properly issued to him. The plaintiff, not the judgment debtor in the execution, instituted against the constable an action for the possession of the property levied upon, and sought and had the immediate delivery of it to him. This Court held that the action could be maintained; that the statute would be a prohibition against a debtor in an execution whose property had been seized under execution, from (414) claiming the same by a suit for its recovery against the officer who had made the levy, but that a third person would have the right to do so. In the case of creditor and debtor, the Court said in that case: "The creditor has established his right to the debt by judgment, and the defendant is not allowed to obstruct the execution by writ of replevin." In the case of a third person, the Court said: "The right to the property is an open question, and there can be no reason why a third party, alleging ownership, should not have the same remedy against one wrongdoer as against another." The Court further said on this point, in that case, that that part of the affidavit which the plaintiff was required to make, viz.: "That the property was not seized under an execution or attachment against the property of the plaintiff, or, if so seized, that it is exempt by statute," applies to an action by the defendant in an execution, and leaves the case of a third person to come under its broad terms.

*McLeod v. Oates,* 30 N. C., 387, seems to be at variance with the case of *Jones v. Ward, supra,* but when carefully examined it will be found not to be so. In *McLeod v. Oates* the action was brought under chapter 111 of the revised statutes, having been for the replevy of a slave levied on by a constable under execution, and the Court said that "the old

authorities all agree that goods taken in execution from a court of record are not repleviable," and held to that view of the law. But the Court said in *Jones v. Ward,* that the case of *McLeod v. Oates* was not an authority on the construction of The Code of Civil Procedure, "which professed to establish a new order of things, and must be judged of by its own language." The language of the revised statutes, ch. 101, in reference to the scope of the remedy therein provided, was, "that
(415) writs of replevin for slaves shall be held and deemed to be sustainable against persons in possession of such slaves in all cases where actions of detinue or trover were now proper." The remedy there was restricted to cases where the action of detinue or trover was proper, and, as the law was then understood, those actions did not apply where the property was in the hands of an officer under the process of the courts. But under section 322 of Code there is no limitation or restriction put upon the plaintiff, who seeks to recover personal property and have the same immediately delivered to him, except that the same has not been taken for tax, assessment or fines pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if seized, that it is by statute exempt from such seizure. The language of The Code is immensely broader in its scope than the language of the revised statutes on the subject in hand.

The case before the Court does not conflict with what was decided in *Williamson v. Nealy,* 119 N. C., 339. In that case the sheriff, who already held the property under an order made in claim and delivery proceedings, undertook to levy upon it under a warrant of attachment in favor of a creditor against the defendant in the claim and delivery proceedings. The Court held that the levy under the attachment was invalid because by such a proceeding the process in the claim and delivery proceeding could not be interfered with, and that the property had to be delivered to the claimant under the order of the Court to that effect. In other words, in actions for the recovery of personal property when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon his executing the bond required by law, to take the property from the posses-
(416) sion of any person, even from an officer of the law, unless it has been taken for tax, assessment or fine pursuant to a statute or seized under an execution or attachment against the property of the plaintiff . . . even though such a course results in the obstruction of the process of the courts to the extent of having tried the title to personal property claimed by a third person, where the same has been levied upon or seized under execution or attachment against the property of the plaintiff. But in the law regulating attachments under The Code, the creditor has no right or privilege given him to seize the

property in the hands of an officer under the process of the courts, or to take it out of the hands of such officer, as is given to claimants for the recovery of personal property under the provisions of The Code.

There was error in the trial below, for which there must be a NEW TRIAL.

*Cited: Bowen v. King,* 146 N. C., 392.

(417)

BROWN & CO. (INCORPORATED) v. R. M. NIMOCKS AND W. S. COOK, ASSIGNEE OF R. M. NIMOCKS.

(Decided 11 April, 1899.)

*Assignment—Schedule—Preferred Debts—Acts of 1893, Chapter 453.*

1. The failure to file with the clerk of the Superior Court, within five days after the filing for registration of the deed of assignment, the verified schedule of preferred debts, required by the act of 1893, renders the assignment null and void.

2. The essential requisites to be stated in the schedule are, the name of the creditor and the amount, date, nature of the debt—in their absence, the debt remains a debt, but has no preference. The term *"nature of the debt"* is descriptive of its character and consideration—as for example, taxes, money borrowed, medical attendance, or merchandise, etc., as the case may be. If debtor is bound as surety only, it should be so stated. The mere form of words is immaterial, but there must be a substantial compliance with the statute.

3. Preferences insufficiently stated do not vitiate the entire schedule—they are simply eliminated from the schedule, leaving it in full force as to the others. *Brannock v. Brannock,* 32 N. C., 429.

ACTION upon a money demand, accompanied with proceeding in attachment, tried before *Bynum, J.,* at November Term, 1898, of CUMBERLAND.

There was no dispute about the debt. The question was as to the validity of the attachment, and that turned upon the legality of the deed of assignment from R. M. Nimocks to W. S. Cook, especially in reference to the sufficiency of the schedule of preferred debts filed by Nimocks; as to this the following issue was submitted:

"Was a duly sworn schedule of preference filed by defendant (418) Nimocks 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?"

The alleged defect was the insufficiency of the description of some of the preferred debts in not stating the consideration, and the plaintiffs contended if any of them were invalid the defect vitiated the whole, and subjected the property to their attachment.

The defendants introduced no evidence. The court instructed the jury, if they believed the evidence, to answer the issue, "No," which they did. Judgment was rendered in favor of plaintiffs for their debt; also vacating the defendants' deed of assignment and sustaining the attachment. Defendants excepted and appealed.

*H. McD. Robinson for plaintiffs.*
*H. L. Cook for defendants.*

DOUGLAS, J. The main object of this action is to set aside an assignment made by the defendant Nimocks to the defendant Cook, on account of an alleged defective schedule of preferred debts; and in the present status of the case this seems the only question necessary for our consideration. The issues were submitted and answered as follows:

1. Is the defendant Nimocks indebted to the plaintiff Brown & Co. (incorporated) by virtue of the deposit made in trust with him by it, and if so in what sum? Answer: Yes, $1,242.68 with interest on $1,225 from 6 August, 1897.

2. Was a sworn schedule of preferences filed by defendant Nimocks 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.

(419) By the consent of the parties the court answered the first issue as above, and the court instructed the jury to answer the second issue, "No" if they believed the evidence. There were two distinct questions in the second issue, one of fact as to the actual filing of the schedule and the other of law as to its sufficiency when filed, which might have tended to confuse the jury if left to their determination. As the issue was answered by the court and the schedule is admitted to have been filed, his Honor evidently intended to pass only upon its sufficiency. It is well settled in this State that the failure to file with the clerk of the Superior Court within five days after the filing for registration of the deed of assignment the verified schedule of preferred debts required by the act of 1893 renders the assignment absolutely null and void. *Bank v. Gilmer,* 116 N. C., 684; *S. c.,* 117 N. C., 416, 426; *Frank v. Heiner, ib.,* 79, 83; *Glanton v. Jacobs, ib.,* 427; *Cooper v. McKinnon,* 122 N. C., 447, 449.

The questions now before us are: (1) Does the schedule as filed comply with the terms of the statute by sufficiently stating the nature of

each preferred debt? and (2) Does the failure to sufficiently specify some of the debts vitiate the entire assignment, or only destroy the preference as to these particular debts?

Section 1, chapter 453, Laws 1893, is as follows: "That upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once; a schedule of all preferred debts shall be filed under oath by the assignor in the office of the clerk of the Superior Court of the county in which such assignment is made, *stating the name of the preferred creditors, the amount due each, when the debt was made, and the circumstances under which said debt was contracted,* and said schedule shall be filed within five days of the registration of such deed of assignment." That part italicized by us explains itself, (420) except the last clause, which we think refers to the nature of the debt and its consideration, as, for example, taxes, money borrowed, medical attendance, or merchandise, as the case may be. We have, then, as essential requisites, the name of the creditor, and the amount, date and nature of the debt. In their absence the debt remains a debt, but has no preference. If the debtor is bound only as surety, it should be so stated, as his creditors might have some rights of subrogation or contribution. The object of the act was to give the creditors a convenient opportunity of ascertaining the nature of the preferences, and to put such information, verified by the oath of the assignor, in such form and place as to be equally accessible to all. While it is entitled "An Act to Prevent Fraudulent Assignments," it had no purpose to prevent honest assignments, nor indeed, to throw around them any unnecessary restrictions, but simply to give those most deeply interested a reasonable opportunity of ascertaining the truth. If a creditor is prevented from making his just debt in the presence of sufficient property of the debtor, he should be told the reason. The assignor is not required to file his schedule during the preparation of his assignment when every minute may count in the race with creditors, but is given five days thereafter during which he can prepare it at leisure and in safety. We do not think that such provisions are unreasonable, and we feel it to be our duty to give them such a reasonable construction as will effectually carry out their beneficial purpose.

The schedule gives the names of all the preferred creditors and the amount of each debt, but in many instances it gives neither the date nor the consideration of the debt, both of which are essential. Thus we think the first preference as follows: "George A. Overbaugh, cash borrowed on my note of 26 April, 1897, for benefit of Thornton Dry Goods Company, $5,000," is sufficient, as it gives the name, amount, date and consideration, as well as the name of the beneficiary. (421)

It is true that in cases of renewal the date of the original debt should also be given, but in the absense of any further explanation the date of the note is presumed to be the date of the creation of the debt.

On the contrary, the second preference, to "M. D. Geddie, amount to his credit on open ledger account, $1,200," is not sufficient, as it gives neither date nor consideration. If it involved a long account the items need not be given, but the assignor could at least state the date and character of the items in general terms, such as "amount or balance due on open ledger account for dry goods (or groceries or both) bought on 1 May, 1876 (or between 1 May and 1 July)," as the case may be. This would give the creditor sufficient information as to the character of the transaction to enable him to investigate it if he saw fit. It may be said that the creditor could apply to the assignee to examine the ledger and thus obtain such additional particulars as he wished; but he might have done that without the schedule and before the passage of the act. Surely the statute means something, and that meaning we must take from its plain and unequivocal words. Where the debt is represented by a note, its consideration should be given the same as an open account, such as borrowed money, merchandise or whatever it may be. The mere statement that a party holds a note of a given date and amount does not "state the circumstances under which said debt was contracted." The defect is so much greater when the date also is omitted, as in the preference to "H. W. Howard, balance due on my note of $5,000, $3,500." The mere form of words is immaterial, but there must be a substantial compliance with the statute.

(422) It is needless to go through the entire schedule, as the debts are easily distinguishable under the above rules; but it is just to the plaintiff to say that in our opinion its debt is sufficiently stated, although perhaps it would have been more fully in accordance with the spirit of the statute if the title of the attachment proceedings had been given.

The only remaining question is whether those preferences insufficiently stated vitiate the entire schedule. We think not. Those failing to comply with the law are simply eliminated from the schedule, leaving it in full force as to the others, and therefore of sufficient validity to support the assignment.

While enforcing the statute in its letter and spirit, we do not intend to place the ban of judicial construction upon honest assignments, which are fully recognized if not favored by our laws, or to base their invalidity upon mere technicalities. The right to convey in trust is a part of the *just disponendi* more or less inseparable from the nature of property, while the right to prefer is simply an extension of the right to pay. Debts are not all of equal dignity, either legal or moral, and this fact is recognized not only by common consent, but by the law itself, as

instanced in statutes prescribing the order of payment in administrations and bankruptcy. Frequently the moral dignity of the debt is greater than its legal status and can be given its effect only by the assignor. Under such circumstances we do not think that an honest and perhaps meritorious creditor should be made to suffer from the bad faith or mere carelessness of the assignor in not sufficiently describing a debt with which his own has no connection whatever. The principle is so clearly stated by *Chief Justice Pearson* in *Brannock v. Brannock,* 32 N. C., 428, that our own views can best be given by a full citation. The Court says: "The operation of the deed was to pass the legal estate with a *separate declaration of trust* for each of the debts therein enumerated. There can be no reason why the declaration of trust (423) in reference to one debt may not stand and the declaration of trust in reference to another be held void. So if a deed contains a declaration of trust in favor of several debts, one of which is feigned, and there be no connection or combination between the creditors to whom the true debts are due and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declaration of trust in favor of the true debts may not stand and the feigned debt be treated as a nullity. Here, the *consideration* which raised the issue, for the purpose of the conveyance, is merely nominal. The debts secured are distinct, due to different individuals, and in no way connected with or dependent on one another—the deed is valid so far as respects the good debt. It would be unreasonable and defeat the object of deeds of trust if they are to be declared void and honest creditors deprived of their security for debts because the debtor, without their knowledge or concurrence, may insert an usurious or feigned debt."

This disposes of the attachment proceedings, all of which were begun after the assignment. As the assignment conveyed to the assignee all of Nimocks' interest in the property, there was nothing left for the plaintiff to attach.

For error in instruction of the court on the second issue,

NEW TRIAL.

*Cited: Hall v. Cottingham, ante,* 403; *Brown v. Nimocks,* 126 N. C., 808; *Friedenwald v. Sparger,* 128 N. C., 448; *Sutton v. Bessent,* 133 N. C., 564; *Odom v. Clark,* 146 N. C., 552; *Powell v. Lumber Co.,* 153 N. C., 57; *Wooten v. Taylor,* 159 N. C., 609.

(424)

A. W. KORNEGAY, PETITIONER, v. JOHN MORRIS.

(Decided 11 April, 1899.)

*Will—Contingent Devise—Survivorship.*

Decision in this cause reported in 122 N. C., 199, is reaffirmed. *Hilliard v. Kearney*, 45 N. C., 229, approved, but distinguished. Code, sec. 1327.

PETITION to rehear dismissed.

*Allen & Dortch for petitioner.*
*Aycock & Danieds, contra.*

FURCHES, J. This case was before us at Spring Term, 1898, when it was considered and decided by the Court (122 N. C., 199) and is now before us upon a petition to rehear. Since it was here before (and at the suggestion of the Court) Frances E. Kornegay has been made a party defendant. But as she files no separate answer, and adopts the answer heretofore filed by the defendant Morris, the situation is not changed, and the facts of the case are the same they were when considered by the Court at Spring Term, 1898.

Upon the rehearing, no facts have been called to our attention which had been overlooked by the Court; nor has any new phase of the law bearing on the case been presented to the Court. But the learned counsel for the petitioner put their case squarely upon the ground of error in the opinion heretofore rendered; and in their brief they base their grounds of error upon *Hilliard v. Kearney*, 45 N. C., 229. They say that the opinion of the Court in this case when here before is in conflict with *Hilliard v. Kearney;* that *Hilliard v. Kearney* is a
(425) correct exposition of the law, and that as the former opinion is in conflict with *Hilliard v. Kearney* it is erroneous.

If the former opinion is erroneous, it ought to be corrected at the first opportunity, which is now.

The case of *Hilliard v. Kearney* was discussed by counsel for plaintiff (petitioner) on the former hearing, and was fully considered by the Court and discussed in the opinion then delivered. And this case *(Hilliard v. Kearney)* was fully discussed by the learned *Chief Justice* in his dissenting opinion.

The case of *Hilliard v. Kearney* is not disputed as being good law, and was a correct exposition of the law of the case then before the Court. But the Court when considering this case on the former hearing was of

the opinion that it was distinguishable from *Hilliard v. Kearney* and that it was not controlled by that case, but by section 1327 of The Code and the opinion in *Buchanan v. Buchanan,* 99 N. C., 308.

Upon a careful consideration of the former opinion and the brief of plaintiff's counsel, we find no error in the former opinion of the Court, and the petition to rehear is

DISMISSED.

*Cited: Rees v. Williams,* 165 N. C., 209; *Patterson v. McCormick,* 177 N. C., 455.

(426)

H. P. WYMAN v. F. W. TAYLOR, JAMES CRATE AND H. A. JOHNSON.

(Decided 11 April, 1899.)

*Grants, Senior and Junior—Entry—Registration—Voidable and Void Reservations.*

1. An entry of public land in 1852, unless followed up by a survey and a grant before 31 December of the second year thereafter, the law declares shall be null and void. Rev. Code, ch. 47, secs. 8 and 9. Even an equitable claim to a grant by reason of an entry will not extend beyond the time limited by law for the perfecting of title.

2. The "*Cherokee lands*" were open to entry and grant with the proviso under the act of 1854-5 that no more than 640 acres should be included in *one entry. Several* entries of 640 acres each made on the same day are permissible, although included in the same survey and grant and in outer boundaries containing the whole—or if irregular, the irregularity is cured by section 2761 of The Code, and the title validated.

3. Reservations in a grant too general to be located are void, and the grant is operative as to the whole, but if they can be located, both grant and reservations are good—the burden of identifying the reservation, where the grant is general, rests upon the claimant to it.

4. A grant conveying more *acreage* than the amount called for in the grant is not void.

5. Parties in interest, entitled to vacate a grant, may bring an action to set it aside—by a direct proceeding, but not by a collateral attack upon the grant; or it may be done under The Code by way of equitable counterclaim, if all the parties are before the court.

6. The Registration Act of 1885, ch. 147 (known as the Connor Act), does not apply to grants—their registration is regulated by The Code, section 2779.

7. The act of 1897, ch. 37, extending the operation of section 2784 of The Code, and validating registration made subsequently to formation of new counties, and changes made in county lines, applies to this case.

(427) ACTION for trespass *quare clausum fregit,* tried before *Robinson, J.,* at August Special Term, 1897, of SWAIN.

*Davidson & Jones for plaintiff.*
*F. A. Sondley, Ferguson & Ferguson, and J. W. Cooper for defendants.*

FURCHES, J. This is an action of trespass *quare clausum fregit,* and the plaintiff not being in possession of the lands trespassed upon, the question of title is involved.

After much skirmishing between the parties as to the location of lines and as to whether defendants could be held liable for trespass committed by their servants, the contest became one of title. Upon this field, each side marshalled its forces and the battle proceeded with great fierceness and for many days.

The plaintiff claimed under a grant to W. L. Love issued in 1872, while defendants claimed under several grants issued to Cooper and Goodhue in 1885. The plaintiff's grant (the Love grant) is shown to cover the *locus in quo,* while defendants' grants (Cooper and (428) Goodhue) also cover the *locus in quo* and plaintiff contends that as his is the oldest grant, he is entitled to recover. But defendants contend that he is not entitled to recover for that the plaintiff's grant is void, for many reasons, which they assign; and for the further reason that their grants are founded upon entries made by one Davis in 1852, and are entitled to a priority to the Love grant, which was not entered until 1871. But it is so manifest that the entries of Davis in 1852 have no bearing on the question that we dispose of that contention first: The Revised Code, which contained the statute law with regard to entries and grants in 1852, provides that if an entry is not surveyed and a grant taken out thereon before 31 December of the second year thereafter, they shall be null and void. Rev. Code, ch. 47, secs. 8 and 9. It is the policy of the State to bring its public lands into market, and it will not allow an enterer to hold even an equitable claim upon them, by reason of an entry, beyond the time limited by law for the perfection of title. *Stanley v. Biddle,* 67 N. C., 383; *Plemmons v. Fore,* 37 N. C., 312. The defendants can therefore derive no benefit or relief, at law in equity, from the Davis entries. This being so, the plaintiff's right to recover depends upon the validity of the Love grant.

Defendants claim that the Love grant is void for the reason that the lands embraced therein are "Cherokee Lands" and were not the subject

of entry and grant, while they claim to derive title to a part of the same lands, based upon entries made by Davis in 1852. While this may seem to be inconsistent, it will not benefit the plaintiff if it were true that said lands were not open to entry and grant until after 1871, when the entries in the Love grant were made. If this were true, it would avoid the Love grant and would also avoid the grants under which defendants claim. *Stanmire v. Powell,* 35 N. C., 312. But it seems that these lands were open to entry and grant by Laws of 1854-5, (429) which had been done to a limited extent by Laws 1852. It is true that the Acts of 1854-5 provided that not more than 640 acres should be included in *one entry.* The entries upon which the Love grant is based seem to have observed the requirements of this statute, by not including more than 640 acres in any one entry. But a number of entries were made adjoining each other, and in making the survey and plat for the purpose of taking out the grant, they were all surveyed together, and but one general boundary line made, which included the several entries. The defendants contend that this was a violation of the statute and that the grant is *void* on this account. But it does not seem to us that it is so. The lands belonged to the State, and it had the right to grant them; it was to its interest to do so; it was the policy of the State to grant these lands to *bona fide* citizens who would reside upon, clear and improve them, and keep them out of the hands of speculators as much as possible. This policy, it seems to us, was a good one and should have been observed, if it was not. But if Love did not observe the rule prescribed by the Legislature in its spirit, he seemed to have done so in the letter, as to making the entries. And the State has accepted his survey made upon these several entries, taken its pay and granted him the lands. It must therefore be supposed that the State considered his entries and his survey and plat a substantial compliance with the statute, or it must have considered this provision of the statute as only directory, and the entries, survey and plat a substantial compliance with the statute. However this may be, they seem to us to be but irregularities that do not vitiate and avoid the grant. Such irregularities seem to be expressly provided for in section 2761 of The Code and the grantee's title validated, if it were defective as contended by defendants.

It is also contended by defendants that the Love grant is (430) invalid—void—for the reason that it appears from the grant that the boundary includes other lands theretofore granted, and which are excepted from the operation of that grant. We do not think so. If the reservations had been general in their terms, without pointing their location or referring to something by which they could be located, the

reservations would have been void and the grant would have been operative as to the whole territory included within its boundaries. *Waugh v. Richardson,* 30 N. C., 470; *McCormick v. Munroe,* 46 N. C., 13. But where the reservations are located or the data is given by which they may be located, the reservation is good and the grant is also good and conveys that part of the boundary not embraced in the reservations. *McCormick v. Munroe, supra.* The fact that it is stated in the grant that the part reserved has heretofore been granted, affords the data by which the reservations may be located, and this being so, both the grant and the reservations are good. But the grant being general, the burden is on the party claiming the benefit of the exception (the reservation), to locate the same, he being supposed to be in possession of the prior grant, if he is the owner. *Barnhardt v. Brown,* 122 N. C., 587; *Iron Co. v. Edwards,* 110 N. C., 353; *Gudger v. Hensley,* 82 N. C., 481. So, if defendants claimed that their grants covered territory within the reservations contained in the Love grant, the burden would be on them to show this. But defendants do not claim under grants, or titles derived from grants for the reserved lands mentioned in the Love grant.

They claim under a grant to Cooper and Goodhue, issued since the Love grant. They claim that the grant contains more land than is called for in the entries, that this is a fraud upon the State and that the Love grant is void on that account. But when the parts reserved are
(431) deducted from the amount named in the grant, it is found that the acreage conveyed by the grant is but little more than the amount stated to have been granted. But if the amount of acres contained in the grant were very much greater than the amount called for in the grant, this fact would not make the grant *void. Barnhardt v. Brown, Iron Co. v. Edwards,* and *Gudger v. Hensley, supra.*

The defendants, being interested in the lands covered by their grants, and the State no longer being interested in them, have a right to bring an action to vacate and set aside plaintiff's grant. *S. v. Bland,* 123 N. C., 739. But this must be done by a direct proceeding, and not by a collateral attack upon the grant. *Stanmire v. Powell, supra; Dugger v. McKesson,* 100 N. C., 1. This, it seems to us, might be done under The Code by way of equitable counterclaim, if all the necessary parties were before the court. But if they could do this, they have not done so in this case. The whole effort of the defendants has been to show that the grant to Love is *void* and not that it is *voidable.* If it is *void* it conveys no title, and plaintiff has no cause of action against defendants. But if it is not void, though it may be voidable, it is good as against defendants until it is declared void by a court having jurisdiction to do so.

While defendants have the right to bring an action to set aside the grant under which plaintiff claims title, it would do them no good to bring such a suit, unless they have grounds that would enable them to maintain their action and to have the grant set aside.

The only remaining questions necessary to be noticed are those connected with the entries upon which the Love grant was taken out, and the registration of this grant. The entries were made in Macon County and the lands are in Swain County. The grant was registered in Macon County in 1873, but was not registered in Swain County until 1889. The defendants' grant was registered in Swain County in (432) 1885. The defendants contend that, leaving out of consideration all other questions, they are the owners of the land covered by their grants, under chapter 147, Laws 1885, as their grants were registered first in Swain County and without notice of plaintiff's title. This question seems not to have been developed on the trial, and if the case hinged upon the (Connor) act of 1885 it may be that we would have to send it back, that the point might be developed and the question of notice presented and tried by the jury. But as it does not seem to depend on the act of 1885, it was not necessary to have that issue submitted and passed upon at the trial.

These lands were all in Macon County until the erection of the county of Swain. This was done by the General Assembly in February, 1871, but was provided that the county government of Macon County should extend over the territory of the new county until it should elect its county officers and they should be qualified and inducted into office in June, 1871. The entries, surveys and plats for the Love grant were all made before the time fixed for the organization of Swain County. Therefore, the entries were made in Macon County, and the surveys and plats made by the surveyor of Macon County. This seems to have been proper, and the only place the entries could have been made, and the surveyor of Macon County was the proper officer to make the surveys and plats. The grant was not issued until 2 May, 1872, but it was issued upon the entries, surveys and plats in Macon County. This grant was registered in Macon County in 1873, but was not registered in the new county of Swain until 1879. It was not void, but good. *McMillan v. Gambill,* 106 N. C., 359.

Upon examination it is found that the act of 1885 repealed (433) section 1245 of The Code and is substituted in its place, while the statute providing for the registration of grants is section 2779 of The Code, thus showing the act of 1885 had nothing to do with the registration of grants from the State. The act of 1885 does not use language applicable to a grant; it uses the term "conveyance of land" from the "donor, bargainor, or lessor," showing that grants from the State were

not in the mind of the draftsman or the minds of the Legislature when the act was passed. This being so, the law with regard to the registration of grants remained as it was before the passage of the act of 1885, and the fact that defendants' grants were registered in Swain County before the grant to Love was registered in that county did not give them the title. And as the registration of defendants' grants did not give them the title, whenever the Love grant was registered, it gave the grantee, Love, the title. *McMillan v. Gambill,* 106 N. C., 359. But it was registered in Swain County in 1879, and it seems that if there was any doubt as to the right to transfer this registration from Macon to Swain County, that any such doubt must be removed by Laws 1897, ch. 37.

The plaintiff, having shown title in himself to the lands trespassed upon, is entitled to recover damages out of defendants for the trespass.

NO ERROR.

*Cited: Janney v. Blackwell,* 138 N. C., 440.

(434)

JAMES H. MERRIMON AND E. STERNBERGER v. A. H. LYMAN ET AL.

(Decided 11 April, 1899.)

*Tax Title—Redemption.*

Where land has been sold for taxes and bid off by the county commissioners, but is redeemed for the owners by payment of taxes, interest and costs, although some time after the time limited by law, a subsequent order to the tax collector to make a deed to another party is invalid, and the deed is of no effect.

ACTION for recovery of land, tried before *Hoke, J.,* at July Term, 1898, of BUNCOMBE.

The plaintiffs claimed the land known as the Riverside Park, in Asheville, by purchase and deed from C. E. Graham, trustee of Natt Atkinson and P. F. Patton, at sale made 10 August, 1895. The defendants claimed under tax deed of J. H. Weaver, tax collector of Buncombe County, dated 17 April, 1895. The tax sale was for the taxes of 1892 and was made by D. L. Reynolds, tax collector, on 22 May, 1893, and the land was bid off by the county. On 12 March, 1895, Graham, the trustee, paid Weaver, the tax collector, the taxes in full, due upon the land for 1892, and Weaver entered the fact of redemption upon his "Redemption Book."

On 1 April, 1895, the county commissioners passed this order:

"Ordered, that J. H. Weaver, tax collector, be instructed to transfer to A. H. & C. E. Lyman all the tax sales for 1892 and 1893, making deeds for 1892 sales and certificates for 1893; the certificates to be paid for now; the deeds to be paid for by 1 June, 1895."

It was in pursuance of this order that Weaver made the deed (435) to the defendants of 17 April, 1895. There was considerable contention and evidence *pro* and *con* whether this deed had a seal to it at the time of execution. In response to an issue, the jury found it was affixed in the fall of 1896. The case, however, turned upon the effect of the tardy payment of the taxes of 1892 by Graham, trustee, in 1895. The defendants contended that such payment was made without authority on the part of Weaver, then tax collector, to receive the taxes, interest and costs, in redemption of the property.

The fifth issue was, "Are plaintiffs owners of land sued for and described in the complaint?" His Honor instructed the jury that if they believed all the evidence, to answer this issue "Yes," which they did.

Defendants excepted. Judgment for plaintiffs. Appeal by defendants.

*Merrimon & Merrimon and W. B. Gwyn for plaintiffs.*
*Davidson & Jones and Shepherd & Busbee for defendants.*

MONTGOMERY, J. This action was brought for the recovery of the possession of certain real estate situated in the city of Asheville, N. C., the right of the plaintiffs to recover being resisted by the defendants, who claim the property under a certain deed executed by J. H. Weaver, once a tax collector of Buncombe County, the deed bearing date 17 April, 1895.

In making out their title to the property the plaintiffs introduced as one of the evidences a deed of trust, dated 30 May, 1892, from Natt Atkinson and wife and P. E. Patton and wife to C. E. Graham. One of the exceptions of the defendants is to the ruling of his Honor in receiving this deed in evidence. The exception is, that the (436) deed was not properly registered, because the probate failed to direct its registration. A copy of the deed is not in the case on appeal, nor is the language of the probate set out so that we can see whether the same embraced an order for registration in sufficient form. The exception is not in such shape as that we can take notice of it. However, there is no reference to the exception in the brief of the defendant, and it may be presumed that it was abandoned. The deed was, in fact, registered, and there is nothing before us upon which we could say that it

was registered improperly. That was the only objection made to the plaintiff's evidences of title; and unless the deed from the tax collector to the defendants is such a one as to convey the property to the defendants, the plaintiffs have made out their title and are entitled to the possession of the property.

It appeared in the case that the property was sold by D. L. Reynolds in 1893, and bid off by the county commissioners of Buncombe; that some time after the time in which the law allows redemption of real estate which has been sold for taxes, by the owners, the commissioners ordered Weaver to make a deed for the property, and that the same was done, the deed bearing date 17 April, 1895. The jury, however, found, in response to the fourth issue, that the property had been redeemed at the time the defendant took his deed for the same.

The defendants contended that the instructions of his Honor upon the fourth issue were erroneous, alleging that there was no evidence tending to show that Weaver, the tax collector, had any authority from the commissioners to receive from the plaintiffs the taxes, interest and costs in redemption of the property. The evidence was not as direct and as clear as it might have been on the point, but we are of the
(437) opinion that it was sufficient to be submitted to the jury. Weaver himself testified that he did not have the tax books for 1892 in his hands when he received from the plaintiffs the taxes of 1892, but he said he received the redemption money, and throughout his testimony he constantly referred to the redemption book and to his receiving money upon it.

The property having been redeemed by the plaintiffs before the order of the county commissioners was made directing the tax collector, Weaver, to make a deed to the property to the defendants (even if the order was of any validity), the deed was of no effect, and his Honor's instruction to the jury to answer the fifth issue—"Are the plaintiffs owners of the land sued for and described in the complaint?"—"Yes," if they believed all the evidence, was correct.

NO ERROR.

*Cited: S. c.,* 126 N. C., 542.

SAMUEL WITTKOWSKY v. J. W. GIDNEY.

(Decided 11 April, 1899.)

*Deed—Husband and Wife—Homestead—Notice—Constitution, Article X, Section 8.*

1. A deed executed by the homesteader without the joinder of his wife is not valid. Constitution, Art. X, sec. 8.

2. A party taking with notice of an equity takes subject to that equity, and the rule of priority, which governs transfers and charges of an equitable interest, is the same as that governing transfers of legal estates—the order of date prevails.

3. If anything appears calculated to excite attention and stimulate inquiry, the party is affected with knowledge of all that the inquiry would have disclosed.

ACTION to recover land, tried before *Norwood, J.*, at Spring (438) Term, 1897, of CLEVELAND.

*Burwell, Walker & Cansler and Jones & Tillett for plaintiff.*

*W. J. Montgomery, Webb & Webb, and G. A. Frick for de-* (439) *fendant.*

FAIRCLOTH, C. J. Action for possession of land. It is not denied that B. Justice had a good title. Both parties claim under him, and neither claims by any title superior to his. The plaintiff owns all the interest conveyed to him and E. Block. The original defendant, J. W. Gidney, has since died, and his heirs are now parties.

Facts: On 5 February, 1877, B. Justice and wife, Mahala, who died in 1886, agreed to convey by mortgage to plaintiff and E. Block a lot of land (described in the first paragraph of the complaint) containing 125 acres. On that day the defendant, Gidney, as attorney of Justice, drew a deed, and by mistake the description embraces an adjoining tract containing 200 acres, more or less.

In 1883 (the day does not clearly appear) the plaintiff brought his action against B. Justice and wife and others, entitled Wittkowsky v. Kiser *et al.*, to have said mistake corrected. The matter was referred, and the report of the referee, finding that there was a mistake in the description, at Fall Term, 1877, was confirmed, and the mortgage of 5 February, 1877, was adjudged to be corrected according to the report and original agreement. There was a foreclosure decree of sale at the same term. Sale was made and the plaintiff (440)

became the purchaser on 6 February, 1888, and by order a deed was made to him and registered 16 May, 1888. During the pendency of this action the defendant, J. W. Gidney, represented Justice and wife as one of their attorneys.

Both parties put in evidence a mortgage deed from B. Justice, *not signed by his wife,* to defendant, J. W. Gidney, and J. C. Gidney, dated and registered 10 February, 1883, conveying land described "as the homestead of B. Justice, being the lands set apart to the said B. Justice as a homestead, under an execution issued from the Superior Court of Cleveland County." The homestead return was also in evidence. The land in said return is the same as that described in the deed of 10 February, 1883. Defendant introduced another mortgage deed from Justice to him, dated 15 September, 1888, and the record of foreclosure proceedings of the said two mortgages commenced 22 July, 1890. It was shown by judgment dockets that on and prior to 10 February, 1883, there were several judgments against said B. Justice, which were, and are, still unsatisfied.

We have read thirty or forty prayers for instructions, but we find it unnecessary to discuss them. Issues were submitted, and his Honor instructed the jury that if they believed the evidence they should answer:

(1) That plaintiff is the owner of the land in dispute.

(2) That defendants unlawfully withhold possession thereof.

(3) That there was a mistake by the party in describing the land in the deed dated 5 February, 1877.

(441) (4) That defendant did not purchase the land in controversy for value and without notice of the plaintiff's equity to correct said mortgage of 5 February, 1877.

Upon these findings, judgment was entered in favor of the plaintiff.

The plaintiff has unquestionably a good title, unless the defendant has acquired a better one. So we will look to his contention. By his deed, dated 10 February, 1893, from B. Justice, *without* the wife's signature, the land assigned and allotted to Justice as a homestead was conveyed to him. This conveyance was invalid. The Constitution, Art. X, sec. 8, provides: "That no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law," and all our statutes on this subject are in conformity thereto.

Whatever diversity of opinion may have been expressed by members of this Court on the homestead question, in no instance has the Court held that the homesteader, under such facts as are here presented, could convey the land set apart as his homestead without the assent of his wife, duly signified; but the Court has repeatedly held that such a conveyance is invalid and passes no interest. *Markham v. Hicks,* 90 N. C., 204;

*Castleberry v. Maynard,* 95 N. C., 281, and a number of subsequent cases. The first-named case was a sale under an execution; the second was by the homesteader himself.

The defendant obtained another mortgage from Justice, dated 15 September, 1888. The plaintiff insists that the defendant's rights under this deed were subject to the plaintiff's legal and equitable rights, and upon investigation we find that we have to sustain the plaintiff's contention. The defendant drafted the original mortgage deed of 1877 as an attorney. He testified that he knew where the Warlick land was, and that in taking his deed he knew that Justice's homestead was a (442) part of the Warlick land. He, as an attorney, appeared and resisted the action of the plaintiff for correcting the mistake, heretofore pointed out, which action was closed by a final decree before the defendant took his last deed.

We need not discuss the principles of *lis pendens,* either at common law or by statute, as the above facts show that the defendant had not only constructive, but actual, notice of the pendency of plaintiff's action to perfect his title to the land now in dispute, and of plaintiff's equity.

"If anything appears calculated to excite attention and stimulate inquiry, the party is affected with knowledge of all that the inquiry would have disclosed. *Bunting v. Ricks,* 22 N. C., 130; 2 Pom. Eq. Jur., 680." A learned discussion of the principles of notice is found in *LeNeve v. LeNeve,* 2 L. C. Eq., Part I, p. 144.

A party taking with notice of an equity takes subject to that equity, and the rule of priority, which governs transfers and charges of an equitable interest, is the same as that governing transfers of legal estates; that is, that the order of date prevails. Adams' Eq., 145, 148. This rule is in analogy to the rule at law, when different liens are created by docketed judgments, levy, or otherwise, i.e., priority of date.

NO ERROR.

*Cited: Wynn v. Grant,* 166 N. C., 45; *Lynch v. Johnson,* 171 N. C., 632.

(443)

P. T. LEHMAN AND WIFE, S. E. LEHMAN, v. CICERO TISE.

(Decided 11 April, 1899.)

*Mortgage—Notes—Judgment—Counterclaim.*

Where a counterclaim consists of a judgment and promissory notes against the plaintiff, who is examined as a witness, and the judgment is proved by the record, and there is no contention over the notes, the rule of preponderance of proof is inapplicable—they are both established, and the jury should be so told.

ACTION for damages for breach of contract, tried before *Coble, J.*, at May Term, 1898, of FORSYTH.

*Watson, Buxton & Watson for plaintiffs.*
*Jones & Patterson for defendant.*

MONTGOMERY, J. The plaintiffs in their complaint allege that in March, 1891, the defendant proposed to the plaintiffs to convey to the *feme* plaintiff a certain lot of land in Winston, N. C., and to build a house thereon at the cost of $1,250, and take a note for the purchase price, secured by mortgage on the property; that the plaintiffs declined the proposition, whereupon the defendant, to induce the plaintiffs to make the trade, guaranteed verbally that if the plaintiffs would buy the property on the terms proposed, that within twelve months the property should bring double the price agreed to be paid for it; and that as a further inducement to the plaintiffs to buy the property the defendant promised the male plaintiff that he would give him employment
(444) in his furniture store and real-estate office at $75 per month, and that he would give to two sons of the plaintiffs, of the age of 17 and 19, respectively, employment in his furniture factory at $1 and $1.25, respectively, and board, until the wages of the three should extinguish the debt for the purchase of the property; that the proposition was accepted, and that the defendant, after procuring the note and mortgage, refused to comply with his contract—refused to make good the guarantee as to the increased value of the property, and refused to give employment to the plaintiff and his sons as agreed upon; but on the other hand, sold the property, by direction of the Superior Court of Forsyth County, in a proceeding brought to foreclose the mortgage, and became the purchaser thereof himself from the commissioner appointed by the court.

The defendant, in his answer, denies the allegations of the complaint, except as to the sale of the property to the *feme* plaintiff and the execu-

tion of the note and the mortgage for the purchase-money, but without guarantees set out in the plaintiffs' complaint, and the sale by the commissioner and the purchase of the property by himself. The defendant, in his answer, set up two counterclaims—one of $783 by judgment, as a balance due on the judgment in the foreclosure proceedings, and the other in the sum of $500, with accrued interest, due by notes and mortgage of the plaintiff, executed to the defendant for the purchase of two vacant lots in Winston.

The seventh issue submitted to the jury was in these words: "What amount is defendant entitled to recover of the plaintiff on his counterclaims?" and upon instructions of his Honor on that issue the jury responded, "Nothing." The defendant excepted to the instructions, and that exception furnishes the chief question for us to consider.

The defendant introduced the judgment in evidence which he (445) claimed as a set-off in the action and the notes of the plaintiff for the vacant lots, and testified that nothing had been paid on either. The male plaintiff, himself a witness, made no contention over the notes, but did say that before the judgment was had in the foreclosure proceedings he had made some payments on the notes upon which the judgment was afterwards taken. Upon this condition of the facts the court instructed the jury upon the seventh issue as follows:

"The plaintiffs contend that the jury should answer the seventh issue 'Nothing.' The jury are instructed that, if defendant has shown, by a greater weight of evidence, he is entitled to recover anything on his counterclaim they will ascertain how much he is so entitled to recover and give such sums as their answer to the seventh issue. Defendant testified that he sold the two vacant lots under the mortgage he held, and bid them off at his own sale, and the jury are instructed that by such a sale the relations of the parties are not changed with regard to the lots, and that defendant still remains a mortgagee and plaintiff a mortgagor. The defendant having the right to have the amount due paid, holding the lots as security, and the plaintiff being entitled to his equity of redemption; and if he has failed to show by a preponderance of the evidence that he is entitled to recover anything on his counterclaims, they will answer the seventh issue, 'Nothing.'"

There was error in the instruction. The rule of the greater weight of evidence had no application. The judgment was proved as required by law, and the defendant introduced the notes of the plaintiffs for the vacant lots without any endorsed credits, and testified that nothing had been paid upon them. The plaintiffs admitted the judgment and made no claim that the notes had been paid. The jury should have been instructed to find the amount of the judgment to be a set-off to which the defendant was entitled; and, further, that if they (446)

believed the notes for the vacant lots had been executed and that no payments had been made upon them, they should find the defendant was entitled to the amount of the notes and interest, as a further set-off.

It is not necessary to consider the other exceptions. We will suggest, however, that it is not certain that the plaintiffs can sustain themselves as to the part of the action growing out of such a guarantee as the plaintiffs allege that the defendant made to them in reference to the future value of the real estate sold by the defendant to the plaintiffs. As that feature of the case, however, embraces only a part of the present cause of action, and as a new trial will have to be granted for the error pointed out, the case will go back for trial without prejudice on the *quaere* suggested.

NEW TRIAL.

(447)

CHARLES A. WEBB, ADMR. OF NATT ATKINSON, v. HARRIET N. ATKINSON, WIDOW, AND OTHERS, CHILDREN AND HEIRS OF NATT ATKINSON.

(Decided 11 April, 1899.)

*Fraud—Fraudulent Conveyances—The Code, Section 1446—Equity—Administrators.*

1. Where the legal title to land is in an insolvent debtor, and, in fraud of his creditors, he conveys the land to his wife, his administrator, under section 1446 of The Code, could maintain an action at law to have it sold and converted into assets.

2. If such debtor bought the land and had others to convey the title to his wife, a court of law would not reach the fraud, but a court exercising equitable jurisdiction would.

3. The same consequences attend conveyances without consideration to the children of an insolvent debtor.

4. An administrator, under our laws, is so far the representative of the creditors of an insolvent estate as to authorize him to follow lands in a Court of Equity into the hands of a fraudulent donee, and to have them converted into assets.

5. The conveyance of land subject to incumbrance by an insolvent debtor to his children upon their promise to remove the incumbrance is without consideration; they take the land subject to the incumbrance.

6. General reputation of insolvency is competent evidence.

7. In a trial demanding heroic treatment it should be given—of course, with fairness to the parties concerned.

WEBB *v.* ATKINSON

ACTION to subject certain funds and lands in the possession of the defendants as assets for the payment of debts of the intestate, alleged to be held by them under fraudulent conveyances, tried before *Hoke, J.*, at July Special Term, 1898, of BUNCOMBE. The answer denies all allegations of fraud.

The following issues, among others, were submitted to the jury:

1. "Was the said deed for lands from Natt Atkinson to his sons (448) made by him with intent to hinder, delay and defraud his creditors?" Ans.: "Yes."

2. "Did defendants, E. B. and C. B. Atkinson, purchase and take a deed for said Whittier lands from Natt Akinson for valuable consideration, without notice or knowledge of any fraud?" Ans.: "No."

7. "Has the defendant, H. N. Atkinson, converted to her own use, and does she now wrongfully detain and withhold any other money or funds belonging to the estate of Natt Atkinson? and if so, what amount?" Ans.: "Yes; $5,000."

The evidence, charge and exceptions are annotated in the opinion.

Judgment in favor of plaintiff. Appeal by defendants.

*J. C. Martin and Moore & Moore for plaintiffs.*
*Merrimon & Merrimon for defendants.*

FURCHES, J. This case was before us at Spring Term, 1898, upon a judgment of nonsuit, treated as a demurrer *ore tenus,* to the complaint (122 N. C., 683). Since that time the case has been tried upon the facts elicited, and is here again upon exceptions taken at the trial.

It is not the practice of this Court to review its opinion rendered on a former hearing, upon a second appeal in the same case, and we do not propose to do so now. But as the brief of the learned counsel for defendants has called in question the correctness of our former opinion, we propose to notice it so far as to say that we consider it our duty to correct errors in our opinions when found, let them be presented as they may. But after a year's reflection, we see no error in our former opinion. It seems to us to be based upon principles of justice (449) and sound reasoning.

If the legal title to the Graham land and the Von Ruck land had been in Natt Atkinson and he had conveyed them in fraud of his creditors to his wife, there could be no doubt that section 1446 of The Code would apply, and that the plaintiff, administrator, could maintain his action at law, and have them sold and converted into assets. If Natt Atkinson were living, his creditors could not proceed to sell these lands under execution, and acquire title to them in that way, for the reason that the legal title was not in Natt, and the statute of 13 Elizabeth would

not apply. *Godwin v. Rich,* 23 N. C., 553. But the fact that he bought and had others to convey to his wife is as much a fraud upon his creditors as if he had owned the lands and conveyed them himself. And while for technical reasons, a court of law could not reach this fraud, a Court of Equity would. *Godwin v. Rich, supra.*

The only difficulty, then, is the technical one that the fraud in one case is reached at law, under the statute of 13 Elizabeth, while in the other case, it is reached in a Court of Equity, or a court exercising equitable jurisdiction. The fraud upon the creditors is the same as if he had conveyed the land himself. The right of the creditors to have them subjected to the payment of their debts is the same, and the defendant has no more right to hold this property so fraudulently conveyed to her from the creditors of her insolvent husband than if he had conveyed them to her.

The plaintiff is so far the representative of the creditors of his insolvent's estate, under our laws as they now stand, as to authorize him to follow these lands in a Court of Equity, into the hands of the fraudulent donee, and to have them converted into assets for the payment of intestate's debts.

(450) The principles are the same—fraud on creditors; the object to be attained is the same—the appropriation of the property to the payment of the debts of the insolvent intestate; and such refinements as may have stood in the way of such actions as this, have been removed, and have given place to the demands of common sense and justice. The facts disclosed on the trial show that Natt Atkinson, plaintiff's intestate, was hopelessly insolvent in 1893; that he was indebted in a large amount, ranging from $75,000 to $90,000, with available property, for the payment of debts, not exceeding one-third of his indebtedness; that his creditors were pressing him on all sides; that among other debts, he owed C. H. Belvin, cashier of a Raleigh bank, a large debt which was being pressed, and which, at March Term, 1894, of Buncombe Court, was reduced to judgment, amounting to $14,022.52.

The largest property the intestate owned was a three-eighths interest in a large tract of land lying in Swain County, known as the Whittier lands, and said to contain 75,000 acres.

This tract of land he conveyed to two of his sons, C. B. and E. B. Atkinson, 1893, while so insolvent and while being pressed by his creditors. These sons paid him nothing for the Whittier land, nor did they promise to pay him anything, nor were they able to pay him anything, though the consideration named in the deed, which had no witness to it, was $40,667. This land was incumbered to some extent when it was conveyed by Natt Atkinson to his sons, and defendants offered evidence to show that they promised to remove these incumbrances, and it is

argued by defendants that this was a consideration. But we see no consideration in this evidence, if true. It was simply taking these lands subject to the incumbrances upon them. It is not shown that the incumbrances upon the lands were put there by Natt Atkinson or that he was bound for them. As they were incumbrances they had to be paid before a clear title could be made to a purchaser. And it is shown that C. B. and E. B. Atkinson had nothing with which to discharge (451) these incumbrances, except the Whittier lands.

Soon after the conveyance of the Whittier lands to C. B. and E. B. Atkinson by their father, Natt, C. B. Atkinson conveyed his interest to E. B. Atkinson, his brother and cograntee from Natt. This conveyance was without consideration.

About 1 August, 1894, this Whittier land was sold to a corporation engaged in the lumber business for the sum of $144,000, out of which the Atkinsons realized the sum of $15,000 over and above the liens upon the property, and in addition to this the sum of $6,000 as commissions, of which last sum it seems that Natt was entitled to two-thirds and E. B. Atkinson to one-third. This $15,000 was paid to Natt or paid into bank and placed to his credit.

On 14 August, 1894, he paid the Cartmell mortgage of about $4,000 out of the Whittier land money. This debt was a part of the price of the land when bought of Graham, and deed made to Mrs. Atkinson—was her debt and her mortgage that was discharged, leaving the legal title in her.

On 15 August, 1894, the intestate, Natt, bought what is called the McGrew tract from Von Ruck, for which he paid out of the Whittier land money $5,097, and had the deed made to Mrs. Atkinson; and on 29 August, 1894, the intestate died, and soon thereafter the plaintiff was appointed and qualified as his administrator. The balance of the Whittier land money not paid out on the Cartmell debt and to Von Ruck for the McGrew place was left in the hands of the defendant, Harriet Atkinson; and on 15 September, 1894, she bought what is called the Ballard lot in the city of Asheville, for which she paid $1,175 out of the Whittier land money and took title to (452) herself.

On or about 1 November, 1894, she bought a lot or an interest in a lot from M. E. Carter in the city of Asheville, for which she paid him $2,000 out of the Whittier land money, and took the title to herself; and the balance of the Whittier land money the jury find she still has in her hands, amounting to $5,000.

Taking these facts to be true, and the jury have found them to be true, they develop and uncover a most palpable fraud. But defendants complain of the charge of the court and file many exceptions, in which

it is contended that the charge contains erroneous propositions of law; that it expresses opinions upon questions of fact, and that it decides issues of fact which should have been left to the jury and have been decided by them. While the charge was heroic, we are of the opinion that it was fair to the defendants. It was given in a trial demanding heroic treatment and should not be condemned on that account if it was fair to the defendants.

The court directed the jury, if they believed the evidence, to find the first issue, "Yes," and second issue, "No." The defendants complain of this charge. But if it be true, as the jury found it to be, that Natt Atkinson, being notoriously insolvent, with his creditors pressing him, conveyed the principal part of his estate to two insolvent sons without consideration; that one of these sons soon thereafter conveyed to the other without consideration; and that soon thereafter a sale of this property was effected, by which $15,000 or $20,000 was realized, and this money, soon after its receipt, was paid over to Natt Atkinson or placed in bank to his credit, and that he used and dealt with it as his own, we can see no ground for complaint. There was no evidence—none that could have been submitted to a jury—controverting these facts.

(453) *Wittkowsky v. Wasson,* 71 N. C., 451; *Spruill v. Ins. Co.,* 120 N. C., 141; *Cable v. R. R.,* 122 N. C., 892; *S. v. Gregg, ib.,* 1082.

Had E. B. Atkinson, the fraudulent grantee, held on to the Whittier land money, the fraudulent grantor Natt could not have recovered it out of him; but the creditors of Natt, who were thereby defrauded might have done so. But this question is not involved in this action, as the fraudulent grantee, recognizing the fact that the money was not his but that it was the money of the fraudulent grantor (his father), turned it over to him. It seems to us that the plaintiff's case might have rested here. The money being back in the hands of Natt, the insolvent debtor, and recognized as his by the fraudulent grantee, it then became a question as to whether he could give it to his wife or not. As the payment of the Cartmell debt was in fact a gift to her of that amount, the purchase of the Von Ruck or McGrew place by him and having the title made to his wife, was a gift to her. The balance of this Whittier land money, left in her hands, belonged to her insolvent husband, and she has no right to hold it from his creditors. She had no right to invest this money in the Bland lot or the Carter lot, and as the money, with which she paid for them belongs to her husband's estate, the equitable title vested in his heirs for the benefit of his creditors, and made her a trustee. But the judge told the jury that if Natt Atkinson, being insolvent or greatly embarrassed with debt, made a conveyance to these two sons without consideration, the law would presume fraud. Defendants complain of this instruction, but we think it sound law. *Redmond v. Chandley,* 119 N. C., 575.

The court allowed the plaintiff to offer evidence of the general (454) reputation of Natt Atkinson's insolvency, and the defendants excepted. But the ruling of the court in allowing this evidence seems to be well supported by authority. *Leak v. Covington,* 99 N. C., 559, and many other cases.

The court allowed declarations of the daughters (who are also parties defendant), made in the presence and hearing of their mother, to be offered in evidence, and the defendants excepted. But the court seems to be sustained by *Merrill v. Whitman,* 110 N. C., 367; *S. v. Suggs,* 89 N. C., 527; *Tobacco v. McElwee,* 96 N. C., 71.

The court allowed in evidence declarations of Natt Atkinson made in the presence of E. B. and C. B. Atkinson, and the defendants excepted. But the court seems to be supported in this ruling by *Ward v. Saunders,* 23 N. C., 382, and by the authorities cited above.

It does not seem to us that any of this evidence objected to did or could have affected the merits of the case. But we have considered it as if it could.

The whole defense has been made upon technical grounds, and we are sure that the defendants have no reason to complain at the manner in which this defense has been made. And this is intended, not as a reflection upon, but as a compliment to the able management of the defense. But when the case is stripped of these technical objections it leaves exposed to view a most palpable fraud.

NO ERROR.

*Cited: Hobbs v. Cashwell,* 152 N. C., 190.

(455)

## PICKETT LEAK v. CAROLINA CENTRAL RAILROAD COMPANY.

(Decided 11 April, 1899.)

*Employer and Employee—Reasonable Care Required of Both—Negligence—Contributory Negligence.*

1. It is the duty of a railroad company to have a "foreign car," as well as its own property, inspected before using it, for either passengers or employees; its liability for defects, causing injury to either, is the same in both cases.

2. Both employer and employee are bound to use reasonable care—such care as a prudent man would ordinarily use under similar circumstances, and it is usually a mixed question of law and fact, to be determined by the jury, under proper instructions from the court.

3. A charge that "The law imposes upon the employer the duty of exercising greater care of protecting the employee from injury due to the defective condition of appliances than is required of the employee in guarding against accident," is too general, and calculated to mislead the jury.

4. Where an employee, hastily mounting a freight car, in the performance of duties required of him, had no time or opportunity to inspect the stirrup before putting his foot on it, he was not guilty of contributory negligence, unless it had been palpably defective, as broken and hanging down.

ACTION for damages for personal injuries sustained by alleged negligence of defendant, tried before *Greene, J.*, at March Term, 1898, of MECKLENBURG.

(457) *Jones & Tillett for plaintiff.*
*Burwell, Walker & Cansler for defendant.*

DOUGLAS, J. The plaintiff was a brakeman and switchman, and his contention is that, in attempting in the discharge of his duties to get on a car while in slow motion, the "stirrup" under the corner of the car, provided for his use, was defective, and when he put his foot upon it, gave way, precipitating him on the rail whereby his foot was crushed by the car wheel. The court properly instructed the jury that the fact that this was a "foreign car (*i. e.*, a car belonging to another road) was no defense, for it was the defendant's duty to have such a car as well as its own inspected before using it for passengers or employees, and its liability for defects is the same in both cases. *Mason v. R. R.*, 111 N. C., 482; *Miller v. R. R.*, 99 N. Y., 657; *Jones v. R. R.*, 92 N. Y., 628. Indeed, the plaintiff could sue both companies (*R. R. v. Snider*, 60 Am. State Rep., 700), and if it was the fault of the first company the latter could recover against it. *Moore v. R. R.*, 24 Am. State Rep.,
(458) 194. In *Johnson v. R. R.*, 81 N. C., 453, where a brakeman was injured by the breaking of the rod from a defect discoverable upon an ordinarily careful inspection, but which was unknown both to plaintiff and defendant, and the plaintiff had no reasonable opportunity for inspection, it was held that the defendant was liable because it had failed to have the rod inspected. Here, the plaintiff, hastily mounting the car in the performance of the duties required of him, had no time or opportunity to inspect the stirrup before putting his foot on it, and was not liable for contributory negligence unless it had been palpably defective, as broken and hanging down.

But we think that the third prayer for instruction given by the court at the request of the plaintiff, was too general in its terms and therefore liable to mislead the jury. It is as follows: "That the law imposes

upon the employer the duty of exercising greater care of protecting the employee from injury due to the defective condition of appliances than is required of the employee in guarding against accident." This may or may not be true, according to circumstances. The true rule is that both are bound to use reasonable care—such care as a prudent man would ordinarily use under similar circumstances; and the relative degree of care required depends upon a consideration of all the circumstances surrounding the respective parties. This is nearly always a mixed question of law and fact to be determined by the jury under proper instructions from the court.

For this error in the charge of his Honor,

NEW TRIAL.

*Cited: Cotton v. R. R.*, 149 N. C., 231; *West v. Tanning Co.*, 154 N. C., 48; *Terrell v. Washington*, 158 N. C., 290; *Kime v. R. R.*, 160 N. C., 462; *Ridge v. R. R.*, 167 N. C., 522; *Deligny v. Furniture Co.*, 170 N. C., 202.

(459)

## ANNA CASHION v. WESTERN UNION TELEGRAPH COMPANY.

(Decided 11 April, 1899.)

*Damages—Telegram—Mental Anguish.*

1. It is not necessary to disclose the relation of the parties in the message in order to recover damages for mental anguish, presumed or proved, in consequence of negligence in its delivery.
2. The failure to promptly deliver a telegram is not only a breach of contract, but is also a failure to perform a duty which rests upon the telegraph company as a servant of the people.

ACTION for damages as compensation for mental anguish occasioned by negligence of defendant in delivering a telegram sent at plaintiff's instance to her brother-in-law, J. W. Mock, tried before *Shaw, J.*, at February Term, 1899, of IREDELL.

This is the same cause reported in 123 N. C., 267, and tried upon the same two issues as to negligence and damages.

Copy of telegram:

MORGANTON, N. C., 17 August, 1897.

J. W. Mock, Davidson:

Come at once; Mr. Cashion is dead; killed while at work.

JOHN PAYNE.

(461) *L. C. Caldwell and J. F. Gamble for plaintiff.*
*Jones & Tillett for defendant.*

(462) DOUGLAS, J. This case was here before, and is reported in 123 N. C., 269. It is now before us on an exception to the charge of the court below, which is stated in the record as follows:

"The following is the charge of the court pertinent to the determination of the contention of the parties: The plaintiff contends that by reason of the delay in the delivery of this telegram, her brother-in-law was prevented from being present with her, and that by reason of the absence of her brother-in-law upon this occasion she suffered mental anguish; that she suffered more than she would have suffered under the circumstances, on account of the death of her husband. Now to determine this question the court charges you that there is no presumption of law that plaintiff suffered mental anguish on account of the absence of J. W. Mock; in fact that she stood in relation to him as a sister-in-law, and the further fact of his being prevented from being with her would not have raised the presumption that she suffered mental anguish on account of his not being there, but the burden is on the plaintiff to show by the preponderance of the evidence that there was existing between plaintiff and J. W. Mock such tender ties of love and affection as that his presence, advice and sympathy with her in Morganton and on the journey to Statesville would have given her comfort and consolation in her distress and would have prevented her from suffering to the extent she says that she actually suffered. But if you should find that such a relation existed between plaintiff and W. J. Mock, yet as the plaintiff admits that she did not sign the telegram, and that her name is not mentioned in the telegram, and that Payne signed and sent the same as the agent of the plaintiff, before she can recover damages for mental anguish occasioned by the failure of J. W. Mock to be present with her upon this occasion, the burden is upon the

(463) plaintiff to show by a preponderance of the evidence that at the time the message was delivered to the defendant company the said company was notified of the fact that the telegram was sent for the benefit of the plaintiff, and also of the relations existing between her and J. W. Mock. And the court charges you that there is no evidence that the defendant telegraph company had any notice that the telegram was sent for the benefit of the plaintiff or that it had any notice of the relationship existing between the plaintiff and the said J. W. Mock, and your answer to the second issue cannot be more than twenty-five cents—the cost of the telegram. The plaintiff does not contend that there was any physical injury to herself resulting from the alleged negligence, but the allegation in the complaint is for mental

anguish suffered by her, and as the plaintiff has failed to show that the defendant company had notice that the telegram was sent for her benefit, or had notice of the relationship existing between her and J. W. Mock, she cannot recover in this action except the twenty-five cents paid for the telegram. If you should answer the first issue 'yes,' that the defendant company was guilty of negligence, your answer as to the second issue can, under no circumstances, be more than twenty-five cents."

There was a verdict, and the following is the judgment of the court:

"This cause coming on to be heard at this term of the court before *Shaw, J.*, and a jury, and being heard upon the whole record and the following issues submitted:

"1st. Was the defendant guilty of negligence as alleged in the complaint? to which the jury answered 'Yes'; and 2nd, 'What damage has plaintiff sustained by reason of the negligence of the defendant?' to which issue the court ordered the jury to respond, '25 cents,' the amount paid for the transmission of the message. It is, therefore, adjudged that the plaintiff recover of the defendant the sum of 25 cents, and the costs of the action."

The plaintiff appealed.

This directly presents the question whether the plaintiff can (464) recover damages for mental anguish, caused by the negligence of the defendant in failing to promptly deliver a telegram sent through an agent, when the name of the plaintiff was not signed to the telegram, and when the fact that it was sent for her was not disclosed to the defendant at the time the message was sent, nor were her relations with the addressee then communicated to the company.

We intended to decide this question at the first hearing and thought we had done so, at least by direct inference, but it seems not explicitly enough to be understood. To prevent any further misconstruction we say plainly she can recover, if otherwise entitled. In other words, the failure to give such information was no bar to the action or to the recovery of substantial damage. In *Lyne v. Tel. Co.*, 123 N. C., 129, it was held that where a telegram relates to sickness or death, it is not necessary to disclose to the company the relation of the parties, as there is a common sense suggestion that it is important. The same rule applies here. The telegram in question stated that Mr. Cashion had been killed while at work, and on its face suggested that it was of unusual importance to somebody. The defendant knew that somewhere there was a vacant chair, that some one the lonely death watch was keeping. Who or where, it mattered not to the defendant, as it had no more right to wrong one person than another.

The able counsel for the defendant relies upon *Hadley v. Baxendale*, 9 Exc., 341, quoting as follows: "Where two parties have made a con-

tract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things from such breach of con-
(465) tract itself or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow a breach of contract under these special circumstances as known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such breach of contract."

This rule is almost universally followed as to all ordinary business transactions; but can it have any possible application to the case at bar? We think not. What probable damages could Mrs. Cashion possibly have had in contemplation, when, in the first hour of her bereavement, she sent a telegram announcing the sudden and violent death of her husband? Surely she could not be expected to dictate such a telegram with the cool deliberation with which a man would contract for the shipment of a mill-shaft; nor can her mental anguish be measured by the rule laid down in determining the lost profits of Hadley's mill. We must admit that damages for mental anguish are somewhat anomalous, and the extreme difficulty of their admeasurement by any ordinary rule of law has led many jurisdictions to reject the doctrine. We have found it established in this State and feel compelled to uphold it on the highest principles of public policy and private right, and must
(466) give it such a reasonable construction as will enforce its legitimate results.

One other principle must be kept in view: A telegraph company is in the nature of a common carrier. Claiming and exercising the right of condemnation, which can be done only for a public purpose, it is thereby affected with a public use. It owes certain duties to the public which are not dependent upon a personal contract, but which are imposed by operation of law. A simple contract is an agreement between two parties, a drawing together of two minds to a common intent, and must be voluntary as well as mutual. Whenever a man, at a proper time and place, presents a telegram to the company for transmittal,

and at the same time tenders the proper fee, the company is bound to receive, transmit and deliver with reasonable care and diligence. It cannot refuse to receive it, and while it may protect itself by reasonable regulations, it cannot insist upon a personal contract contrary to its usual custom or to public policy. As was said in *Reese v. Tel. Co.*, 123 Ind., 294, the failure of the telegraph company 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." While reaffirming the doctrine, we must again earnestly caution juries against its abuse. The defendant is in no way responsible for the anguish suffered by the plaintiff for the loss of her husband. All that can possibly be charged to it is the injury resulting from a negligent failure to deliver the telegram, and the jury in considering this matter should carefully guard against the sympathy they would naturally feel for the widow and orphan child. However creditable to them as men, it must be ignored by them as jurors. If the defendant has been negligent, it is their duty to give to the plaintiff a fair recompense for the anguish she has suffered from such negligence, but from that alone; and in determining the amount, they should render to each party exact and equal justice without the shadow of generosity, which is not a virtue when dealing (467) with the property of others.

The counsel for defendant argued before us other questions not presented by the record, which we cannot properly consider. For error in the charge of the court a new trial must be ordered.

NEW TRIAL.

*Cited: Kennon v. Tel. Co.*, 126 N. C., 236; *Laudie v. Tel. Co., ib.*, 436; *Bennett v. Tel. Co.*, 128 N. C., 104; *Mfg. Co. v. Bank*, 130 N. C., 609; *Cogdell v. Tel. Co.*, 135 N. C., 435; *Hunter v. Tel. Co., ib.*, 462; *Hunter v. Tel. Co., ib.*, 473; *Green v. Tel. Co.*, 136 N. C., 492, 497; *Cranford v. Tel. Co.*, 138 N. C., 165; *Shepard v. Tel. Co.*, 143 N. C., 246; *Helms v. Tel. Co., ib.*, 391, 392.

H. BALK v. ISAAC H. HARRIS.

(Decided 18 April, 1899.)

*Attachment—Garnishment—Situs of Debt.*

1. For the purpose of an attachment, the *situs* of a debt is where the debtor resides.

2. As a general rule, the courts of a State cannot, by service of process upon an inhabitant of another State, transiently within their jurisdiction, charge such person as garnishee; but if, when so served, the garnishee have in his possession, within the State, money or property of the defendant, or has contracted to pay money or deliver property within such jurisdiction, he may be charged.

3. The court entertaining a garnishment must have some jurisdiction over the thing garnisheed.

PETITION TO REHEAR case reported in 122 N. C., 64.

*Charles F. Warren for petitioner (defendant).*
*John H. Small, contra.*

(468) CLARK, J. This is a petition to rehear the decision reported in 122 N. C., 64. The judgment of another State condemning the debt due by Harris to Balk can only be recognized as valid here when the Court acquired jurisdiction. It was not founded on personal service, but it is contended that the Maryland Court acquired jurisdiction by attaching the debt due Balk by serving notice upon Harris, who was transiently in the city of Baltimore. The *situs* of the debt for purposes of taxation, and usually for all purposes is with the creditor. But there are many States whose courts hold that for the purposes of attachment the *situs* of the debt is at the residence or domicile of the debtor. The conflicting authorities are summed up and arrayed in the notes to *R. R. v. Smith,* 19 L. R. A., 577, whose accomplished editor sums up a careful review of the authorities as follows: "The true doctrine seems to us to be that no jurisdiction can be obtained to condemn a debt due to a nonresident unless jurisdiction of his person is obtained, that is, that the *situs* of the debt for the purpose of garnishment is at the residence of the creditor. To hold that such *situs* is with the debtor seems against reason because he has no property in the debt and because it allows a proceeding to condemn one's property to be prosecuted without notice to him, or representation by any one who cares for the protection of his interests. Such a proceeding seems unworthy to be called due process of law." There is logic and force in these views if it were

an open question with us, but North Carolina is one of the States whose courts have held that for purposes of an attachment the *situs* of a debt is where the debtor resides. *Cooper v. Security Co.,* 122 N. C., 463; *Winfree v. Bagley,* 102 N. C., 515.

The apparent inconsistency or hardship of such ruling is much (469) lessened by the uniform holding by courts of that line of thought that the attachment of the debt can only be made where the debtor resides, and can have no validity if levied upon him when only passing through or transiently in another State. It is thus stated in 8 A. & E., 1129, 1130: "Choses in action upon which the garnishee is liable are not to be considered as following the former wherever he may be transiently found, to be there taken, at the will of a third person, within a jurisdiction where neither such debtor nor his creditor resides. As a general rule, therefore, the courts of a State cannot, by their service of process upon an inhabitant of another State transiently within their jurisdiction, charge such person as garnishee. But if when so served the garnishee have in his possession, within the State, money or property of the defendant, or has contracted to pay money or deliver property within such jurisdiction, he may be charged." This is sustained by uniform decisions (many of which are there stated in the notes), among many others, *Smith v. Eaton,* 36 Me., 298; *Lovejoy v. Albee,* 33 Me., 415; *Sawyer v. Thompson,* 24 N. H., 510; *Baxter v. Vincent,* 6 Vt., 614; *Ray v. Underwood,* 3 Pick., 302; *Hart v. Anthony,* 15 Pick., 445; *Cronin v. Foster,* 13 R. I., 196. In the last case it is said, "When a person transiently in another State is sued for his own debt, it is a different case. But if a person by garnishment is compelled, in order to satisfy a debt not his own, but due from one of his creditors, to pay his own debt in a mode very different from that in which he would otherwise have paid it, it would be a hardship." The Court proceeding admits the recognized exceptions above stated that the foreign court could acquire jurisdiction by service upon a garnishee transiently within the State: (1) When the garnishee has personal chattels of the debtor with him (which usually could be attached without garnishment); and (2) When the debt due by the garnishee is contracted to be paid within the State. Among other cases to the same effect, *Wright v.* (470) *R. R.,* 19 Neb., 175, in which it is said (p. 182): "The rule is well settled that garnishment served upon a nonresident of the State, but temporarily within it, is not effectual as an attachment," citing to same purpose *Green v. Bank,* 25 Conn., 451; *Casey v. Davis,* 100 Mass., 124; *Sawyer v. Thompson,* 24 N. H., 510; *Lawrence v. Smith,* 45 N. H., 533; *Nye v. Lipscombe,* 21 Pick., 263; *Tingley v. Bateman,* 10 Mass., 343; *Jones v. Winchester,* 6 N. H., 497; *Matthews v. Smith,* 13 Neb., 190; *Danforth v. Penny,* 3 Met., 564; *Gold v. R. R.,* 1 Gray, 424. In

*Bush v. Nance,* 61 Miss., 237, it is said that unless the debt of the non-resident garnishee was payable in the State where garnisheed "he was not subject to garnishment in that State, and the writ served on him there was a nullity, and this seems settled law by the authorities. The reason is that the court entertaining a garnishment must have some jurisdiction over the thing garnisheed, and where the garnishee is a non-resident, has in his hands no property belonging to the principal debtor, and owes him nothing payable within that State, the jurisdiction is defeated. Such is the well settled law. Drake on Attachment (5th Ed), sec. 474-5, and cases there cited." This is sustained by reference to the citation from Drake on Attachment, and also by Waple on Attachment, 228. There are many other cases to same effect, among them *Squair v. Shea,* 26 Ohio St., 645; *Mobile v. Barnhill,* 91 Tenn., 395; *Bank v. R. R.,* 45 Wis., 172. The defect being jurisdictional, the garnishee cannot waive it "because it is not with him a personal matter, and he has no right to prejudice the defendant." *Rindge v. Green,* 52 Vt., 204; Waple's Attachment, 228; Drake on Attachment, sec. 476.

(471) Inasmuch as an attachment is in effect a proceeding by the principal debtor (the defendant in the action) in the name of the plaintiff against the garnishee, it is thus properly held even in those courts which hold that the *situs* of a debt for this purpose is with the debtor (garnishee) that the action must be brought where he "resides" or "has his domicile," since it is there that this creditor must have sued him. One or two cases unguardedly say the action may be brought "wherever the debtor (garnishee) may be found" but the context and the facts in those cases show that they mean where he may be found "resident" or "domiciled" as it is expressly held in all cases where the point is made. As upon the uniform authorities above cited and others not necessary to cite, the Maryland Court acquired no jurisdiction as against Balk by service of notice upon his debtor Harris, who had no tangible property of Balk's in his possession, and was not resident in that State, we reaffirm our former decision, but after the benefit of the able and exhaustive argument upon the rehearing, for an entirely different reason from that given on the first hearing.

PETITION DISMISSED.

*Cited: Strause v. Ins. Co.,* 126 N. C., 229; *Balk v. Harris,* 130 N. C., 381; *Sexton v. Ins. Co.,* 132 N. C., 2; *Balk v. Harris, ib.,* 13; *Goodwin v. Clayton,* 137 N. C., 235.

*Reversed on Writ of Error,* 198 U. S., 215.

(472)

F. B. MITCHELL AND WIFE ET AL., CAVEATORS, v. A. J. CORPENING ET AL., PROPOUNDERS.

(Decided 18 April, 1899.)

*Wills—Caveat—Evidence.*

1. An act of civility on the part of counsel in handing a juror a glass of water, at his request, has no element of impropriety in it.

2. Where there is no allegation nor evidence of insanity as the foundation of the caveat, but imbecility of mind, growing out of weakness produced by protracted illness, was the alleged foundation, and there was evidence tending to prove it, a special instruction bearing upon insanity only is inapplicable.

3. It is not required that instructions asked for should be given in the very words of the prayer; it is sufficient if fully and fairly given in the charge of the court.

4. If the testatrix had a protracted illness which was attended by a gradual weakening of body and mind until her death, and if at the time of the execution of the will there was evidence tending to show that she was not of testamentary capacity and so weak that she had to be lifted up to sign the paper, evidence of her mental condition a *very few* days thereafter is some evidence of her mental condition when the will was made.

*Devisavit vel non in re* the will of Lucinda L. Tuttle, tried before *Coble, J.*, at Fall Term, 1898, of CALDWELL.

His Honor thus stated the issue to the jury:

"The issue submitted to the jury is: 'Is the writing offered, the will of Lucinda L. Tuttle, deceased?' If the jury find from the evidence that the writing offered was written in the lifetime of Lucinda L. Tuttle; that the said writing was signed by her; that it was subscribed in her presence by M. H. Tuttle and J. M. Crump as witnesses (473) thereto, then the jury will answer the issue, 'Yes'—unless the caveators have shown by a great weight of the evidence, either a want of testamentary capacity in the testatrix, or that undue influence was exerted upon the testatrix at the time of the execution of the alleged will."

The jury answered the issue, "No."

The errors assigned by the propounders upon their motion for a new trial are sufficiently adverted to in the opinion. There was judgment in accordance with the verdict, and appeal by the propounders.

*No counsel for propounders.*

*Edmund Jones for the caveators.*

MONTGOMERY, J. The appellants were not represented here by counsel, nor was there a brief filed in their behalf; in fact, the case on their part seems to have been abandoned, and upon our reviewing it we feel safe in saying that, in that respect at least, their course was a wise one. The first exception was to what the appellants call the conduct of one of the counsel of the caveators on the trial. The offending lawyer, during the trial, in open court, went to the water pitcher near the jury box and quenched his own thirst with a glass of water. Several jurors, taking the contagion, gave him a sign that they, too, would like to partake of the cooling draught, whereupon he politely waited on them. For which cause it is insisted that the Supreme Court ought to grant a new trial of the case.

This, to us, seems to be trifling with the Court.

The second exception was to the refusal of his Honor to instruct the jury that "Sanity is the natural and usual condition of the human mind,

(474) and every person is presumed to be sane. If the deceased was not insane, then the execution of her will was a valid one." The first sentence of the requested instruction was taken, word for word, from the opinion of the Court in the case of *Sawyer v. Wood,* 67 N. C., 277. In that case the caveat to the will was filed on the alleged ground of the insanity of the testator. In the case before us the foundation of the caveat to the will is not the alleged insanity of the testatrix at the time of its execution, but her imbecility of mind, growing out of weakness produced by a long-continued illness; and there was not a syllable of the evidence introduced for the purpose of showing insanity of the testatrix, or that tended to prove it. There was, however, testimony strongly tending to prove imbecility—total mental incapacity—as well as great physical exhaustion from weakness and disease. The instruction could not have been given in any view of the case.

The third exception was to the refusal of the court to charge the jury "That the caveators impeaching the validity of the will must affirmatively show the want of capacity, or the exercise of undue influence, which is defined to be influence by fraud or force; and they must show its application to the making of the will. How this exception could be insisted in the face of the instruction on the point which his Honor gave in the general charge is a puzzle to us.

His Honor said: "Did she, the said Lucinda L. Tuttle, at the time of the execution of the script or writing in question, have sufficient mental capacity to understand the nature and character of the property disposed of? To whom she was giving her property, and how she was disposing of the property? If so, then she was of sound mind and memory, within the meaning of the law; if not, then she had not testamentary capacity. The law is, that to be of sound and disposing mind and memory, so

as to be capable of making a valid will, the deceased must, at (475) the time of executing the paper-writing, have had sufficient mental capacity to understand the nature and character of the property disposed of, to whom she was willing it, and how she was disposing of her property. If, at the time of the alleged execution of the said writing, the said testatrix had the capacity to know what she was doing, and was capable of understanding the nature and character of the property disposed of, to whom and in what way she was disposing of her property, then her mental capacity would be sufficient. On the question of undue influence, the real inquiry to be determined is: Did the said Lucinda L. Tuttle, deceased, make and execute the alleged will, in all its provisions, of her own free will and volition, so that it now expresses her own wishes and intentions, or was she constrained or coerced, through the undue influence, restraint or coercion of others, in making her will, to act against her own desire and intention as regards the disposition of her property or any part of it? And the jury are instructed that the influence exercised over a testator or testatrix which the law regards as undue or illegal must be such as to destroy her free agency in the matter of making the will; but it matters not how little the influence if her free agency is destroyed, it vitiates the act which is the result of it; and the amount of undue influence which will be sufficient to invalidate a will may vary with the strength or weakness of the mind of the testatrix, and the influence which would subdue and control a mind and will naturally weak, or one which had become impaired by age, disease or other cause, might have no effect to overcome a mind naturally strong and unimpaired. The jury are instructed that any influence exercised upon the testatrix is proved by reason of which her mind was so embarrassed and restrained in its operations that she had no control of her own opinions and wishes in respect to the disposition of her estate, was undue influence, within the meaning of the law. It is (476) not, however, unlawful for one, by honest advice or persuasion, to induce a person to make a will or to influence him in the disposition of his property by will. To vitiate a will on account of undue influence it must appear from the evidence that there was something wrongfully done, amounting to a species of fraud or moral force and coercion or other improper conduct destroying free agency, so that the will does not express the real wishes of the testatrix or testator, but those of some other person."

Several exceptions were made to the charge of his Honor, but upon an examination of them they are found to be no more meritorious than those to the refusal of his Honor to give the special instructions requested.

One of the objections made by the propounders to a part of the evidence is of sufficient importance to be considered. The testatrix had been sick some year or more, and in bed for the two or three months preceding her death. The evidence of the caveators tended to prove that the mind and body of the testatrix had gradually declined and weakened from her long and serious sickness till her death; and there was evidence tending to show that when the will was executed she did not have testamentary capacity and her bodily strength was almost exhausted. In connection with that matter a witness was allowed to testify, over the objection of the propounders (appellants), that in a *very few days* after the execution of the will, he, in company with the pastor of the testatrix, went to see her, and that she was found utterly unable to understand or comprehend anything he said to her. If the testatrix had had a protracted illness, and there had been a gradual weakening of the body and the mind until death, and if at the time of the execution of the will she was not of testamentary capacity, and so weak that she had to be lifted up to sign the paper, then we think that her
(477) condition of mind at that time was some evidence of what her mental condition was when the will was made. In *Norwood v. Morrow,* 20 N. C., 442, this Court held: "It seems to us that the evidence offered of the bargainor's declaration, connected with his conduct the next day, was relevant and proper. When the inquiry is whether a particular malady, mental or corporal, existed at a particular time, its existence previously and just up to the period, and its existence also just afterwards, furnished together the strongest presumption that the disease was seated in the system at the given period." The principle of evidence announced in the last-named case is not precisely like that involved in this case, but we think there is an analogy between them. There was

NO ERROR.

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

*Cited: Lloyd v. Bowen,* 170 N. C., 219.

(478)

## C. W. BROADFOOT v. CITY OF FAYETTEVILLE.

(Decided 18 April, 1899.)

*Towns and Cities—Old and New Charter—Debts—Bonds and Coupons—Statute of Limitations—Mandamus.*

1. Debts due from a municipal corporation are not extinguished by the repeal of its charter, and still exist, notwithstanding that repeal.

2. When the old charter is repealed and a new one is granted, in which latter are bestowed by law all the benefits and property of the old, the burden of the old must be borne by the new; where the benefits are taken, the burdens are assumed.

3. The city of Fayetteville is the successor of the town of Fayetteville, and liable for its debts, and the remedies for the enforcement of them, existing when the contract was made, must be left unimpaired by the Legislature, unless a substantial equivalent is provided.

4. The provisions in the act of 1893 incorporating the city of Fayetteville, which prohibit the levying of taxes by the new corporation for the payment of the bonds issued by the town of Fayetteville, are invalid and cannot be regarded.

5. The coupons, being for interest to become due on the bonds, are a part of the bonds and partake of their nature; the bonds are specialties, and so are the coupons. The same statute of limitations (ten years) applies to both. In the computation of time, the period elapsing between the repealing act of 1881 and the reincorporating act of 1893 is not to be counted; ability to resort to the courts having been taken away from the creditor during that time.

6. The creditor is entitled to a peremptory *mandamus*, requiring the proper city authorities to levy and collect taxes upon property and polls within the city, with which to pay his claim.

ACTION to enforce the payment of coupons matured upon bonds issued by the old town of Fayetteville, tried before *Bynum, J.*, at Fall Term, 1898, of CUMBERLAND.

*R. P. Buxton and J. C. and S. H. MacRae for plaintiff.* (483)
*N. W. Ray and H. McD. Robinson for defendant.*

MONTGOMERY, J. Under the provisions of an act of the General Assembly of 1881, the charter of the town of Fayetteville was surrendered and repealed. At its session in 1883 the General Assembly created a taxing and police district out of the territory included in the boundaries of the old town of Fayetteville, the taxing and police district to be called Fayetteville. Under the last-mentioned act, all of the property

of the former town of Fayetteville was transferred to the custody and control of the board of commissioners appointed by the General Assembly. The public buildings, streets and squares and the policing of the same were placed under the charge of those commissioners. Taxes were levied by the General Assembly, with a specification as to the purposes to which they were to be applied. The General Assembly, at its session of 1893, incorporated the inhabitants within the old territory of the town of Fayetteville under the name of the city of Fayetteville.

The plaintiff, in 1880 and 1881, being the owner of 52 coupons cut from bonds executed by the town of Fayetteville, presented the same for payment, and, upon payment being refused, brought two actions against the town of Fayetteville to recover the amounts due on the coupons. Judgments were rendered at August Term, 1882, of Cumberland Superior Court, in the two actions, in favor of the plaintiff, but between the time of action begun and judgment rendered, the charter of the then defendant, the town of Fayetteville, was surrendered and repealed.

The complaint in the present action embraces three causes of action. The first is founded upon the judgments procured in 1882 by the plaintiff against the town of Fayetteville; the second, upon the coupons themselves, upon which the judgments were procured; and the
(484) third, upon the plaintiff's alleged right to have the two cases against the town of Fayetteville, which were pending in the Superior Court of Cumberland, at its August Term, 1882, reinstated on the civil-issue docket, brought forward and consolidated into one action, and judgment rendered therein for the amount due on the 52 coupons mentioned in those actions. The plaintiff's allegations are, that the judgments against the town of Fayetteville, or the coupons if the judgments are invalid, are still due; that, although the charter of the old town of Fayetteville was repealed and surrendered under the act of 1881, yet the act incorporating the city of Fayetteville rehabilitated the old town of Fayetteville, and that the city is the successor of the old town, and therefore liable to the plaintiff for the amount of the coupons.

The defendant admits the repeal of the charter of the town of Fayetteville; that the coupons have never been paid; that the judgments were entered against the town of Fayetteville after its charter had been surrendered, and that the inhabitants of the old town have been incorporated by the act of 1893 under the name of the city of Fayetteville. The defendant avers, however, that the judgments procured by the plaintiff against the town of Fayetteville were void, and denies that the city of Fayetteville is the successor of the old town of Fayetteville or liable on the coupons or on the judgments.

It is of the first importance, then, to consider whether the city of Fayetteville, the new corporation, chartered by the act of March, 1893,

is so far the successor of the town of Fayetteville, the old corporation, as to be liable for its debts. If this question is answered in the affirmative, the statutes of limitation set up in the answer as a defense to the action will then have to be discussed and decided. This (485) Court at one time adopted the old common-law rule, that upon the civil death of a corporation the grantors of its real estate took it by reversion, and the debts due to and from it were extinguished. *Fox v. Horah,* 36 N. C., 358. This rule was changed by the Court in the case of *Wilson v. Leary,* 121 N. C., 90, and that of *Fox v. Horah, supra,* was overruled. The debt then due to the plaintiff by the town of Fayetteville was not extinguished by the repeal of its charter, and still exists, notwithstanding that repeal. *Merriwether v. Garrett,* 102 U. S., 472; *Wolf v. New Orleans,* 103 U. S., 358; *Mobile v. Watson,* 116 U. S., 289; *O'Connor v. Memphis,* 6 Lea, 730.

Apparently, each corporation created by a separate charter is a distinct entity, and from this it may be argued with plausibility that no two successive corporations can be connected unless they are connected by the terms of the act which created them. But that view must be often only apparently true. If, in the case of a municipal corporation, the old charter should be repealed and a new one granted, and the new one should include the same territory, substantially the same people, and the great mass of the taxable property of the old corporation, and the property of the old corporation used for the public purposes be passed over to the possession and control of the new corporation without consideration from the new corporation, it would be difficult to appreciate how the property and the benefits of the old corporation could be received by the new one without the shouldering of its responsibility by the new one. It must be that the creditors of a defunct municipal corporation, whose money and property have helped to build up and improve the wealth and influence of the old corporation (although they must submit when a charter is absolutely abolished and while the old territory and people remain unincorporated), have the right in equity to have a new corporation, embracing the same territory and the same inhabitants and the same taxable property, considered as the successor of the old, at least so far as its liabilities for the debts of (486) the old corporation are concerned. When the old charter is repealed and a new one granted, upon which latter are bestowed by law all the benefits and property of the old, the burden of the old must be borne by the new; where the benefits are taken, the burdens are assumed.

So strong has this view been impressed upon the courts that in *O'Connor v. Memphis, supra,* the Court said: "But in no case have the courts ever failed to declare the identity, or succession, or continuity of

the two corporations where the same corporators and the same corporate property have passed to the new corporation. The terms of the charter have in such cases never been construed otherwise."

The same doctrine was laid down in *Mount Pleasant v. Beckwith,* 100 U. S., 514; in *Broughton v. Pensacola,* 93 U. S., 266; in *Wolf v. New Orleans,* and in *Mobile v. Watson, supra.* The acts of the Legislature repealing the old charters of the cities of Memphis and Mobile, and incorporating those cities, were passed on the same day, and it might be inferred that these acts were considered as one and the same in legislative intent. But in the case of *Amy v. Selma,* cited, endorsed and approved with high commendation by the Supreme Court of the United States in *Mobile v. Watson, supra,* the acts were not simultaneously passed. The repealing act was passed in December, 1882, and the reincorporating act in February, 1883. In that case the Supreme Court of Alabama held that the act repealing the charter of the city of Selma was without effect or operation upon the liabilities of the city of Selma; that the act of February, incorporating the inhabitants and territory formerly embraced within the limits of the city of Selma, was a reorganization, under the corporate name of Selma, of the same corporators, and embraced substantially the same territory as the city
(487) of Selma; that Selma was the successor of the city of Selma, and liable for the payment of its debts.

It appears also in *Broughton v. Pensacola, supra,* that the repeal of the charter of Pensacola was under one act and the reincorporation of the city under the same name was under a different law.

In the case before us, twelve years elapsed between the repeal of the charter of the town of Fayetteville and the incorporation of the city of Fayetteville; but we cannot see how that can alter the principle involved in the case. The foundation on which the liability of the new corporation rests is, that the new corporation embraces the same territory, the same incorporators, the same taxable property, and has received the property of the old corporation without consideration; and for these benefits must, in return, bear the burdens of the old corporation. The liability in such a case commences from the receiving of the benefits, and whether those benefits were received one or ten years, or more, from the repeal of the old charter, makes no difference.

But it is argued for the defendant that even if the act of 1893 did have the effect to make the city of Fayetteville the successor of the old town of Fayetteville, yet the new corporation was not liable for the debts of the old corporation, but, on the other hand, was expressly prohibited from assuming the debts of the old town or from paying any part of them, except such as were provided for in the act of 1883, and the plaintiff claimed no benefit under that act. The position was with-

out any citation of authority to support it, and to us it did not seem to be sound (and the authorities, so far as they have been examined by us, are all the other way). If the law was as is contended for by the defendant, then it would be in the power of the Legislature to destroy the claims of creditors against municipal corporations by simply repealing their charters on one day, and on the next reincorpo- (488) rating the same inhabitants in the same territory, taking care to insert in the repealing acts a provision to the effect that the new corporation should not be liable for the debts of the old. Such legislation would be contrary to every idea of justice and law, and obnoxious to the Constitution of the United States and to that of our own State.

In *Amy v. Selma, supra,* it appeared that the act incorporating Selma authorized the proper officials to levy taxes, but declared that no funds derived by the corporation from the collection of taxes or from any other source should be used for the payment of any of the debts of the city of Selma, the old corporation; and, as we have seen, the Supreme Court of Alabama in that case held that the provision was inoperative against the debts and liabilities of the city of Selma, and the Supreme Court of the United States, in *Mobile v. Watson, supra,* cited the decision with marked approval.

But the defendant further contends that, even if it should be held by this Court that the debts against the town of Fayetteville were not extinguished by the repeal of the town charter, and that they are valid and good against the city of Fayetteville, yet the officials of the new corporation are not only not authorized to levy taxes to pay those debts, but are prohibited from doing so by the very terms of the act of incorporation, and that "the power of taxation is legislative and cannot be exercised otherwise than under the authority of the Legislature," as was said in *Merriwether v. Garrett, supra.* That is a good proposition of law, and it was applicable to the condition of affairs which appeared in that case, as well as from the view of the law which that court took of the effect of the charter of Memphis and the one creating out of the same territory a taxing district. That court held that the charter of Memphis was absolutely repealed, and treated the case of (489) *Merriwether v. Garrett* upon that view. The effect of the act creating the taxing district was not directly before the court. We have seen that the Supreme Court of Tennessee, in *Luehrman v. Memphis,* 2 Lea, 425; *O'Connor v. Memphis,* 6 Lea, 730, held that the taxing district was a reorganization of the city of Memphis. But the act of the Tennessee Legislature creating the taxing district of Shelby was a very different act from the act of the North Carolina Legislature which created the taxing district of Fayetteville. The former conferred on the officers of the former extensive legislative and judicial powers, and

provided that at the end of two years the district should be governed by officers of its own choice. No such powers were conferred on the officers of the taxing district of Fayetteville. But that the power of taxation which is vested in the Legislature is such a power as the defendant contends for, cannot be maintained. The power is subject to the qualification which attends all State legislation—that is, that it must not be exercised to impair the obligation of contracts, thereby conflicting with the Constitution of the United States and of North Carolina. There is no doubt of the power of the Legislature to repeal, out and out, a municipal charter, and there is no doubt that, after the application of the property of the defunct corporation not necessary for public uses (public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses and engineering instruments being property necessary for public uses, as is held in *Merriwether v. Garrett, supra,* and not subject to the demands of creditors of the corporation) towards the payment of any remaining indebtedness, the debt cannot be enforced, although it is not extinguished. But as long as the charter is not repealed, or, if repealed and be
(490) rehabilitated so as to become the successor of the old, and liable for its debts, the taxing power in the hands of the Legislature cannot be used to decrease or impair the rights of the creditor in the enforcement of the collection of the debt. In reference to this matter it was said, in the case of *Wolf v. New Orleans, supra:* "This doctrine has been repeatedly asserted by this Court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation continues in existence, the Court has said that the control of the Legislature over the power of taxation, delegated to it, is restrained to cases where such control does not impair the obligation of contracts made upon a pledge expressly or impliedly given that the power shall be exercised for their fulfillment. However great the control of the Legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts." The same doctrine is declared in *Mobile v. Watson, supra* (and many cases there cited), where it is said: "But when (municipal corporations) empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals. Therefore, the remedies for the enforcement of such obligations assumed by a

municipal corporation which existed when the contract was made must be left unimpaired by the Legislature; or if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United (491) States and is null and void."

Now, to apply the law, as we have found it to be, to the particulars of the case before us: Under what circumstances did the debt of the plaintiff against the town of Fayetteville arise? And what were the means provided, at the time the debt was contracted, for its payment? The Western Railroad was incorporated by the General Assembly of North Carolina at its session of 1852, by chapter 147. By an act passed at the same session (chapter 207)) the town of Fayetteville was authorized to subscribe for shares of stock in that railroad company, the shares of stock to be held for the use and benefit of the town. To meet the payment of any subscriptions that might be made, the town was authorized to issue and sell bonds bearing interest, and, by section 4, to levy and collect taxes for the payment, yearly, of the interest and to create a sinking fund for the ultimate payment of the debt, and to invest from time to time in profitable stock the surplus of their taxes to meet the maturity of the bonds. An election was held according to the provisions of the act, and a majority of the qualified voters cast their ballots "for subscription," and the bonds were issued. On 22 March, 1875, the General Assembly of that year passed an act (chapter 248) in which the town of Fayetteville was authorized to fund the bonded debt of the town, contracted for stock of the Western Railroad Company by virtue of the act of 1852. The debt was funded, and the coupons on which this suit was brought are clipped from the bonds issued by the town under the funding act of 1875. It appears, then, from the above statement of the facts, that the bonds were originally issued by the town with the express provision in the act which authorized their issue (1852) that the town authorities were to levy and collect an (492) annual tax upon the property and polls within the town, with which to pay the interest (coupons), and in the same way to raise a sinking fund to pay the bonds at maturity. The act of 1875, authorizing the town to fund the original bonds, provided for the payment of the new bonds in the same manner and to the like extent as were the old bonds.

It follows, then, from the conclusion at which we have arrived, aided as we have been by the decisions of other courts, that the act of 1852

was the basis of a contract between the holders of the bonds which were issued to buy the stock of the Western Railroad Company and the town of Fayetteville, by which the town authorities were to levy a tax upon the property and polls of the town with which to pay the coupons and also to provide a sinking fund with which to pay the bonds at maturity; that the coupons upon which this suit was brought were clipped from the bonds issued under the act of 1875, under which the old bonds were funded; that the new bonds are of the same nature as the old bonds, and were invested with the same security for their payment; that these bonds are still in force, and that the obligation to pay the same, together with the coupons (the interest), rests upon the city of Fayetteville as the legal successor of the town of Fayetteville.

The provisions in the act of 1893, incorporating the city of Fayetteville, which prohibit the levying of taxes for the payment of the bonds by the new corporation, are invalid and cannot be regarded. In support of this position we refer to the case of *Mobile v. Watson, supra.* "All laws passed since the making of the contract whose purpose or effect is to take from the city of Mobile, or its successor, the power to levy the tax and pay the bonds, are invalid and ineffectual, and will be disregarded"; to *Wolf v. New Orleans, supra,* where the Court (493) said: "The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed and, by mandamus, compel, at the instance of parties interested, the exercise of that power as if no legislation had ever been attempted."

The conclusion at which we have arrived as to the liability of the city of Fayetteville, the new corporation, for the debts of the town of Fayetteville, the old corporation, makes it necessary for us to discuss and decide the question of the statute of limitations set up by the defendant in the answer as a bar to the action. The coupons, being for interest to become due on the bonds, are a part of the bonds and partake of their nature, and the statute of limitations, therefore, which applies to the bonds themselves, must be the same statute which is applicable to the coupons. The bonds are specialties, and so are the coupons. The ten-years statute begins to run against coupons from the time of their maturity. 8 A. & E., 18; *Clark v. Iowa City,* 20 Wall., 583; *Amy v. Dubuque,* 98 U. S., 470; *Koshkorig v. Burton,* 104 U. S., 668. The coupons in this case became due in 1881; the charter of the town of Fayetteville was repealed in October, 1881; the city of Fayetteville was incorporated in March, 1893, and this action was brought in 1894. If

the time which elapsed between the repeal of the charter of the town of Fayetteville and the act of 1893, which incorporated the city of Fayetteville, and during which time the territory was a taxing district, is to be counted, then the statute of limitations (ten years) will be a bar to the action; if that time is not to be counted, then the statute will not be a bar to the action. We are of the opinion that the time should not be counted. In *Lilly v. Taylor,* 88 N. C., 489, it was held that as a result of the repeal of the charter of Fayetteville (and that, too, (494) after the court had taken official knowledge of the act of 1883 creating the taxing district) the creditors of the town had had all remedies for coercing the payment of their debts taken from them; and by the reference of the Court to the case of *Merriwether v. Garrett, supra,* as decisive of the case before them, the Court could have had no other idea than that the creation of the taxing district did not in any way or for any purpose revive the old corporation.

But the defendant insists that the statute of limitations began to run against the coupons in 1881 when they fell due, and that more than ten years elapsed between that time and the time when this action was begun; and that when the statute once begins to run, no subsequent happening or event can obstruct its course. That, as a general proposition of law, is true, and we have numerous decided cases in our own reports which lay down that rule in the clearest language. In *Hamilton v. Shepperd,* 7 N. C., 115, the plaintiff insisted that his action was not barred because there was fraud in the conduct of the defendant, but the Court said: "But it (the matter on which the plaintiff relied to take his case out of the operation of the statute) is not in the act, nor is there anything like it, and we cannot put it there. It is neither in its letter or spirit." In *Vance v. Granger,* 1 N. C., 204, the Court said: "The act of limitation would amount to a general and positive bar, were not certain exceptions contained in the proviso; we cannot add to these others which the Legislature has omitted." But we are satisfied that when these decisions were made the Court had in mind only cases where the ability to bring suit on the part of the plaintiff, or some one for him, had not been taken away by law—by statute—and where the courts were open for the hearing of all matters of which they had jurisdiction. Statutes of limitation are founded on the idea that one who has a cause of action will undertake to enforce it within a reasonable time if the courts are open to him. To prevent confusion and to produce (495) certainty as to what is reasonable time, the law (the statutes of limitation) has fixed the periods within which actions must be brought. These views are so well expressed in the case of *United States v. Wiley,* 78 U. S., 508, that we cannot do better than quote a part of the opinion in that case: "But it is the loss of the ability to sue, rather than the

loss of the right, that stops the running of the statute. The inability may arise from a suspension of right or from the closing of the courts; but, whatever the original cause, the proximate and operative reason is that the claimant is deprived of the power to institute his suit. Statutes of limitation are, indeed, statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is, therefore, defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have." This view of the law is strengthened by what was said by the Court in *Harper v. Abbott,* 73 U. S., 532: "They (the statutes of limitation) proceed also upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period, and they take away all solid ground of complaint because they rest on the negligence or laches of the party himself." These cases were approved in *Braur v. Sauerwin,* 77 U. S., 218, where it was said: "Similar decisions (referring to *Harper v. Abbott, supra*) have been made in the State courts. They all rest on the ground that the creditor has been disabled to sue by a superior power, without any default of his own, and, therefore, that none of the reasons which induced the enact-
(496) ments of the statutes apply to his case; that unless the statutes cease to run during the continuance of the supervening disability he is deprived of a portion of the time within which the law contemplated he might sue."

It is unnecessary to consider at any length the effect of the judgment which was entered up against the town of Fayetteville after the charter of the town of Fayetteville had been repealed. For the purposes of this case, we will treat it as void, as was contended by the defendant. The second cause of action, founded on the coupons, is good.

In conclusion, we are of the opinion that the city of Fayetteville, the new corporation, is the successor of the town of Fayetteville, the old corporation; that the debts of the old corporation were not extinguished by the repeal of its charter; that the same power to assess and collect taxes to pay the plaintiff's claim, which existed at the time that the bonds were issued, is in the new corporation and has not been affected by the provision in the act incorporating the city of Fayetteville, which prohibits the collection of taxes for the payment of claims like those of the plaintiff; that the statute of limitations did not run during the time when the territory and inhabitants of the territory formerly embraced in the town of Fayetteville was a taxing district, and, therefore, is not a bar to this action; and that the plaintiff is entitled to a peremptory

mandamus requiring the proper authorities of the city of Fayetteville to levy and collect taxes upon property and polls within the city with which to pay the plaintiff's claim.

AFFIRMED.

*Cited: Torrence v. Charlotte,* 163 N. C., 566; *Drainage District v. Parks,* 170 N. C., 438; *Mann v. Allen,* 171 N. C., 221.

(497)

EDWARD W. KEITH, ADMR. C. T. A. OF E. T. CLEMMONS, v. MARY P. SCALES ET AL.

(Decided 18 April, 1899.)

*Wills—Charitable Uses—Trusts—Latent Ambiguity—The Code, Sections 2342 to 2345.*

1. A latent ambiguity as to the *cestui que trust* or as to the trustee may be explained by evidence. If the evidence fails to identify the *cestui que trust,* the trust fails; but the courts will not allow a trust to fail for want of a trustee, and, if necessary, will supply one.

2. Devises for charitable uses to institutions to be established, if sufficiently definite, have always been upheld; and, if necessary, the courts would hold the fund until incorporation could be effected, or would appoint substituted trustees. The whole matter of enforcing and controlling private charities is regulated by sections 2342 to 2345 of The Code. The courts take special care to enforce them.

3. A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-being of social man. Neither the doctrine of *cy pres* nor 43 Elizabeth, ch. 4, in any wise affects the validity of a devise for such purpose in this country.

ACTION by plaintiff as administrator, with the will annexed, of E. T. Clemmons, for construction of said will, and advice of the court thereupon, instituted in BUNCOMBE, and removed by order of the court, all parties consenting, to FORSYTH, and heard at February Term, 1899, before *Allen, J.*

Appeal by defendants.

*Watson, Buxton & Watson, Jones & Patterson, and W. R. Whit-* (506) *son for plaintiff.*

*A. H. Eller and Holton & Alexander for defendant.*

CLARK, J. This proceeding is brought by the administrator, with the will annexed, of E. T. Clemmons, against his heirs at law, next of kin, and devisees, to have the will proved in solemn form, and for a construction of the same. He died childless. After a devise to his widow, which is eliminated from our consideration by reason of her having dissented, and three small bequests to relatives, which are not contested, the testator devised and bequeathed his estate, estimated at $100,000, as follows:

(507) "After the above, then I will and bequeath all the rest of my estate, including my wife's, at her death, for a Moravian church and school in my native town, Clemmonsville, Forsyth County, N. C. I desire the Moravian Church, of Salem, appoint proper persons to purchase 100 acres of land in or near Clemmonsville; to first erect a substantial church, of brick, not to exceed in cost $10,000; a school building, not to exceed in cost $10,000, and a comfortable house for the entire use of a Moravian minister and teacher. I desire each member of said church have a lot of 1 acre of this land purchased at $1 each, as far as the land goes, and his children to be sent to school, free of charge, as long as any part of my estate remains to pay the expenses of said church first, then school; to be managed and controlled by the church of Salem, N. C. It is my intention that all my estate, except as before stated, be used and managed by the Moravian Church, of Salem, to maintain a church and school at or near Clemmonsville, N. C., and when, if ever, abolished, then to go to my nearest living relatives."

The case having been transferred, upon issues raised by the pleadings, to the Superior Court, the judge, upon facts agreed, found as a fact that "The Board of Provincial Elders of the Southern Province of the Moravian Church, or *Unitas Fratrum*," officially located at Salem, N. C., and a corporation under the laws of North Carolina, was the trustee intended in his will by the designation "Moravian Church, of Salem," and adjudged that the bequest and devise of the residue of the estate, as above set forth, was valid, and directed that the net proceeds of the personalty after payment of the widow's distributive share, the three small bequests and the costs of administration, be paid over to said trustee, and that said trustee is the owner and entitled to the possession of all the real estate of which the testator died seized, subject to the dower rights of the widow. From this judgment the defendants

(508) appealed, assigning the following grounds of exception, which will be noted *seriatim*.

The first two exceptions are to the findings of fact, that the "Board of Provincial Elders of the Southern Province of the Moravian Church" was the trustee named. This was shown to be the official designation

of the religious denomination commonly known as the Moravian Church, with its headquarters at Salem, which is incorporated in North Carolina and owns large bodies of land, having received *inter alia* at one time a grant of 1,000,000 of acres of land from Earl Granville, holding and investing the funds of the province and the legal title to the churches and chapels and schools within its jurisdiction, including the well-known and long-established female college at Salem. It was also in the facts admitted that the Moravian Church congregation at Salem, owing allegiance to the province above referred to, of which it is a member, was also incorporated and owned considerable property, including four affiliated chapels, and is also commonly known as the Moravian Church, of Salem, but it exercises no control over any property or church beyond its immediate vicinity, and is subject to the authority of the province of which it is a member, and from which its ministers receive their appointment. (This last corporation and its charter have been before this Court in *United Brethren v. Comrs.*, 115 N. C., 489.) At the most, this was a latent ambiguity and explainable by parol evidence. *Simmons v. Allison,* 118 N. C., 763, 776; *Asheville v. Aston,* 92 N. C., 578; *Ryan v. Martin,* 91 N. C., 464; *Tilley v. Ellis,* 119 N. C., 233. The finding of fact by the judge to whom, by consent, it was submitted, is binding upon the defendants. In *Tilley v. Ellis, supra,* a latent ambiguity was sent back to be passed upon by the jury, but as, in that case, the ambiguity was as to the *cestui que trust,* the Court added that if it could not be determined who was meant, the (509) devise would lapse for the benefit of the heirs. *Trustees v. Colgrove,* 4 Hun, 368, and cases there cited. But here, the ambiguity being as to the trustee, the Court would not allow a trust to fail for want of a trustee. Besides, it is not ground for exception to the defendants, who cannot be concerned who is trustee.

But when the case gets back into the Superior Court it may be well for the administrator, for his own protection, to cause the Moravian congregation at Salem, which is officially incorporated as the "Congregation of the United Brethren of Salem," to be made a party defendant (it is not a party to this action), that it may be bound by the final order holding the Provincial Elders of the Moravian Church to be the trustee designated, or give opportunity to contest the same if that congregation should so desire. It is a matter between the two congregations, commonly known as the "Moravian Church of Salem," as to which was intended to be the trustee. This will not affect the validity of the devise or the rights of the defendants. An uncertainty as to the *cestui que trust* is fatal to a devise in trust, unless it is a latent ambiguity which can be ascertained. *Tilley v. Ellis, supra; Institution v. Nor-*

*wood,* 45 N. C., 65. It is otherwise where the uncertainty is as to the trustee, in which case the court will protect the trust and, if need be, appoint a new trustee. 2 Perry Trusts, secs. 730, 731.

The next two exceptions are, that the court erred in not holding that the trustee, the Moravian Church, could not hold real estate, and, besides, has no corporate existence. It appears from the facts agreed that both the organizations referred to above, and both of which are commonly known as the "Moravian Church of Salem" (one being the Province, with headquarters at Salem, and the other the Congregation of that church in that town), were incorporated, and both have
(510) power to take and hold property, real and personal. But if there had been no incorporation, the court would hold the fund until "incorporation could be taken out" (*Allen v. Baskerville,* 123 N. C., 126; *Ould v. Washington,* 95 U. S., 303), and if that were not done in a reasonable time, appoint a substituted trustee.

The other exceptions are to alleged error in not holding the devise for church and school at Clemmonsville void:

1. "That the same is attempted to be given to a church and school not in existence." In *Griffin v. Graham,* 8 N. C., 96, the will provided that 2 acres of land should be purchased, and "that a brick house shall be erected on said land, suitable for a schoolroom, and furnished in a plain manner, for the accommodation of indigent scholars, and be called Griffin Free School." The school had no previous existence, but was to be established by the trustees. The Court upheld the trust, and the institution is still the pride of New Bern. To the same effect, *White v. University,* 39 N. C., 19; *Vidal v. Philadelphia,* 2 Howard (U. S.,), 127 (the famous *Girard will case*); *Ould v. Washington, supra.* In *Jones v. Habersham,* 107 U. S., 174, it is said: "The bequest, in the twenty-third clause of the will, of $1,000 to the first Christian Church erected or to be erected in the village of Telfairville, in Burke County, or to such persons as may become trustees of the same, is supported by *Inglis v. Sailors,* 2 Peters, 99; *Ould v. Washington, supra; Russell v. Allen,* 107 U. S., 163, and is directly within the decisions of *Lord Thurlow* in *Attorney-General v. Bishop,* 1 Bro. Ch., 444, of *Sir John Copley,* afterwards *Lord Lyndhurst,* in *Society v. The Attorney-General,* 3 Russ., 142, and of *Lord Hatherly* in *Sinnett v. Herbert,* L. R. 7 Ch., 232." In fact, a very large proportion of devises of this nature are to institutions to be established in consequence of the will, and if sufficiently definite
(511) they have always been upheld. Certainly we know of none declared void on the ground assigned in this exception.

2. "That a church and schoolhouse are directed to be built, at a cost not exceeding $10,000, thereby giving a discretion, without a person or

corporation being named capable of exercising the discretion." It is evident that the discretion was to be exercised by the trustee, and this is a limitation thereon.

3. "That 100 acres of land are directed to be bought, and 1 acre allotted, each, to parties incapable of being designated, nor capable of enforcing the trust." A devise "for the establishment of a free school or schools for the benefit of the poor of the county" was held valid (*S. v. McGowan,* 39 N. C., 1; *Hunt v. Fowler,* 121 Ill., 269); and "for the poor in the county of Beaufort" (*S. v. Gerard,* 37 N. C., 210); to "a bishop, of North Carolina, and his heirs, in trust for the poor orphans of the State of North Carolina, and the said bishop and his successors have the right to select such orphans," was upheld by *Pearson, C. J.,* in *Miller v. Atkinson,* 63 N. C., 537; a gift to trustees, "to be by them applied to the payment of tuition money for such poor children as the trustees may designate," was sustained in *Newton Academy v. Bank,* 101 N. C., 488; and the interest on the fund to be applied for the "educating of poor mutes," was treated as valid in *School v. Institution,* 117 N. C., 164. "Each member of said church, not to exceed 100," is sufficiently definite.

4. "That the will attempts to provide for the education of the children of the indefinite persons to whom the 1 acre of land is given." The parents being ascertainable, as above said, this exception is untenable.

5. "That the paper-writing attempts to provide a house for a Moravian minister and teacher, and is too indefinite in providing who that teacher may be." The selection was evidently left to the trustees, the Moravian Church, and intended to be so left, just as the (512) trustees of Girard College, of the Griffin School, and other institutions established by virtue of a devise, select the president and professors from time to time.

6. "That the provision reciting his intention that his estate shall be used and managed by the Moravian Church of Salem to maintain a church or school at or near Clemmonsville, N. C., is too general and indefinite, and fails to point out the beneficiaries or the means by which they may be ascertained." This has already been discussed.

7. "That the said Moravian Church is not an incorporation, and is incapable of holding a trust." This is counter to the facts agreed, and need not be considered. Besides, it does not concern the defendants.

8. "That there are no beneficiaries mentioned in said paper-writing sufficiently identified that can enforce the trusts." As much so as in the Girard College case, the Griffin School case, and all similar instances. In those cases, what boy could come into court and say, "I, among others, was intended to enjoy this bounty"? The trustees could answer, "In our judgment, you are not best entitled to the benefit of the donation," yet such devises were upheld.

In *Sinnett v. Herbert, supra,* the Court held that "a gift to a charitable purpose, if lawful, is good, although no object be in existence at the time," citing *Attorney-General v. Bishop,* 1 Bro. Ch., 444, sustaining a gift for "establishing a Bishop in His Majesty's Dominions in America." In which case it was also said, "It is immaterial whether the person to take be *in esse* or not, or whether the legatees were, at the time of the bequest, a corporation capable of taking or not, or how uncertain the object may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to these objects, or whether their corporate designation be mistaken," which is cited in *Vidal* (513) *v. Philadelphia, supra,* which adds, "If the intention sufficiently appears in the bequest, it should be valid." In *Holmes v. Mead,* 52 N. Y., 232, it was held that a beneficiary need not necessarily be described by name; that it is not material that a legatee should be definitely ascertained and known at the date of the will or even at the death of the testator, and it is sufficient if he is so described that he can be ascertained and known when the right to receive the gift accrues. A provision by will that the whole estate should be used at discretion by the selectmen of B. for the special benefit of the worthy, deserving, poor, white, American, Protestant, democratic widows and orphans residing in B. is valid. *Beardsley v. Bridgeport,* 53 Conn., 489. The whole matter of enforcing and controlling private charities is regulated by sections 2342 to 2345 of The Code, whereby the Attorney-General or solicitor is authorized, on the suggestion of two reputable citizens, to bring suit.

9. "That the power given to the trustees to abolish the church and school makes the devise to them void." No power is given to the trustees to abolish the church and school, and the reference to the possible abolition thereof is merely a condition subsequent, and does not prevent the vesting of the estate in the trustee. This objection was answered by *Pearson, C. J.,* in *Miller v. Atkinson, supra.* "It will be time enough at his (Bishop Atkinson's) death to make the objection that his successor cannot exercise the power." So it will be time enough to discuss the effect of an abolition, if it ever happens, at the time it takes place; but such a condition subsequent cannot possibly have the effect of destroying the estate.

10. "That the estate attempted to be devised is a base or qualified fee, and is therefore void." If it be admitted to be a base or qualified fee, it is not void in North Carolina. "But, however broad may (514) be the language quoted, we have no idea that it was the purpose of the *Chief Justice* to say that the limitation expressly defined by him as a base or qualified fee in *Merrimon v. Russell,* 55 N. C., 470, could not be valid in North Carolina. Such limitations are not infre-

quent in this and other States, and we are not prepared to adopt a view which leads to such a revolution in the law of limitations of real property." *Hall v. Turner,* 110 N. C., 292.

11. "That there are no words of conveyance conveying the estate to any one to hold in trust, and it therefore descends to the heirs or distributees." No technical words of conveyance are required in wills. *Allston v. Davis,* 118 N. C., 202; The Code, sec. 2180.

12. "That the will does not contemplate a charity, for it provides that only the children of each member having 1 acre of the land be sent to school, 'free of charge, as long as any part of my estate remains to pay the expenses, of said church first, then of the school,' and is not in contemplation of section 2342 of The Code." While the will prescribes that such children shall be educated free, that is only a part of the trust, which provides in addition for the maintenance of the church and school at that point. The charity is not too vague and indefinite, but quite specific—for "a Moravian church and school at my native town, Clemmonsville, in Forsyth County, N. C., to be managed and controlled by the Moravian Church, of Salem, N. C."; the trust is not difficult of execution, according to the intention of the testator. He says it is his intention that all of his estate be used and managed by the Moravian Church, of Salem, to maintain the charity which he was about to establish. Instead of himself naming new trustees to administer the trust, he places this trust in the hands of that church. The testator himself was a native of Clemmonsville. He was, and had been for fifty years, a member of the Moravian Church at Salem, and died childless, and evidently wished, through his church, to perpetuate his (515) family name by establishing at the place of his nativity, which took its name from his family, a charity to be managed and controlled by the parent church. Courts incline strongly in favor of charitable gifts, and take special care to enforce them. 2 Story Eq. Jur., sec. 1169. Charitable bequests are said to come within that department of human affairs where the maxim, *ut res magis valeat quàm pereat,* has been and should be applied. 2 Perry Trusts, sec. 687. Until the statute of distributions (22 Car. II., ch. 13) was enacted, the ordinary was obliged to apply a portion of every intestate's estate to charity, on the ground that there was a general principle of piety and charity in every man. 2 Perry, *supra,* sec. 690; 2 Bl. Com., 494, 495. This was doubtless a crude beginning of the graduated inheritance tax by which, in Great Britain and most of our States, the estates of the dead are now made to contribute to the benefit of the public.

It is contended that there are several cases in North Carolina in which charitable bequests were declared invalid. But these were very different from the one now before the Court. In *McAuley v. Wilson,*

16 N. C., 276, the testator directed that his property should be formed into a fund to pay a preacher of the Associate Seceding Party to preach at the Church of Gilead, which belonged to the Reformed Party. The Reformed Party would not allow the preacher to preach, but fastened the door and windows of the church against him. The Court said that it did not have the power to force the church to let him preach, and so the devise failed. In *Holland v. Peck,* 37 N. C., 255, the will required the sum to be disposed of by conference, or the different members composing the same, as they shall in their godly wisdom judge to be most (516) expedient or beneficial for the increase and prosperity of the gospel; held too indefinite to be executed. In *Bridgers v. Pleasants,* 39 N. C., 26, the bequest was to foreign missions and to the poor saints. The Court, with fine irony, said that it was impossible for a court to say that this man, or that, was a saint, and the bequest was declared void, though it was careful to add that if the testator "had made it plain who *he* thought were saints, the Court would enforce the trust." In *White v. University,* 39 N. C., 19, the Court pronounced a provision that the proceeds be laid out in building convenient places of worship, free for the use of all Christians who acknowledged the divinity of Christ and the necessity of a spiritual regeneration, as void for uncertainty.

There are numerous cases that where the testator does not select the object of his bounty, but attempts to leave it to his executors or trustees to select the purpose or class, this is too indefinite, and the devise is void, because one cannot appoint another to make a will for him. Among cases of this kind are the famous *Tilden will case, Tilden v. Green,* 130 N. Y., 29; *Bridgers v. Pleasants, supra; Johnson v. Johnson,* 36 Am. St. Rep., 104; *S. c.,* 22 L. R. A., 179, and notes; *Gambell v. Tripp,* 15 L. R. A., 235; but that is an entirely different matter from a case where the object of the bounty, or the class out of which the individuals are to be selected, is definite, as in the *Girard will case,* the *Griffin School case,* and others cited above, in which the selection of the individuals of the class designated to share in the bounty is necessarily left to the trustee, since they might not even be born till long after the testator's death. To the latter class the present devise belongs.

The doctrine of *cy pres* does not obtain in North Carolina (*Bridgers v. Pleasants, supra*), and would have no application to the case before us if it did, and therefore needs no discussion. That doctrine (517) was simply that if a trust failed for any reason, the court would apply the fund to some other charity as similar as possible—to "something else as good." Nor does the validity of charitable devises depend upon whether the statute, 43 Eliz., ch. 4, "Charitable Uses," is or is not in force in this State. "The opinion to that effect has been

thoroughly exploded," says the United States Supreme Court in *Ould v. Washington, supra,* and further says, citing 2 Perry on Trusts, sec. 687, "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-being of social man."

To sum up:

1. This is a charitable use.

2. Neither the doctrine of *cy pres* nor 43 Eliz., 4, in any wise affects the validity of a devise for such purpose in this country.

3. A latent ambiguity as to either *cestui que trust* or trustee is explainable.

4. The latent ambiguity here being as to the trustee, if not explained, the trust could not have failed, but a new trustee would be appointed.

5. If the object of the trust were indefinite, it would be void; otherwise, where as in this case it is definite and the selection of the individuals to enjoy its benefits is left to trustees.

After a careful review of the elaborate argument on both sides, which has been of great assistance to the Court in drafting this opinion, the judgment below is

AFFIRMED.

*Cited: St. James v. Bagley,* 138 N. C., 399; *McLeod v. Jones,* 159 N. C., 78; *In re Lloyd,* 161 N. C., 560; *Gold Mining Co. v. Lumber Co.,* 170 N. C., 277; *Gold v. Cozart,* 173 N. C., 613; *Trust Co. v. Ogburn,* 181 N. C., 327, 329, 330, 331.

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(518)

HORNER SCHOOL, INC., v. R. M. WESCOTT.

(Decided 25 April, 1899.)

*Contract—Jurisdiction.*

1. Where, according to the school catalogue, tuition and board are payable in installments, in advance, and no money thus paid to be returned in event of dismissal for bad conduct, and by special indulgence payment in advance was not insisted on from a cadet who was dismissed for bad behavior, the school is entitled to recover the installment which ought to have been paid in advance.

2. Where, by special contract, half of the catalogue prices were to be paid, and dismissal occurred before payment, half rates only are recoverable.

3. In an action involving the construction of a contract, where it is apparent there was a *bona fide* contention for more than $200, the Superior Court has jurisdiction.

ACTION on contract for board and tuition of two cadets entered at the Horner School, tried before *Robinson, J.*, at January Term, 1898, of GRANVILLE.

The plaintiff claimed $479.25 for board, tuition, etc., for one scholastic year for the cadets. Under the charge of the court, excepted to by plaintiff, that there could be no recovery upon the contract, but upon a *quantum meruit* only, a verdict was rendered for the plaintiff for $38.50, value of services actually rendered. Judgment for that amount in favor of plaintiff, who appealed.

The circumstances are fully stated in the opinion.

(519) *A. W. Graham and J. W. Graham for plaintiff.*
*Edwards & Royster for defendant.*

FURCHES, J. The plaintiff is a corporation, conducting a select public school for boys. In September, 1896, R. D. Wescott, a son of the defendant, entered this school as a student, and in October of the same year T. L. Leonard, a nephew and ward of defendant, also entered said school as a student. R. D. Wescott remained about five weeks and T. L. Leonard about one week, when they were expelled for going into a grog-shop on Sunday and getting drunk.

It appears from the evidence that the plaintiff had published a catalogue for its school, stating that it was founded in 1851, containing its rules, prices and terms of payment; that this catalogue had been extensively distributed, and its rules were kept posted up in the schoolroom, the dining-room and the chambers or bedrooms of students; that in said catalogue, under the head of "Expenses of Session of Twenty Weeks," is the following statement: "Board and tuition, including furnished room, fuel, use of arms, etc., $125; washing and lights, $6.75; books, stationery, etc., about $10. No extra charges are made. Payment for board and tuition must be made on 1 September, 1891, $62.50; 1 November, 1891, $62.50; 18 January, 1892, $62.50; 1 April, 1892, $62.50. No money will be returned in case of dismissal for bad conduct or in case of voluntary withdrawal, except at the option of the principals." That the catalogue of 1896 was the same as this.

Plaintiff contends that this constitutes a contract between it and the defendant for the tuition, board, books, and washing for the students, Wescott and Leonard, for the whole scholastic year, commencing in September, 1896, which, plaintiff says, amounts, to $479.25; that it had the right to expel these "cadets" for the cause assigned, and that it was

expressly stated that "no money will be paid back in case of dismissal for bad conduct," and that a dismissal for bad conduct was equivalent to voluntary withdrawal by these students.

The plaintiff's catalogue, published for so long a time and so (520) extensively circulated, would ordinarily be some evidence tending to show that a party who patronized the school had seen and known its terms, and should be submitted to the jury; and if they should find that defendant had seen the catalogue and then patronized the school, the terms would be binding on him as an accepted offer and contract. *Horner v. Barker,* 74 N. C., 65; *Bingham v. Richardson,* 60 N. C., 215. But the plaintiff's evidence shows that these "cadets" were not received under the terms stipulated in the catalogue, but that each one of them was received under a special contract that differed from the terms stated in the catalogue. Wescott was received at one-half the catalogue price, upon condition that he contributed his musical talent to the benefit of the school, one-half being $62.50; and Leonard was to be taken at $100, instead of the rates stated in the catalogue; that while plaintiff calls ten months, or forty weeks, a scholastic year, it calls five months, or twenty weeks, a session. If it should be held that this evidence showed a contract for the full session of ten weeks, commencing the first of September, it must be borne in mind that this was not all the evidence with regard to the contracts under which these cadets entered the plaintiff's school. The plaintiff introduced the catalogue in evidence for the purpose of proving the contract. So the plaintiff's evidence, which shows that Wescott was to be taken at half price, and Leonard at $100 per session, must be taken in connection with the catalogue, which shows that one-half of this amount, to wit, $31.25 for Wescott and $50 for Leonard, was due on the first of September, or when they entered school, and that there was nothing more due from them until the first of November if they had continued in school; and before this November installment was due, they had been expelled and left school.

There is no stipulation in the contract that if these cadets are (521) expelled for good cause, they (or those who sent them) should be liable for the whole session or for the scholastic year. The only stipulations are that $62.50, or *one-half* of what will be due for the session of ten weeks, is due—to be paid—at the commencement of the session or when the boy enters school. In this case one-half was $31.25 for Wescott and $50 for Leonard. This was not paid, as it was to be. If it had been paid, it is stipulated that "it would not be returned, except at the option of the plaintiff." That it was not paid when these boys entered school was owing to the indulgence, and not the fault of the plaintiff, and the defendant has no right to complain of this. If this installment had been paid, the plaintiff would have had the right to retain it, and nothing more.

As it was the defendant's duty to have paid this installment when it was due, and not the plaintiff's fault that it was not paid, it seems that defendant should not complain if he has to pay now. And it does not seem to us that plaintiff has any right to recover more than it would have been able to retain if both plaintiff and defendant had observed and kept the contract and these installments had been paid.

It therefore seems to us that plaintiff, upon its own evidence, cannot recover more than what was due on the September installment.

As this action involves the construction of a contract, in which we can see there was a *bona fide* contention for more than $200, it seems to us that it was properly brought to the Superior Court.

We therefore decline to dismiss for want of jurisdiction. But, as there is error in holding that plaintiff could not recover on the contract, there must be a

NEW TRIAL.

*Cited: Conservatory v. Dickenson,* 158 N. C., 209; *Brock v. Scott,* 159 N. C., 516; *Fields v. Brown,* 160 N. C., 300; *Teeter v. Military School,* 165 N. C., 571; *Petree v. Savage,* 171 N. C., 439; *University v. Ogburn,* 174 N. C., 432.

(522)

## W. B. DOWDY AND WIFE v. WESTERN UNION TELEGRAPH COMPANY.

(Decided 25 April, 1899.)

*Telegraph Companies—Agents—Negligence—Mental Anguish.*

1. Agency is a matter of law, purely, when the facts are undisputed.

2. Where, by custom and rules of the defendant company, their telegraph offices at Sanford and Aberdeen, two places on the Augusta Air Line Railroad, were closed to publid business between 7 o'clock p. m. and 7 o'clock a. m., and between those hours the night operators of the railroad company were on duty for railroad business only, but the offices were not in fact closed, and the night operators received messages for transmission and the usual charges, which were both turned over to the day operator next morning: *Held,* that the night operators were agents of the telegraph company as well as of the railroad company, both for transmission and delivery.

3. The defendant company cannot keep its offices open, receive messages for pay, and then, when a negligent delay in their delivery service occurs, screen themselves by saying that the persons who are in their places of business take the messages and receive payment therefor are not its agents.

DOWDY *v.* TEL. CO.

ACTION for damages for mental anguish occasioned by negligence in delivery of a message, tried before *Timberlake, J.,* at September Term, 1898, of CHATHAM.

*H. A. London for plaintiffs.* (524)
*R. C. Strong for defendant.*

MONTGOMERY, J. This action was brought to recover damages for mental anguish alleged to have been suffered by the plaintiffs on account of the alleged negligent failure of the defendant to deliver a certain telegraphic dispatch sent by the *feme* plaintiff to the male plaintiff, her husband. In the wife's telegram she informed the husband that their child was very sick, and requested him to come home at once. The wife was at Sanford and the husband at Aberdeen, both places being on the Augusta Air Line Railroad. The defense of the defendant as set up in their answer was that the message was not delivered to their agent at Sanford, nor transmitted to their agent at Aberdeen, but was delivered for transmission to the night operator of the Seaboard Air Line system of railroad, at Sanford, and was received by the night operator of the same railroad company at Aberdeen, and that upon the delivery of the telegram to the defendant's agent at Aberdeen, when he went off duty the next morning at seven o'clock, by the night operator of the railroad company, it was promptly delivered to the sendee, the male plaintiff.

J. M. Dowdy, the father of the male plaintiff, testified that he (525) delivered the telegram to Huntley, the agent of the defendant at Sanford, on 21 February, 1898, at 8 p. m., to be transmitted to the agent of the company at Aberdeen for the sendee, the male plaintiff, and paid the charges. Huntley denied that he received the telegram from J. M. Dowdy. He said, however, that on the next morning on going to his work in the office of the defendant company he found on the hook the message; that it was attached to a Western Union Telegraph Company blank; that he put it "Western Union Telegraph Company's business," and that the night operator gave him the money for transmitting the message which he turned over to the defendant company.

S. A. Johnson, a witness for the defendant, testified that he was the night operator of the S. A. L. R. R. Co., and that he received the telegram at 9:45 p. m. on 21 February; that when he received it he wrote it out on a Western Union blank; that when messages not on railroad business came he always did this, and, after making memoranda thereon as to the time of transmission and receipt, according to rules, hung them on a hook in the office where the Western Union operator could

get them when he came on duty in the morning. Johnson further said that he never took such messages for delivery; that there was no provision made for delivering messages at night. Johnson, Huntley and W. F. Williams, another witness of the defendant, all testified that at Sanford and Aberdeen the custom of the defendant company was to close those offices for public business, from 7 p. m. to 7 a. m. of each day, and that after 7 p. m. the night operators of the railroad company went on duty for railroad business only. The house in which the male plaintiff was staying at Aberdeen was about a fourth of a mile from the office of the defendant company, and Johnson, the night opera-
(526) tor, knew where he was when the telegram was received. There was a train leaving Aberdeen for Sanford at 12:02 a. m., and the plaintiff could have arrived at the latter place an hour afterward had the telegram been delivered to him before the departure of the train from Aberdeen. It was not delivered to him until 7 a. m. the next morning, too late for the plaintiff to arrive at Sanford before the baby's death. The defendant's contentions were that the defendant company had the right to establish reasonable rules for the regulation of its business, and in the exercise of that right that they had made a rule that their offices at Aberdeen and Sanford should be closed for public business each day from 7 p. m. to 7 a. m.; that the office hours for business at Sanford when the telegram was delivered there to the night operator of the railroad company having been over, the defendant could not be held liable for any neglect on the part of the railroad operators at either Sanford or Aberdeen as to the delivery of the telegram to the male plaintiff; that even if the person who received the telegram at Sanford had been the agent of the defendant he had no right or authority to receive it contrary to the rule of the company closing the office at 7 p. m.; and that even if the agent of the defendant at Sanford had received the telegram either before or after the office hours at that point, and had transmitted it to the agent at Aberdeen after the close of business there, the defendant would not be liable for the failure of the agent at Aberdeen to deliver it to the sendee unless he had failed to deliver it within a reasonable time after the opening of the office for business on the morning of the 22d.

These contentions of the defendant were the subject-matter in various forms of those of its special prayers for instructions, which his Honor refused to give. His Honor's view of the case as is seen in his charge to the jury was that, upon the testimony of the defendant's wit-
(527) nesses, the person who received the telegram at Sanford, and the one who received it at Aberdeen, notwithstanding that they were in the employment of the railroad company for receiving and transmitting of railroad business dispatches, were also agents of the defend-

ant, and we think his view the right one. These night operators were in the offices of the defendant, and were using their wires and their instruments. The offices were not closed in fact, but open, and the persons who were in charge were receiving messages and making the usual charges therefor. The defendant company cannot keep its offices open, receive messages for pay, and then when a negligent delay occurs, screen themselves by saying that the persons who are in their places of business, take the messages and receive payment therefor are not its agents. Johnson, the night operator at Aberdeen, who received the message from Sanford, stated that when he received such messages he made memoranda on them at the time of their receipt according to rules, and hung them on the hook for the agent of the company next morning. What rules did he refer to? Certainly the railroad authorities had nothing to do with business other than that which concerned railroad transactions. The rules must have been for the benefit of the defendant company, and to keep account and checks between and on agents at the different stations who were receiving and transmitting telegrams and receiving charges therefor. Agency is a matter of law purely when the facts are undisputed. The facts in this case as to how this telegram was received and transmitted are undisputed, and they, in law, in our opinion, constitute the person in the office at Sanford, to whom the message was delivered for transmission, and the one in the office at Aberdeen who received it, agents of the defendant, and that was the view his Honor took of the matter, and there was no error in the manner in which he submitted the case to the jury. From the (528) view we have taken of the legal relation between the persons in the offices of the defendant at Aberdeen and Sanford who handled the messages, any discussion of the matters argued by the defendant's counsel involving the right of the company to establish reasonable office hours, and the benefits attendant upon that right, has become unnecessary.

NO ERROR.

FAIRCLOTH, C. J., dissents.

*Cited: Kennon v. Tel. Co.,* 126 N. C., 236; *Hendricks v. Tel. Co., ib.,* 311; *Carter v. Tel. Co.,* 141 N. C., 377; *Helms v. Tel. Co.,* 143 N. C., 394; *Ellison v. Tel. Co.,* 163 N. C., 14.

C. L. LAUDIE AND WIFE, MARGARET E. LAUDIE, v. THE WESTERN UNION TELEGRAPH COMPANY.

(Decided 25 April, 1899.)

*Negligence—Mental Anguish—Undisclosed Principal.*

1. A telegraph company, as a common carrier, in the transmission and delivery of messages, owes a public duty which should be performed with reasonable care and diligence.

2. The plaintiff is not debarred from a recovery of damages from negligence in the delivery of a telegram because her name was not signed to the telegram, and the defendant company was not then notified that it was sent by her direction or for her benefit.

ACTION to recover damages for mental anguish suffered by *feme* plaintiff on account of alleged negligence of defendant in the delivery of a telegram, tried before *Coble, J.*, at March Term, 1899, of MECKLENBURG.

(530) *Osborne, Maxwell & Keerans for plaintiff.*
*Jones & Tillett for defendant.*

DOUGLAS, J. This was a civil action by the *feme* plaintiff to recover damages for mental anguish suffered by her, caused by the assurance on the part of the defendant that a telegraphic message sent for her benefit had been delivered, when in fact it had not been delivered; and also by the negligent failure of the defendant to promptly deliver said telegram.

The infant child of the plaintiffs had died early on the morn-
(531) ing of 24 May, 1897, and about 10 o'clock on the same day C. L. Laudie, husband of the *feme* plaintiff, by an agreement with her and for her benefit, delivered the message hereinafter set forth to the defendant company for transmission to T. L. Huntley, a kinsman of the *feme* plaintiff. The said Laudie paid the defendant its charges for transmission to Chesterfield, and at the time of the delivery notified the company that it was a very important matter, relating to the burial of the child; the said company assured Laudie that the same would be forwarded immediately, and, in order to be certain of its delivery, the said Laudie went back to the office of the company about 12 o'clock on the same day and was assured by it that the message had been delivered to its destination; that he thereupon informed his wife, the *feme* plaintiff, and she, acting and relying upon said representations of the defendant, prepared the body of her infant and started with it to Wadesboro on the morning of 25 May, reaching that point about 7 o'clock a. m.,

expecting to be met there in accordance with said telegram; that the said message was not delivered on 24 May, as assured by the company, but not until the following day, too late for any one to meet the *feme* plaintiff; that on account of the nondelivery she had to remain for several hours at the depot in Wadesboro, alone with the dead body of her infant, and then make arrangements to carry the same across the country to Chesterfield, by which she suffered great mental anguish, as she alleges.

The *feme* plaintiff, in order to maintain her action, proposed to show that the message was sent by an agreement with and for her benefit, and that she was the undisclosed principal, which the court refused to permit.

To this ruling the plaintiff excepted, submitted to a nonsuit, and appealed.

The telegram was as follows:

CHARLOTTE, N. C., 24 May, 1897. (532)

*To* T. L. HUNTLEY, Chesterfield, S. C.

Frank dead; meet depot Wadesboro, 8 a. m. Bury him in Chesterfield. Grave three feet. C. L. LAUDIE.

The only point presented to this Court by the distinguished counsel, who frankly admitted that it was covered by the case of *Cashion v. Tel. Co.*, 123 N. C., 267, was that of an undisclosed principal. It is due to them to say that the *Cashion case* had not been decided when the appeal was taken.

We see no reason to reverse our ruling in that case, and, therefore, hold that the plaintiff is not debarred from a recovery because her name was not signed to the telegram, and the defendant was not then notified that it was sent by her direction or for her benefit. The facts as presented to us in this appeal are stronger than those in the *Cashion case*, and therefore bring this case more clearly within the rule. Even if the male plaintiff had not notified the defendant of the urgency of the message, its importance clearly appeared upon its face; and the negligence of the defendant in failing to deliver it was aggravated by its negligent assurance that it had been delivered. We have decided this question upon what we believe to be true legal principles; but let us gauge it for a moment by the rule of common sense. The male plaintiff left his wife alone at home with the dead body of their child, and went to the telegraph office to send a message to a relative to prepare the grave and meet the body. Suppose we had found him doing what the defendant says he should have done: coolly and deliberately informing the defendant that he was the agent of one M. E. Laudie; that he sent the telegram by her direction and for her benefit; and that "she had then in

contemplation" heavy damages for great mental anguish which would probably result from a failure to promptly deliver the telegram. Would it not have tended to raise in the minds of the jury a suspicion (533) of speculation? While it might have come within the rule of *Hadley v. Baxendale,* 9 Exch., would it be within the ordinary rule of human conduct? Would we expect such care and deliberation on the part of a father or mother under such circumstances, and would it be reasonable in us to require it? The telegraph is not intended solely for lawyers, nor for those skilled in business or experienced in litigation. It is intended for the general public, and must meet their reasonable convenience. Moreover, the defendant, as a common carrier, owed to the plaintiff a public duty which it should have performed with reasonable care and diligence. It cannot be relieved from liability for the proximate results of its own negligence if it existed, by unreasonable regulations or technical objections.

For error in the intimation of his Honor, the judgment of nonsuit must be set aside.

NEW TRIAL.

*Cited: Kennon v. Tel. Co.,* 126 N. C., 236; *Hendricks v. Tel. Co., ib.,* 311; *Laudie v. Tel. Co., ib.,* 433; *Mfg. Co. v. Bank,* 130 N. C., 609; *Cogdell v. Tel. Co.,* 135 N. C., 435; *Hunter v. Tel. Co., ib.,* 466; *Green v. Tel. Co.,* 136 N. C., 492; *Crawford v. Tel. Co.,* 138 N. C., 165; *Helms v. Tel. Co.,* 143 N. C., 392, 394, 395; *Holler v. Tel. Co.,* 149 N. C., 344; *Cordell v. Tel. Co., ib.,* 408; *Penn v. Tel. Co.,* 159 N. C., 309.

(534)

## FIRST NATIONAL BANK OF WINSTON v. H. L. RIGGINS.

(Decided 25 April, 1899.)

*Stock Note—Set-off.*

1. Where a bank is in course of liquidation, and a stockholder is indebted to the bank by note secured by pledge of stock, his supposed share in the assets is not available as a set-off, legal or equitable, in a suit upon the note.

2. Stock pledged as collateral must be released by payment or sale before it is entitled to prorate in the assets of a bank winding up its business. The general rule is, in such cases, that the *net* balance must be distributed *pro rata* among the beneficiaries.

3. DOUGLAS, J. (concurring in the judgment, but not in the opinion, of the Court), expresses as his view of the case (concurred in by MONTGOMERY,

J.), that it does not involve any equitable principles, but simply a question of legal set-off or counterclaim, and as defendant's share was not demandable at the bringing of the action or at any time before judgment, it was not the subject of set-off or counterclaim; creditors having been settled with, if a partial dividend payable out of remaining assets on hand had been declared, it would have been available as a set-off in this action.

ACTION upon a promissory note for $1,300, payable to the bank, and past due, secured by pledge of ten shares of the capital stock lodged as collateral security, tried before *Allen, J.*, at February Term, 1899, of FORSYTH.

The relief asked was judgment on the note and order of sale of the stock, unless the judgment was paid in some reasonable time. The defendant set up a counterclaim of $800, alleging that when the debts due the bank are collected and its property reduced to money, his distributive share in the assets would amount to at least that sum. Judgment was rendered in favor of plaintiff for $1,300 and (535) interest. After judgment, the defendant moved the court for the appointment of a receiver, a referee to take and state all accounts, and ascertain the amount to be credited on the judgment, and an order of restraint in the meanwhile—all of which motions were refused by the court, and defendant excepted and appealed.

*Watson, Buxton & Watson and Jones & Patterson for plaintiff.*
*No counsel for defendant.*

FAIRCLOTH, C. J. The plaintiff, the First National Bank, is in liquidation, and a committee duly appointed has charge of its property, to collect the assets and pay its debts, and distribute the balance among the stockholders. The defendant is a stockholder in plaintiff bank, and is indebted to it for his stock, which was deposited as collateral security, and this action is brought to collect the amount due on said stock, and to sell the stock in payment, or part payment, of the amount found to be due.

The defendant alleges that upon a final settlement of the bank's affairs he will be entitled to $800, as his distributive share of the assets, and demands a credit on his debt for that amount. This allegation and this right are denied, and it does not appear what will be his distributive share. In cases of insolvency, private or corporate, the general rule is that the *net* balance must be distributed *pro rata* among the beneficiaries.

Under the National Banking Act, when an assessment is made, each stockholder is required to pay his part in full, regardless of

(536) whether he is a debtor or creditor of the bank, and when the collections are made, and all debts and expenses are discharged, an equitable distribution of the assets is made. The same rule applies in the settlement of insolvent estates by executors and administrators. And so it is in winding up the business of insolvent building and loan associations, as was held by this Court in *Meares v. Duncan,* 123 N. C., 203, and cases cited.

If the defendant's contention was allowed he would get the full value of his stock, at least *pro tanto,* and thus the net amount for the other stockholders would be reduced, and the principle of an equitable settlement would be disturbed, as the liability of the stockholder would be diminished, and that of the other stockholders increased, which would be a result not contemplated in law or equity. As a stockholder, he is liable to an amount equal to his stock, or to a just proportion if all is not required; but as a creditor, he is entitled only to a dividend in proportion to other creditors. His liability as a contributor for the benefit of creditors must be distinguished from his character as a simple contract debtor to the bank upon ordinary business transactions. The money arising from unpaid shares is a trust fund for all the creditors, and cannot be affected by any individual transactions of the stockholder, to the prejudice of the other stockholders. *Hobart v. Gould,* 8 Fed., 57; Morse Banks, p. 500.

Besides, the distributive share of the defendant is unknown, and it seems it would be impracticable to ascertain it with any certainty.

The above authorities do not stand upon facts *on all fours* with the present case, but they all enunciate a principle plainly applicable to the present case; and that principle is so manifestly just that we have no hesitation in adopting it. We think, therefore, that the defend-
(537) ant cannot set off what he supposes to be his distributive share against his individual indebtedness to the bank.

NO ERROR.

DOUGLAS, J., concurring: I concur in the judgment of the Court, but not in the opinion, which is based upon principles some of which have apparently no application to the facts, and may be confusing to us in other cases.

I do not think this case involves any equitable principles, but is simply a plain question of legal set-off, or counterclaim, as all such matters are now designated under The Code. Neither does it come within the principles governing the rights of creditors to the assets of an insolvent corporation, for the simple reason that there are no creditors, as it expressly alleged in the complaint and admitted in the answer.

Strictly speaking, the bank is not insolvent, because it owes no debts, but has gone into voluntary liquidation because its capital has become impaired to such an extent as to prevent its carrying on a profitable business. It is true that all corporations in their statements place their capital stock among the liabilities, but this is necessary to offset the asset representing the money paid in on the stock. Paid-up stock may in one sense be a liability of the corporation, but in no sense can it be a debt. It represents a certain share or part of the corporation, and for that reason, in England, the holders of such shares are called *shareholders* instead of stockholders. Such holders cannot withdraw their stock at will, but only upon the dissolution of the corporation, and then they are entitled not to any particular sum, but to such a proportion of its assets as their respective shares bear to the entire stock. This cannot be definitely ascertained until the assets are all collected or reduced to a certainty. They are, of course, entitled to reasonable dividends, but such dividends should come only from profits, and should (538) never impair the capital. As a stockholder is entitled only to his distributive share, he cannot demand it in advance of a general distribution. By this is not meant a final distribution, but such a distribution in whole or in part as applies equally to all the stockholders. In other words, if one stockholder is given ten per cent, all can demand ten per cent. As the defendant's share was not demandable at the bringing of this action or at any time before judgment, it was not the subject of set-off, which at common law applied only to mutual debts upon which independent actions could have been brought. 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; but The Code (section 244) specifically provides that "The counterclaim . . . must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action." This question is discussed in *Electric Co. v. Williams,* 123 N. C., 51. If the stock itself and the money due in payment therefor were mutual debts, capable of mutual set-off, then no stock subscription could ever be collected; and if the stockholders could individually withdraw their shares at their option, the very purpose of incorporation would be defeated. As the defendant could not have brought suit for his individual stock, then he cannot set it off against the debt due the plaintiff. The note sued on is clearly a debt, although given in part payment of a stock subscription. The defendant subscribed for twenty shares of the capital stock of the plaintiff bank, and apparently paid $700 in cash and gave his note for the balance, with the stock itself as collateral security. It appears that, by consent, the capital of the bank was reduced one-

(539) half on account of losses, but as the reduction was uniform, the actual value of the stock remained the same, as it represented the same relative proportion of ownership in the same amount of assets. It therefore makes no difference in this suit.

It is the duty of those winding up the affairs of a corporation to do so with the least possible expense and inconvenience to the stockholders, but in the absence of any allegation of fraud or oppression we should not interfere with their reasonable discretion, even in a proper action. We certainly cannot do so on a mere plea of set-off or counterclaim.

For the reasons herein stated I concur in the judgment of the Court.

MONTGOMERY, J. I concur in the concurring opinion.

(540)

GEORGE D. HODGIN, SURVIVING PARTNER OF HODGIN BROS. & LUNN, v. PEOPLES NATIONAL BANK.

(Decided 25 April, 1899.)

*Partnership—Surviving Partner—Bank Deposit—Bank Debt—Set-off.*

1. In the absence of an agreement to the contrary, a bank may apply deposits, other than special, to any indebtedness due it in the same right of the depositor, provided such indebtedness has matured, and if the depositor has become insolvent, whether the indebtedness has matured or not.

2. The same right of set-off and application exists whether the depositor is an individual or a firm, where the indebtedness is in the same right; and it matters not whether the deposits stand in the name of the firm or of a surviving partner. The rule is otherwise in case of an executor or administrator.

3. A partnership is not liable for the debts of its members, and a bank has no right to apply deposits standing in the name of the firm in payment of the individual indebtedness of any of its members; nor can the bank apply individual deposits of a partner to the indebtedness of the firm to the bank.

FURCHES and DOUGLAS, JJ., dissent.

ACTION upon a money demand for the recovery of deposits alleged to have been misapplied, tried before *McIver, J.*, at August Term, 1898, of FORSYTH.

The plaintiff is surviving partner of the firm of Hodgin Bros. & Lunn, composed of himself and L. L. Lunn. The firm became indebted

to the bank in the sum of $5,800, and effected a compromise at 50 per cent, and executed a note at the bank for $2,900, dated 5 December, 1893, payable six months after date, with privilege of renewal. On 16 March, 1896, L. L. Lunn died, and plaintiff Hodgin, as surviving partner, proceeded to collect and close up the business, making deposits of the assets of the firm in the bank. In addition to the (541) firm note, the bank held the individual note of L. L. Lunn, endorsed by G. D. Hodgin for $650, payable at 90 days from date, 29 January, 1896.

On 10 April, 1897, it became known that the firm was insolvent, that Hodgin was insolvent, and so was the estate of L. L. Lunn. At that date the firm indebtedness to the bank was $2,350.50, and the individual debt of Lunn was $687.29, aggregating $3,037.77; this amount the bank charged up against the firm, and deducted from its deposits, and for this amount the plaintiff brings suit. The defendant claimed that it was entitled to deduct both amounts from plaintiff's deposit account, the plaintiff contends that neither amount could be deducted, and that all the defendant was entitled to was to pro rate with other creditors of the firm in the partnership assets for the firm debt only, and not upon the individual debt of Lunn at all. His Honor declined to so instruct the jury; plaintiff excepted.

There was a verdict in favor of defendant, and judgment that the plaintiff take nothing by this suit. Plaintiff appealed.

*Holton & Alexander, Shepherd & Busbee, E. E. Gray and Charles Price for plaintiff.*

*Glenn & Manly, Watson, Buxton & Watson, Jones & Patterson and A. H. Eller for defendant.*

CLARK, J. A bank has the right to apply the debt due by (542) it for deposits to any indebtedness by the depositor, in the same right, to the bank, provided such indebtedness to the bank has matured. *Bank v. Hill,* 76 Ind., 223; *Knapp v. Cowell,* 77 Iowa, 528; *Coats v. Preston,* 105 Ill., 470; *Bank v. Bowen,* 21 Kansas, 354; *Clark v. Bank,* 160 Mass., 26; *Bank v. Armstrong,* 15 N. C., 519; *Muench v. Bank,* 11 Mo. App., 144; Morse on Banks, sec. 324; *Bank v. Hughes,* 17 Wend., 94; *Eyrich v. Bank,* 67 Miss., 60. Even if the indebtedness to the bank has not matured, if the depositor becomes insolvent, the bank by virtue of the right of equitable set-off may apply the deposits with it of such debtor to his indebtedness. *Dammon v. Bank,* 50 Mass., 194; *Flour Co. v. Bank,* 90 Ky., 225; *Trust Co. v. Bank,* 91 Tenn., 336; *Seed Co. v. Talmage,* 96 Ga., 254; Waterman on Set-off, 432.

The money deposited by Hodgin as surviving partner was kept under the same heading in the bank's book, "Hodgin Bros. & Lunn," as before the death of Lunn, and was merely a continuation of the old line of deposits. This would have been equally true if the deposits after the death of Lunn had been made in the name of "Hodgin, surviving partner." In either event the deposits were in behalf of the firm, and were in the same right as the note held by the bank against said firm, and on the insolvency of the firm the bank had the right to apply the deposit made by the surviving partner in behalf of the firm to the indebtedness of the firm, whether matured or not. If the surviving partner had made a deposit, a special deposit, or if there had been an agreement with the bank that these deposits should not be applied to the indebtedness of the firm to the bank, then the bank's right of set-off would have been tolled. Morse on Banks, sec. 325. But there was no evidence to that effect.

(543) It is true that deposits made by an executor or administrator in a bank cannot be applied to the indebtedness to the bank of the deceased. *Jordan v. Bank,* 74 N. Y., 467; *Appeal of Bank,* 48 Pa. St., 57. But that is because the personal representative holds the funds of the estate for the payment of the debts in the order prescribed by statute, and then *pro rata* in each class, which would be disturbed if the bank could apply the funds deposited by the executor or administrator to the indebtedness due to it by the deceased, though the deposits at the death of the testator could be applied to any indebtedness of his, then due. *Jordan v. Bank, supra.* It is otherwise as to the surviving partner, who merely continues the business for the purpose of winding it up, and of whom the law does not require the application of the funds in his hands to the debts, in any prescribed order.

The bank had no right, however, to apply the deposits on behalf of the firm, whether made during its existence or by the surviving partner, to the indebtedness held by it against one of the partners, and it could make no difference that this was the note of one partner endorsed by the other. It was an individual indebtedness, and partnership deposits could not be applied to it. A partnership is not liable for the debts of its members. *Straus v. Frederick,* 91 N. C., 121. Though each partner (except in limited partnerships) is severally responsible for the entire indebtedness of the firm, yet, notwithstanding that fact, the individual deposits of a partner cannot be applied to the indebtedness of the firm to the bank. *Adams v. Bank,* 113 N. C., 332; *S. c.,* 23 L. R. A., and notes; *Bank v. Jones,* 119 Ill., 407; *Raymond v. Palmer,* 41 La. Ann., 425; *Dawson v. Pike,* 5 Pike, 283.

Upon the issues as found, the judgment might have been cor-
(544) rected to accord with the above opinion but for the finding upon

the eighth issue. The plaintiff is entitled to recover the excess of the deposits above the indebtedness of the firm, with interest from date of demand.

NEW TRIAL.

FURCHES, J., dissenting: The firm of Hodgin Bros. & Lunn was composed of the plaintiff, G. D. Hodgin and L. L. Lunn. This firm was indebted to the defendant bank. Lunn died, and the plaintiff became sole surviving partner of the firm of Hodgin Bros. & Lunn. After the death of Lunn, the plaintiff commenced collecting in the debts due the firm, and, not knowing what to do with the money, went to the president of the defendant bank, stated the fact that he wanted the president to advise him in the matter, when the president advised him to collect the assets as fast as he could, and pay the debts of the firm. The plaintiff then replied, "The firm is owing you, and I want to deposit the assets with you, that you may see that it is properly applied." Thereupon, the plaintiff made his deposits in the defendant bank, and they were entered as deposits of "Hodgin Bros. & Lunn." Besides the debt due the defendant by the firm of Hodgin Bros. & Lunn, the deceased partner, Lunn, owed the bank an individual debt of $650, with plaintiff, Hodgin, as his surety.

Plaintiff continued to make deposits in the defendant bank as he collected the assets of the firm until he had about the sum of $4,000 on deposit with the defendant.

But about 1 April, 1897, it became known that the firm of Hodgin Bros. & Lunn was insolvent, and that Lunn's estate was insolvent, and that the plaintiff, Hodgin, was also insolvent. Upon the defendant's receiving information of the insolvency of the firm, of the estate of Lunn, and of Hodgin, it applied a sufficient amount of the money so deposited with it by defendant to pay the debt against the firm, and also the note of $650 of Lunn, to which the plaintiff, Hodgin, was surety, amounting in all to more than $3,000. The question is, (545.) could the defendant do this?

The partnership was dissolved by the death of Lunn on 16 March, 1896, and plaintiff became the only surviving partner—became the legal owner of all the partnership assets. Bates' Law of Partnership, sec. 713. Hence his powers to dispose of the partnership assets in payment of debts and settling up the concern is derived from his title to the property and not from his powers. *Ib.*

After a dissolution, by death, the surviving partner is the legal owner in trust for the purpose of winding up the concern, payment of debts,

etc. *Ib.*, sec. 720. This being so, the plaintiff was the owner of the money he deposited with the defendant, and the bank became his debtor and he the bank's creditor to the amount deposited.

The fact that the deposits were made in the name of the firm of Hodgin Bros. & Lunn made no difference, as the firm was dissolved by the death of Lunn, and the defendant knew this, and knew that plaintiff was making the deposits as the surviving partner. Morse on Banking, sec. 326.

The right of "lien, set-off, and application only exists where the individual, who is both depositor and debtor, stands in both these characters in precisely the same relation and on precisely the same footing towards the bank." Morse on Banking, *ib.*

It seems to us that the principles enunciated by these authorities, if applied to this case, decides it against the defendant's right to apply the deposits to the satisfaction of the debt due by the firm of Hodgin Bros. & Lunn. The parties owing the debt and the party making the deposits are not the same. The debt due to the bank is the debt of Hodgin Bros. & Lunn; the deposits made by the plaintiff were funds that *belonged to him.* It is true that they belonged to him as trustee, but the defendant cannot be allowed to interfere with his rights as trustee against his will, unless it has a specific lien upon these
(546) deposits, and it seems to us that we have shown that it has no such lien.

The same principle is involved in this case as that of an executor or administrator who deposits in a bank to which his intestate or testator was indebted. The bank cannot make an application of such deposits to the satisfaction of the debts due by the intestate or testator. *Jordan v. Bank,* 74 N. C., 467; *Appeal of Bank,* 48 Penn. St., 57.

It is true that it is contended that the reason of this is, that it is the duty of the personal representative to pay the debts of the deceased *pro rata.* And there is that difference, but we do not think that is the controlling reason. This seems to have been so before the statute requiring the debts to be paid *pro rata,* and was so when he had a right to prefer creditors of equal degree. The true ground is the one we have stated—the want of mutuality in debtor and creditor.

It seems to be clear that the bank had no right to apply these deposits to the satisfaction of the note of Lunn for $650.

A partnership is not liable for the debts of its individual members (*Straus v. Frederick,* 91 N. C., 121), and if the deposits had been made by the firm they could not have been applied by the defendant to the satisfaction of the individual debts of one partner.

DOUGLAS, J. I concur in the dissenting opinion.

*Cited: S. c.,* 125 N. C., 507, 511, 513; *S. c.,* 128 N. C., 111; *Bank v. Hodgin,* 129 N. C., 248; *Moore v. Bank,* 173 N. C., 182; *Moore v. Trust Co.,* 178 N. C., 128.

(547)

S. A. HARRIS v. KATE RUSSELL.

(Decided 2 May, 1899.)

*Marriage Settlement—Life Estate—Vested Remainder.*

1. In a marriage settlement it was provided that the intended wife, in the event of survivorship, should be entitled to a city lot in Charlotte belonging to the intended husband, to be enjoyed during her life, and at her death the property to descend to his heirs at law. The marriage took place and she survived him: *Held,* that the remainder, subject to the widow's life estate, vested at his death in his heir at law, a son by a previous marriage.
2. Upon the death of an intestate ancestor, the title to his estate descends and vests at once in his heirs; it cannot stand in abeyance and vest in future, like an executory devise.

CONTROVERSY without action, under The Code, sec. 567, submitted to *Coble, J.,* in the Superior Court of MECKLENBURG, and decided at chambers, 13 April, 1899.

*Osborne, Maxwell & Keerans for plaintiff.* (553)
*Burwell, Walker & Cansler for defendant.*

FAIRCLOTH, C. J. Controversy without action under The Code, sec. 567. Plaintiff's father, in 1868, entered into a marriage contract with his intended wife, in which he stipulated that if she survived him "then in that case she should be entitled to the use, possession and enjoyment of the lot owned by him" (lot No. 54, in square 8, in Charlotte), "with all the improvements thereon, for and during the term of her natural life, and at her death said real estate to descend to the (554) heirs at law of said party of the first part," the plaintiff's father, who died in 1870. The widow is still living, and the plaintiff at his father's death was, and still is, his only heir at law. The widow conveyed her interest in 1893 to the plaintiff who, in 1896, conveyed his interest to the defendant, and took her notes for the purchase price. She paid a part and now refuses to pay the balance, on the ground that the plaintiff cannot make her a good title during the lifetime of the widow.

The only question is whether the estate vested in the plaintiff at his father's death.

In *Rives v. Frizzele,* 43 N. C., 237, there was a bequest to the widow for life, and "after her death, to be equally divided among his lawful heirs." Held a vested legacy at the time of his death.

In *Brinson v. Wharton,* 43 N. C., 80, a testator bequeathed all the residue to his wife "during her widowhood, and when she marries, then, that all the remaining property, both real and personal shall be equally divided between his children and beloved wife, share and share alike." Held, a vested remainder.

In *DeVane v. Larkins,* 56 N. C., 377, upon similar facts, the decision was the same.

In each of the above cases it was a conveyance by devise, and it was held that if one of the heirs died before the death of the widow or the happening of the future event, his or her share went to his or her representative, and that "after" or "upon" the death of the wife, or the like expression, does not make a contingency, but merely denotes the commencement of the remainder in point of enjoyment.

The case before us is not a conveyance, but a covenant—marriage contract, evidently for the benefit and protection of the wife, if (555) she should become a widow. Upon the death of an intestate ancestor, the title to his estate descends and vests at once in his heirs; it cannot stand in abeyance and vest in future like an executory devise.

Consider an estate with a conditional limitation: The title passes at once, and may be divested by the happening or non-happening of some future event, but this can only take place when so expressed or clearly intended. There is nothing in this agreement indicating any intention that the estate, which vested in the plaintiff by his father's death, should be defeated by the death of the widow. We are satisfied that S. A. Harris, Sr., meant that his heir, the plaintiff, or heirs, if he should have other children, should possess and enjoy the property after the widow's death, and that he did not mean to divert the law of descent from its natural course. The plaintiff's estate therefore vested at his father's death, and we see no reason why he cannot give the defendant a good title.

AFFIRMED.

*Cited: James v. Hooker,* 172 N. C., 782.

PRICE & LUCAS CIDER AND VINEGAR COMPANY v. J. D. CARROLL.

(Decided 2 May, 1899.)

*Notary Public—Fees.*

The fees of notaries public are created and regulated by statute. The Code, sec. 3749, amended by Laws 1895, ch. 296, allows 25 cents for all services of protest, to which is to be added 25 cents additional for internal revenue stamp. For other services, not relating to protests, The Code, sec. 3308, allows 50 cents.

APPEAL from justice's court, heard before *Brown, J.*, at Feb- (556) ruary Term, 1899, of WAKE.

*Perrin Busbee for appellant (plaintiff).* (559)
*A. J. Feild for appellee.*

FURCHES, J. The defendant, in October, 1898, drew and forwarded to plaintiff his check on the Citizens National Bank of Raleigh for $15. On 21 October this check was duly presented and protested for non-payment. The notary public charged as fees for said protest $2.29, and this action is brought to recover the amount due on said check, and the $2.29 charged by the notary public for said protest. The defendant admits the balance claimed to be due on the check, but denies that he is liable for $2.29, the amount claimed for the protest. On the trial in the justice's court the plaintiff recovered judgment for the full amount due on the check and $2.29, the amount claimed for the protest. The defendant appealed from this judgment to the Superior Court, where the case was heard upon a case agreed, the facts being substantially the same as stated above. The Superior Court held that plaintiff was only entitled to recover 25 cents as a fee for the protest, and 25 cents for an internal revenue stamp, which it was necessary for the notary to use in making the protest, and rendered judgment accordingly for the plaintiff, from which the plaintiff appealed to this Court.

The fees of notaries public are created and regulated by statute. Section 3749 of The Code fixed the fees of a notary public for all services of a protest at $1. But Laws 1895, ch. 296, amended section 3749 by striking out *one dollar* and inserting *twenty-five cents* instead thereof.

It is claimed in the brief of the plaintiff that the notary is allowed 50 cents under section 3308 of The Code; that the act of (560) 1895 does not refer to nor repeal this section, and that plaintiff is at least entitled to 75 cents for the protest, 25 cents for the internal revenue stamp, and 8 cents postage, making $1.08.

We agree with the plaintiff that the act of 1895 does not refer to nor repeal section 3308 of The Code, but we do not agree with the plaintiff that a notary public has the right to charge 50 cents or any other sum, under section 3308 of The Code, for protest services. His pay for this service is fixed by section 3749 of The Code, as amended by the act of 1895. Section 3308 of The Code applies to other services rendered by a notary public than those for protesting a paper for non-payment or non-acceptance, such as taking the acknowledgment or probate of a deed or other legal instrument.

The judgment of the court below is

AFFIRMED.

(561)

PIEDMONT BANK OF MORGANTON ET AL. V. J. W. WILSON AND THE MORGANTON MANUFACTURING AND TRADING COMPANY.

(Decided 2 May, 1899.)

*Note at Bank—Payment—Executory Agreement—Nudum Pactum—Counterclaim—The Code, Sec. 244 (2).*

1. The execution of a note being admitted, matter in evidence must be proved by the maker; if payment is relied on as a defense, there must be evidence tending to prove an actual payment.

2. An executory verbal agreement, made with the cashier, without consideration, to take in payment of a note due the bank an interest for the same amount in a note upon a third party, which was never assigned to the bank, and which is now in suit for the full amount by the holder, is not equivalent to payment, but is *nudum pactum*—beyond the scope of a cashier's authority and an arrangement not to be encouraged by the courts.

3. The counterclaim as it now exists is the creature of The Code, and must conform to its provisions.

4. Section 244 (2) allows as a counterclaim, in an action arising on contract, any other cause of action arising also on contract and *existing at the commencement* of the action.

ACTION for $400 due by note under seal, executed by defendant Wilson, payable to the codefendant, the Morganton Manufacturing and Trading Company, and discounted by plaintiff bank, tried before *Coble, J.*, at Fall Term, 1898, of BURKE.

This action was commenced in June, 1895. During its pend- (562) ency the defendant company deposited with the plaintiff bank the sum of $100.36. The bank failed and passed into the hands of a receiver, L. A. Bristol, who has been joined as plaintiff.

The defendant company filed a separate answer, and sought to set up its deposit of $100.36 as a counterclaim to plaintiff's demand. The plaintiff demurred *ore tenus,* and the demurrer was sustained, and the counterclaim disallowed. Defendant excepted, and after the plaintiff took an appeal, it also appealed from the judgment overruling its demurrer.

*Avery & Erwin for plaintiff.*
*S. J. Ervin for defendant.*

PLAINTIFF'S APPEAL

DOUGLAS, J. This is an action upon a promissory note executed by the defendant Wilson to his codefendants, The Manufacturing Company, and by it endorsed to the plaintiff. A payment on the note reduced the principal to $400, which is now due, with interest thereon.

The defendants in their answer contend: "That at the time the said note was executed, and when it was due, the plaintiff held a note on Isaac T. Avery and W. C. Erwin for the sum of $1,500 to be due 1 January, 1895, which he had assigned to Davis & Wiley (563) Bank; that he had made an arrangement with said bank to allow him $400 of this note to be used by him in payment of the note sued on in this cause; that accordingly, on 29 December, 1894, he paid to the plaintiff, through its cashier, S. T. Pearson, the $21.74 as above stated, the plaintiff then agreeing that they would take the $400 out of said note of $1,500 due 1 January, 1895; that in accordance with this agreement the Davis & Wiley Bank, 1 January, sent said note to the plaintiff, and they declined to receive it and allow defendant credit therefor; that this defendant understood and has been informed by the said Isaac T. Avery that although the said note for $1,500 was signed by him and W. C. Erwin, the plaintiff bank was the real party who would have it to pay, and that in making the agreement to accept the said $400 in payment of his note the plaintiff was only paying an indebtedness due from it.

"That the said Davis & Wiley Bank is still willing the said arrangement shall be made, and the defendant now pleads said agreement and the said indebtedness as a counterclaim in payment in full of said note.

"The plaintiff, in reply, denies the material allegations of the answer, set up the pendency of a suit by the Davis & Wiley Bank, and pleaded

the statute of frauds. The following issue was submitted: Did the plaintiff bank agree with the defendant J. W. Wilson to take in payment of the balance of the note sued on, an interest of $400 in a $1,500 note given said Wilson by I. T. Avery and W. C. Erwin and assigned by said Wilson to the Davis & Wiley Bank, and did said Davis & Wiley Bank agree that said plaintiff bank should have the said $400 interest in the $1,500 note, and was such $400 interest in the $1,500 note
(564) ever assigned to the plaintiff bank?" This was answered in the affirmative.

The execution of the note sued on by plaintiff was admitted, as was also its endorsement by the Morganton Manufacturing and Trading Company. The defendant, J. W. Wilson, introduced as a witness in his own behalf, subject to the objection of the plaintiffs, testified as follows: "After execution of the note to the Morganton Manufacturing and Trading Company, on 24 August, 1894, witness had a conversation with either S. T. Pearson or G. P. Erwin; thinks it was with Mr. Pearson (Mr. Pearson was cashier and Mr. Erwin was president of the Piedmont Bank). The bank had a note on witness of $421.74, on which the Morganton Manufacturing and Trading Company was surety. Witness was one of the stockholders of said company. Witness had at same time a note on I. T. Avery and W. C. Erwin for $1,500 (note shown witness, which he says is the note, and note put in evidence), which witness had given to Davis & Wiley (bankers) in payment of a security debt which witness had down there, with the understanding with Davis & Wiley that $400 of that note could be used by witness in paying off the debt of $421.74 the witness was due the Piedmont Bank. Witness went into bank and told them of the arrangement, and paid them the $21.74, leaving the $400 unpaid, which they were to collect out of Avery & Erwin and settle. Witness supposes that the bank did not collect it out of Avery & Erwin as they had promised to do, and they have not paid it up to this time. The plaintiff bank was to take the balance of note for $400—Erwin & Avery were to pay on the following January $1,500 and interest on the note Davis & Wiley held, and $400 of it was to go to the plaintiff bank and the balance to Davis & Wiley, and the bank agreed to this in payment of $400. Witness had a talk with some of the officers of the bank. The interest on the $1,500 was paid
(565) by the bank. Witness called at the bank to get payment on the Avery & Erwin note when it was due, and the bank officer gave witness to understand that Erwin, the maker, had the money to pay it, so witness made a deed for the property and tendered it at the bank and they declined to pay it. All the parties declined to pay it. Suit was then brought upon the $1,500 note and that case is still pending. Suit brought in favor of Davis & Wiley on this note.

"Davis & Wiley are still willing to carry out their part of the contract and pay them $400, when the parties pay them the $1,500."

This is the entire testimony of the witness Wilson, who was the only witness examined as appears in the record. It was all objected to in apt time, admitted by the court, and excepted to by the plaintiff. The defendants admit that the Davis & Wiley Bank have a suit pending for the $1,500 note of Avery & Erwin, brought since the commencement of this action. Both notes were in evidence, that of Avery & Erwin bearing the following endorsements: "Jas. W. Wilson." "Pay to the order of G. P. Erwin, president, for collection account Davis & Wiley Bank. O. D. Davis, cashier." The latter endorsement had been stricken out. At the close of the evidence the plaintiff filed the following requests for instructions:

1. That if the jury believe the evidence they will answer the issue "No."

2. That upon all the testimony the plaintiff is entitled to recover.

3. That there is no evidence of any assignment of any part of the Avery & Erwin note to the plaintiff bank by the Davis & Wiley Bank.

4. That there is no evidence that the plaintiff bank agreed to accept $400 of the Avery & Erwin note in discharge of the note sued on; on the contrary, the evidence of defendant, J. W. Wilson, (566) was that the bank "agreed to collect the Avery & Erwin note, and apply $400 on the debt sued on, but that the plaintiff bank did not collect the Avery & Erwin note."

5. That no consideration being shown for the alleged agreement, it was *nudum pactum* and void.

6. That even if there had been a consideration, the transaction testified to by J. W. Wilson was, in effect, a promise on the part of the plaintiff bank to pay the debt of Avery & Erwin, and was void under the statute of frauds.

That, upon the testimony of J. W. Wilson, the transaction or agreement with the bank was merely executory, was without consideration, and being never executed, conferred no liability.

If the jury believed that plaintiff bank did as testified by Wilson—"agree to collect" the Avery & Erwin note and pay $400 of the proceeds on the Wilson note, and that the bank did not collect it—they will find the first issue "No."

The court declined to give either or any of the instructions prayed for by plaintiffs, and plaintiffs excepted to the refusal of the court to give each and every one of the instructions as prayed by plaintiff.

The court charged the jury as follows:

The burden of proving the affirmative of this issue by a greater weight of the evidence is upon the defendants.

If the jury find that the plaintiff bank agreed, through its cashier, with the defendant, J. W. Wilson, to take, in payment of the balance of the note sued on, an interest of $400 in a $1,500 note given said Wilson by I. T. Avery and W. C. Erwin, and assigned by said Wilson to the Davis & Wiley Bank, and further find that the said Davis
(567) & Wiley Bank consented and agreed that plaintiff bank should have the $400 interest in the said $1,500 note, and that the said Davis & Wiley Bank, in pursuance of said agreement, sent the said $1,500 note to the plaintiff bank for collection, and that the said Davis & Wiley Bank are still willing to carry out the said agreement, then the jury will answer the issue "Yes."

If the plaintiff bank did not agree to take in payment of the $400 balance on note sued on a $400 interest in said $1,500 note, but only agreed to collect the $1,500 and apply $400 of the money collected to the payment of note sued on with the consent of Davis & Wiley Bank, in the event that they were able to collect it, and if the plaintiff bank has been unable to collect the said $1,500 note, then there would be no payment, and the jury will answer the issue "No."

If the defendant failed to prove by a greater weight of the evidence the affirmative of the issue, then the jury will answer the issue "No."

Judgment was rendered for the defendants, and the plaintiff appealed.

*Upon the foregoing facts* we are of the opinion that the plaintiff is entitled to a new trial. The execution of the note having been admitted, the burden shifted upon the defendants of showing matter in avoidance. Their plea is substantially that of payment, but we find no substantial evidence tending to prove actual payment. In arriving at this conclusion we have accepted the defendants' evidence as true, and construed it in the light most favorable for them, as it is our duty to do in a prayer for instruction in the nature of a demurrer to the evidence. *Cox v. R. R.,* 123 N. C., 604; *Cable v. R. R.,* 122 N. C., 892. At best, the evidence tends to prove simply an executory agreement to pay.
(568) It is not contended that the note in suit has ever been actually paid, or that it has been canceled or surrendered. It was permitted to remain in the possession of the bank, and was turned over among its assets to the receiver. The testimony of the defendant Wilson that the Davis & Wiley Bank is still willing to carry out its part of the contract, if admissible, tends to prove an executory agreement; while the endorsement on the $1,500 note shows that it was transmitted to the plaintiff for collection entirely on account of the Davis & Wiley Bank, without admission of any interest whatever belonging to the plaintiff. *Boykin v. Bank,* 118 N. C., 566; *Bank v. Bank,* 119 N. C., 307. We are not attempting to pass upon the *weight* of the evidence, for that function belongs to the jury; but we think that in the absence of any evidence

more than a mere scintilla tending to prove the contention of the defendants, on whom rested the burden of proof, the court should have directed a verdict in favor of the plaintiff. *Spruill v. Ins. Co.*, 120 N. C., 141.

But if we are mistaken in our view of the evidence, we are still of the opinion that the alleged agreement was beyond the scope of the agency of a cashier, and without consideration, and therefore void. There is no pretense of consideration. The payment by the defendant Wilson of the $21.74 was simply the payment of a small part of that for which he was bound. We do not think that a cashier can, without express authority, take in payment of a note a mere verbal assignment of an intangible interest in another note already held by another bank as collateral security. If the alleged contract operated as payment in full of the note in suit, then the plaintiff bank has absolutely nothing to show for the unpaid debt originally owing to it by the defendants, and still owing by somebody. Such transactions are not within the ordinary dealings of a bank, and cannot be encouraged.

It is scarcely necessary to cite authorities as to the effect of a (569) *nudum pactum*, especially when made by an agent.

Our view of the case renders it unnecessary for us to discuss the other questions raised by exception. For the reasons above stated a new trial must be ordered.

NEW TRIAL.

DEFENDANT'S APPEAL IN SAME CASE

DOUGLAS, J. This is the appeal of the defendant manufacturing company in the preceding case between the same parties, involving, however, an entirely different question of law. The plaintiff brought this action upon the promissory note of the defendant manufacturing company, endorsed by said Wilson. The defendant company filed its separate answer as follows:

1. "That after the suit was brought in this case by the plaintiff bank, it failed, and the plaintiff, L. A. Bristol, was made permanent receiver, and is made party plaintiff at this term of the court; that he is now pressing this cause against defendants to create assets in his hands."

2. "That at the time of the failure of said bank, on 2 December, 1898, this defendant was a depositor, and had to its credit on the books of said bank the sum of $100.36, which sum is still due and owing to this defendant, and defendant now pleads the said sum of $100.36 as a counterclaim against the debt of the plaintiff."

The defendant company admitted the execution of the note in suit and that its said counterclaim was not in existence when this action was brought. The plaintiff admitted the facts alleged in the separate answer of the defendant company, but demurred *ore tenus* to the answer of

(570) said company, on the ground that the said counterclaim was not in existence when this action was brought. The demurrer was sustained, and the defendant company appealed.

We see no error in the ruling of the court below. As we have said in *Electric Co. v. Williams,* 123 N. C., 51, the counterclaim, as it now exists, is the creature of The Code, being provided for in section 244, which is as follows: "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 commencement of the action." The counterclaim of the defendant company has no connection whatever with the plaintiff's original cause of action, and hence must come under the second class, which is available only when existing at the commencement of the action.

We see no ground for equitable interference. The defendant company deposited money to its own credit with the plaintiff after the plaintiff had brought suit on a note in which the defendant company was the principal debtor. It may seem hard that the plaintiff should collect its own debt in full, and also keep the money of the defendant, but it is the defendant's own fault. It might have applied this money to the payment of its own debt; but if it failed or refused to do so, it must abide the consequences of its own act. It may be that it relied on the defense of its codefendant Wilson, and preferred to keep its money where it could be drawn in case of need. Whatever may have
(571) been the motive, it was a deposit and not a payment, and, occurring after the bringing of the action, cannot be set up as a counterclaim.

NO ERROR.

*Cited: Griffin v. Thomas,* 128 N. C., 313; *Bank v. Lennon,* 170 N. C., 11; *Sewing Machine Co. v. Burger,* 181 N. C., 251.

HENRY B. STEVENS, GEORGE A. SHUFORD, AND JAMES H. MERRIMON v. C. L. SMATHERS AND J. WILEY SHOOK.

(Decided 2 May, 1899.)

*Land Mortgage—Trespass—Injury to Realty.*

1. Where a house is wrongfully pulled down and removed from mortgaged land, all the participants in the wrongful act are trespassers.

2. Any one who, with the knowledge of all the circumstances, allows the material to be used in the reërection of the building on his own land, sanctions the trespass and renders himself liable for the value of the removed house.

ACTION for special relief, tried before *Hoke, J.*, at Spring Term, 1898, of HAYWOOD.

*W. T. Crawford, Davidson & Jones, Merrimon & Merrimon,* (572) *and George A. Shuford for plaintiffs.*

*Ferguson & Ferguson and Womack & Hayes for C. L. Smathers, defendant.*

CLARK, J. The plaintiffs had a mortgage on a house and lot, to secure a debt due by J. Wiley Shook. The latter tore down the house, removed it, and reërected it upon the land of the defendant Smathers. The jury found that the house, when torn down, was worth $150, and that the mortgaged property was impaired that much in value by its removal. The court charged the jury (there being evidence to sustain the charge) that if the removal of the house to the land of the defendant Smathers was with his knowledge and assent, and he knew, before (573) it was rebuilt on his land, that it had been taken from the land covered by plaintiffs' mortgage, his acquiescence therein made Smathers responsible for the value of the building. In this there was no error. *Horton v. Hensley,* 23 N. C., 163. We were treated to an argument whether the lien of plaintiffs' mortgage was not destroyed by tearing down the house and rebuilding it upon Smathers' land. But this is not a case where the lien is sought to be enforced against the removed building, as in *Turner v. Mebane,* 110 N. C., 413, where the house was bodily rolled across the road upon another tract.

Here no lien is sought to be enforced against the building, but the mortgagee asks a personal judgment against Smathers, who acquiesced in the removed building being built upon his own land with knowledge that it had been taken from premises covered by plaintiffs' mortgage. The court, upon the verdict, properly rendered judgment against Shook

for the balance due on the mortgage debt, and against Smathers for $150, the value of the removed house, and by whose removal the plaintiffs' security had been impaired to that amount, payment of said $150 to be credited on the mortgage debt.

NO ERROR.

(574)

MAGGIE MEANS, ADMX. OF TAYLOR MEANS, v. THE CAROLINA CENTRAL RAILROAD COMPANY.

(Decided 5 May, 1899.)

*Negligence—Engineer—Brakeman—Local Train—Evidence.*

1. A local mixed train, passenger and freight combined, which runs daily between designated places, with schedule time for arrival and departure, with considerable passenger business, and schedule so arranged as to enable and encourage the people along the route to go to and fro, the same day, between their homes and important places, the object being to promote travel and to build up business in that line, ought to have a conductor, and the defendant was negligent in not having provided one.

2. Whether or not the intestate's death was caused, without his fault, by the failure of defendant company to furnish a conductor, is a question for the jury, under proper instructions as to the law, from the court.

3. The declaration of the intestate, made while he was hurriedly going from the coach at the rear end of the train to the engine in front, "Get out of my way; I want to get to Mr. Hall (the engineer) to give him these tickets before the train gets too fast," was competent evidence as a part of the *res gestæ*, and was properly admitted.

4. It was incompetent, after objection, for the engineer to testify that he would have stopped the train in order that the intestate might have returned to the coach if he had been requested so to do. This evidence was improperly admitted.

ACTION for damages from alleged negligence of defendant, in occasioning the death of Taylor Means, intestate of plaintiff, tried before *Starbuck, J.*, at October Term, 1898, of MECKLENBURG.

(576) *Osborne, Maxwell & Keerans for plaintiff.*
*Burwell, Walker & Cansler for defendant.*

MONTGOMERY, J. When this case was here at February Term, 1898, (*Means v. R. R.*, 122 N. C., 990), a new trial was ordered, because of an error committed by his Honor on the trial below in instructing the jury that "it is the duty of a railroad company to have a conductor

when there are passengers, and it is negligence not to have one." In reference to that instruction we said: "The rule would apply where the trains are passenger trains or where a considerable part of the train was for the accommodation of passengers and the passenger fare would be a considerable part of the inducement to run the train. But where the train is a freight train with a passenger car attached, it is a fair presumption that the passenger coach is purely for the accommodation of the public, and we cannot say as a matter of law that it would be negligence (nothing else appearing) in a railroad company not to furnish a conductor on such trains." In the case as it was made up for this Court at the first hearing, nothing appeared as to the nature or destination of the train, except that it was one which consisted of an engine and eleven cars, including one passenger coach and a shanty car, and that it left Charlotte at 4 p. m. Nothing was said of the extent of the passenger traffic. We thought the charge of his Honor too broad to fit the facts of that case.

The case as presented now has some new features, and impor- (577) tant ones. The train, a local one, was operated between Charlotte, by Lincolnton and Shelby. Its schedule time for departure from Shelby was 6 a. m., and for arrival at Charlotte 10 a. m. It left Charlotte at 4 p. m. The engineer testified that "at ordinary times we carry a good many passengers." It is apparent from the facts above stated that in the running of that train the passenger traffic was a matter of business consideration to the company; that the inducement to attach the passenger coach was not simply to oblige a passenger now and then who might wish to make an emergency trip or to visit some obscure station, but to establish a passenger business by a schedule so arranged as to enable and encourage the people along the route, and especially those in Shelby and Lincolnton, to visit the city of Charlotte for several hours and return to their homes at a reasonable hour on the night of the same day, and that the result was what was anticipated—a considerable passenger business.

His Honor, after the conclusion of the testimony, was of opinion that the plaintiff could not recover, and upon intimating so much to the plaintiff's counsel the plaintiff submitted to a nonsuit and appealed.

His Honor thought the case as developed did not differ materially from the case as brought out on the first trial. We think, however, that there was a substantial difference between the two cases in the respects pointed out by us. It was the duty of defendant company to have a conductor for such a train as that of the defendant's was shown to have been by the undisputed evidence, and the defendant was negligent in not having provided one. What might be a sufficient crew to manage a train would ordinarily be a question for the jury, but whether or not

(578) it is negligence in a railroad company not to furnish a conductor, in a case like the one before the Court, the evidence being undisputed, must be a question of law. The conductor need not have been purely and entirely a passenger conductor; a freight conductor might have been sufficient, under the circumstances, to have discharged the duties of a passenger conductor and his own at the same time. Whether or not the intestate's death was caused, without his fault, by the failure of the defendant company to furnish a conductor, is a question for the jury, under proper instructions as to the law from the court.

There was only two exceptions on points of evidence. The plaintiff was permitted, over the objection of the defendant, to introduce a declaration or statement made by the intestate while he was hurriedly going from the coach at the rear end of the train to the engine in front. The declaration was, "Get out of my way; I want to get to Mr. Hall (the engineer) to give him these tickets before the train gets too fast." The evidence was competent as a part of the *res gestæ*. It was cotemporaneous with the main subject—the alleged killing of the intestate, through the negligence of the defendant; it was made without forethought or design, and it helped to explain the main fact in the case. *Carter v. Buchanan,* 3 Ga., 513; 21 A. & E., 99; Best on Evidence, 446. The declaration of the intestate was the natural and inartificial concomitant of a probable act which itself was a part of the *res gestæ*. *Hunter v. State,* 40 N. J. Law, 540.

The defendant offered to show by the engineer that he would have stopped the train in order that the intestate might have returned to the coach if he had been so requested to do. We do not see how the evidence was material, as the case was then constituted, and it should not have been admitted, for it threw no light upon the matter. There was error in the ruling of his Honor, and there must be a

NEW TRIAL.

*Cited: S. c.,* 126 N. C., 425; *Shaw v. Mfg. Co.,* 146 N. C., 239; *Hill v. Ins. Co.,* 150 N. C., 2; *S. v. Spivey,* 151 N. C., 681; *Ridge v. R. R.,* 167 N. C., 524.

(579)

P. A. CUMMINGS, EXR. OF J. L. HENRY, v. VIRGINIA B. SWEPSON, EXR. OF GEORGE W. SWEPSON.

(Decided 5 May, 1899.)

*Referee's Report—Discretion and Power of the Judge—The Code, Sections 422 and 423.*

1. The judge, in his discretion, may set aside a reference after the report is filed, and proceed and try the case.

2. The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee; and a discretion to modify or set aside the report, and its ruling in the latter respect, is not reviewable unless it appears that such discretion has been abused.

ACTION to enforce a contract for payment of money alleged to be due to the testator of plaintiff from testator of defendant, instituted 20 November, 1886, in BUNCOMBE.

*J. W. Summers and T. H. Cobb for plaintiff.* (584)
*Moore & Moore, Shepherd & Busbee, and Burwell, Walker & Cansler for defendant.*

FAIRCLOTH, C. J. This action was referred, by consent, and on the trial day the plaintiff made affidavit that he could not try, stating his reasons. The referee required him to proceed to trial, and the plaintiff's counsel stated that, in justice to his client, he was driven to consent to a nonsuit. The referee filed his report, and the defendant made a motion that judgment of nonsuit be entered by his Honor, which was refused.

His Honor, upon the facts found in the exercise of his discretion, ordered that the plaintiff be relieved from his consent to nonsuit before the referee, and that the cause be remanded to the referee to proceed according to the original order.

Defendant's exception is, that the Court had no power to set aside the nonsuit entered before the referee, and relies upon *Boyden v. Williams,* 80 N. C., 95, and *Twitty v. Logan,* 86 N. C., 712. Each of those cases involved a question of excusable neglect in allowing judgments to be entered at a term of the court. The law of those cases has no application to the facts in the present case. It is a first principle that the law must fit the facts.

The powers and duties of a referee are found in The Code, sec. 422, and *Jones v. Beaman,* 117 N. C., 259. The Code, sec. 423, provides that the referee shall make his report to the court in which the action is pending, and "either party may move the judge to review such report and set aside, modify or confirm the same, in whole or in part,
(585) and no judgment shall be entered on any reference, except by order of the judge."

In *Boushee v. Surles,* 79 N. C., 51, it was held not to be error when the judge in his discretion sets aside the reference after the report was filed, and proceeded and tried the case. See also *Earp v. Richardson,* 75 N. C., 84.

Under section 423 of The Code, and these authorities, we can have no doubt of the power of the judge to make the orders set out in the record, and above stated. The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee, and a discretion to modify or set aside the report, and his ruling in the latter respect is not reviewable unless it appears that such discretion has been abused.

AFFIRMED.

*Cited: Brackett v. Gilliam,* 125 N. C., 382; *Baggett v. Wilson,* 152 N. C., 182; *Rogers v. Lumber Co.,* 154 N. C., 109; *Lance v. Russell,* 157 N. C., 453; *Dumas v. Morrison,* 175 N. C., 434; *Caldwell v. Robinson,* 179 N. C., 522.

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W. B. WILLIAMSON, TRUSTEE OF THE NATIONAL BANK OF ASHEVILLE, v. W. J. COCKE, ADMR. OF W. M. COCKE, JR., AND W. J. COCKE, INDIVIDUALLY.

(Decided 5 May, 1899.)

*Service of Summons—Judgment by Default—Motion to Set Aside.*

1. The Code, sec. 214, requires service of summons to be made by reading the same to the defendant. He, however, may waive the reading.

2. The fact that defendant supposed and believed that the action was against him as administrator, and not individually, is not such excusable neglect as entitles him to relief.

3. What constitutes service of process, and whether upon a given state of facts service has been duly made, is a question for the court. The return of the sheriff is *prima facie* service, subject to be overcome by proof of the facts.

MOTION to vacate a judgment rendered against defendant, indi- (586) vidually, at March Term, 1898, heard upon affidavits before *Starbuck, J.*, at March Term, 1899, of BUNCOMBE.

The motion was allowed, and plaintiff appealed.

*Davidson & Jones, J. W. Summers, and George A. Shuford for* (588) *plaintiff.*

*Merrimon & Merrimon and Carter & Weaver for defendant.*

FAIRCLOTH, C. J. The summons in this case was issued against W. J. Cocke, administrator of W. M. Cocke, Jr., and W. J. Cocke, individually. The deputy sheriff returned the summons, with this endorsement: "Served, 16 February, 1898, by reading the within summons to W. J. Cocke, administrator of W. M. Cocke, Jr., and W. J. (589) Cocke, individually." The defendant did not answer or appear in court, and, for want of an answer, a judgment was entered. On notice and motion of defendant, the said judgment was set aside, and the plaintiff appealed.

His Honor, after hearing affidavits, found as facts: "That at some time the defendant was accosted by said Greenwood (deputy sheriff), on West Courthouse Square, in Asheville, and near the entrance to the office of Dr. C. V. Reynolds, and told by said Greenwood that he had a summons for him. The defendant was ascending the stairway which leads to the office of Dr. Reynolds, and looked back and upon a paper in the hands of said Greenwood saw the name of W. B. Williamson, trustee (the plaintiff), and said, 'Well, I know all about that,' and turned immediately and walked up the stairway, and saw no more of said Greenwood"; that he believed at the time that the summons was against him as administrator of W. M. Cocke, Jr., and had no idea that he had been sued individually, and that the deputy did not so inform him by reading the summons or otherwise.

Do these facts, found by his Honor, constitute cause for setting aside the judgment by default? The judgment was regularly entered on a duly verified complaint. The Code, sec. 214, requires the summons to be served by reading the same to the party named as defendant. The return of the sheriff is *prima facie* service, subject to be overcome by proof of the facts. *Miller v. Powers,* 117 N. C., 218; *Strayhorn v. Blalock,* 92 N. C., 292. When the sheriff informed defendant that he had a summons for him, and defendant looked at it enough to see the name of the plaintiff, trustee, and said, "Well, I know all about that," and immediately departed from the sheriff, it is clear that he elected to waive his right to have the summons read to him by the officer, as he had a right to do. It was then defendant's duty to attend (590)

court and see the nature of the allegations in the complaint, and defend, if necessary in his opinion. The performance of that duty would have furnished all proper information, and this case, on the matter now presented, would not be here. The failure to attend to that duty was negligence. Such negligence frequently occurs by inattention by suitors in court. This negligence cannot be held a sufficient ground for setting aside a regular judgment, entered up in consequence of inattention on the part of defendant to an important duty. The courts must proceed with business in a reasonable way, or forfeit their usefulness to the public. The fact that defendant supposed and believed that the action was against him as administrator, and not individually, is not such excusable neglect as entitles him to relief. He would have known otherwise by simply discharging his own duty. *White v. Snow,* 71 N. C., 232.

What constitutes service of process, and whether upon a given state of facts service has been duly made, is a question for the court.

We hold, upon the case before us, that the court's conclusion was a misapprehension of the law.

REVERSED.

*Cited: Morris v. McLaughlin,* 131 N. C., 214; *Hardware Co. v. Buhmann,* 159 N. C., 513; *Comrs. v. Spencer,* 174 N. C., 37; *Jernigan v. Jernigan,* 179 N. C., 240.

(591)

## A. J. CRAMPTON v. IVIE BROS.

(Decided 5 May, 1899.)

*Negligence—Concurring Negligence—Hack Drivers—Passenger—Hirer.*

1. The hirer of a hack, who merely directs where he is to be driven and does not attempt to control the driving, is only a passenger and is not responsible for the negligence of the driver.
2. If a passenger is injured through the negligence of the driver in his employment, he can sue the owner, or if he is injured through the negligence of the driver of another hack he can sue the owner of that hack, or if he is injured through the concurrent negligence of the drivers of both hacks he can sue the owner of either hack or the owners of both.

ACTION for damages, for personal injury sustained through the alleged negligent driving of defendants' hack driver, tried before *Starbuck, J.,* at October Term, 1898, of MECKLENBURG.

*Jones & Tillett for plaintiff.* (593)
*Burwell, Walker & Cansler and Scott & Reid for defendants.*

MONTGOMERY, J. The plaintiff, a traveling salesman, on 23 December, 1897, hired a team—a buggy and two horses, with a driver—furnished from a liveryman in Reidsville, to take him from Reidsville to Spray and return. On the way back from Spray to Reidsville, about 8 o'clock p. m., the plaintiff's team met in the road, in the darkness, a team of the defendants—a surry and two horses—driven by the driver of the defendants. The place where the teams met was a level surface, about 50 yards long and 12 or 13 feet wide in the clear. The evidence of the plaintiff tended to prove that the two teams met (594) just as the one of the plaintiff had ascended a steep hill and reached the level road at the top, the defendants' team traveling at the rate of 8 or 10 miles an hour; that it was so dark, and there being also a bend in the road, they could not see the defendants' team until within 20 yards; that upon seeing the defendants' team, they began to shout to the driver to stop, and that no attention was paid to the cries; that the plaintiff's driver, to prevent a collision and injury, turned suddenly out of the road and upon a bank, and in doing so upset the buggy, by which the plaintiff was thrown out and injured.

The defendants' evidence tended to show that their team was going at a slow rate of speed, about 3 miles an hour; that there was plenty of room for both teams to pass without collision or injury to either, and that, at the time of meeting, the defendants' driver pulled his team as far out of the road as it was possible to do.

The plaintiff made three special prayers for instruction, in substance as follows: First, that from the *undisputed* evidence the driver of defendants' team, at the time of the alleged injury of the plaintiff, was the servant of the defendants and in the regular course of his employment, and if the driver was guilty of negligence on that occasion, then the defendants were as much responsible for that negligence as if the defendants themselves had been driving the team. Second, that a recovery by the plaintiff would not be dependent upon an actual collision of the teams if by the negligence of the defendants' driver the plaintiff was suddenly put in danger, and the driver of the plaintiff, in order to extricate himself and the plaintiff from peril, suddenly pulled the team upon a bank at the side of the road, and that was done under a reasonable apprehension that it was necessary for their safety, (595) and the plaintiff thereby was thrown from the buggy and injured. Third, that notwithstanding the plaintiff might not have been injured if the buggy had not been driven out of the road and upon the bank, yet if the plaintiff was put in sudden peril by the negligence of the

defendants' driver, and the buggy was driven on the bank under a reasonable apprehension that a collision would have occurred if it had remained in the road, and the plaintiff's driver acted as a reasonably prudent man would have acted under the circumstances, in the effort to extricate himself from sudden peril, and the plaintiff was thereby thrown from the buggy and injured, then the plaintiff's injury would be the direct consequence of the defendants' negligence. Fourth, that it was the duty of the defendants' driver to drive his team in such a manner that he would not unnecessarily imperil the rights of persons on the road, and that if it was dark and travelers from an opposite direction might not be seen or heard, it was all the more necessary that he should drive carefully to prevent sudden peril, accidents and injury to those he might meet, and that even if the road was wide enough for the teams to have passed in safety, yet if the defendants' driver negligently delayed to turn out of the road until his horses' heads got nearly to the heads of the plaintiff's horses, and the plaintiff and his driver were thereby put in reasonable apprehension that there was about to be a collision, and, to avoid the impending danger, the buggy of the plaintiff was pulled upon the bank and the plaintiff thereby thrown from his buggy and injured, the injury was the result of the defendants' negligence. The instructions were given, and the defendants excepted.

The error complained of, as to the refusal to give the first prayer, was that the court assumed that the person who was driving the defendants' team was the servant of the defendants and acting in the usual
(596) course of his employment. The exception was without merit. It was admitted in the answer that the team and driver were the team and driver of the defendants. Evidence to that effect on both sides was introduced, and special instructions were requested by the defendants, based on that assumption.

Exception to the second prayer for instructions was that his Honor left out any instruction concerning the conduct of the plaintiff in jumping from the buggy, and applying the rule of the prudent man to the facts. Without passing, just now, upon whether or not the defendants were entitled to any instruction as to whether the plaintiff jumped from the buggy, it appears that an instruction—all the defendants were entitled to—was given, in the following words: "Even if the plaintiff, Crampton, was placed in a position of danger or peril, the law requires that he should exercise ordinary firmness in avoiding the peril of his position, and if he became frightened and jumped from the buggy when a man of ordinary firmness would not have jumped, under the same circumstances, any injury received by him in consequence of, or as the result of, this act, cannot be imputed to the negligence of the defendants, but would be considered as the result of his own negligence."

As to the rule of the prudent man, his Honor told the jury that the apprehension for their safety by the driver must have been reasonable; and, to further illustrate that doctrine, he said, in his charge in chief: "To answer the first issue 'Yes,' you must find by a preponderance of the evidence, in the first place, that defendants' driver was driving in such a negligent manner as to cause the driver, Hunt (plaintiff's driver), to believe his buggy would be struck if he remained in the road, and that to avoid a collision Hunt drove upon the bank, and the plaintiff was thereby thrown out and injured. In the next place, you (597) must find by a preponderance of the evidence that a driver of ordinary prudence, under the circumstances, and when Hunt drove on the bank, would have had reason to believe that there was danger of a collision, and would probably have driven upon the bank to avoid the danger."

The third instruction was correct in every particular. *Vallo v. Express Co.*, 14 L. R. A., 745; *Lincoln v. Nichols*, 20 L. R. A., 855.

The ground of exception to the fourth instruction was the same as that made to the second, and we have disposed of that.

The defendants submitted the following prayers for instruction:

1. It was not negligence in the defendants' servant in charge of his team to drive rapidly on an open country highway if the danger of collision was slight, and even if the jury find that he was driving rapidly at the time he first saw, or could by reasonable care have seen, the team of Crafton & Ogburn, in which the plaintiff was riding, and that defendants' servant, as soon as he saw the team, did what he could, under the circumstances, to avoid any collision with the team of said Crafton & Ogburn, there was no negligence on the part of the defendants' servant, and the jury will answer the first issue "No."

The court declined to give the instruction, and the defendants duly excepted.

2. That the servant of defendants, who was driving their team, was required to exercise only that degree of care or prudence in driving over the public highway which careful drivers are accustomed to use, or that degree of care usual with careful drivers under the same circumstances, and if the jury find in this case that the defendants' driver used that degree of care in order to avoid a collision with the other team, they will answer the first issue "No," and the defendants' servant in such case was not guilty of negligence. (598)

This instruction was given by the court.

3. That if the defendants' driver, as soon as he discovered the other team, either standing still or approaching him in the road, drove his team out of the way, as well as he could under the circumstances, in

order to give the other team sufficient space in the road to pass, and he thought at the time that the driver of Crafton & Ogburn had sufficient space to pass his team in safety, and the driver of the defendants could not give more space than he did, by reason of the fact that there were obstructions on his side of the road which prevented the driving of his team further away from the other team, the jury will find that there was no negligence on the part of the defendants.

This instruction was refused as asked for, but the court gave the same, with this addition at the end thereof, to wit, "after discovering the other team."

To the refusal to give the instruction, and to the modification thereof, defendants duly excepted.

4. If the driver of the team of Crafton & Ogburn had sufficient space in the roadway, or traveled part of the road, to pass the team of the defendants in safety, and the driver of Crafton & Ogburn's team drove said team farther to the right than he was required to do under the circumstances in order to pass, and by reason thereof the plaintiff was thrown from buggy or vehicle in which he was riding, the jury will answer the first issue "No," as the injury in such case was not caused by the negligence of the defendants' servant, but by that of the driver of the team of Crafton & Ogburn.

The court refused this instruction, and defendants excepted.

(599) The court gave it in a modified form, as follows:

"If it was a fact, and would have so appeared to a man of ordinary prudence and firmness under the circumstances, that the driver of the team of Crafton & Ogburn had sufficient space in the roadway, or traveled part of the road to pass the team of the defendants in safety, then, inasmuch as the evidence shows that the driver of Crafton & Ogburn's team drove said team so as to throw the wheels on the embankment, the jury will answer the first issue "No," as the injury in such case was not caused by the negligence of the defendants' servant as the proximate cause, but by that of the driver of Crafton & Ogburn."

The defendants excepted to the modification of the court.

5. That all that was required of the servant of the defendants, Ivie Bros., under the circumstances, was to use such a degree of care as was proportioned to the danger of the situation and surroundings, and to do what a reasonable and prudent man would have done under the circumstances, and if he exercised that degree of care the jury will answer the first issue "No."

This instruction was given by the court.

6. That if the accident to the plaintiff occurred by reason of the fact that his legs were so wrapped in the lap robe which he was using that

he could not prevent his fall from the buggy, and if the jury find that his fall from the buggy was caused by the manner in which his legs were wrapped in the lap robe, they will answer the first issue "No."

The court declined to give the instructions, and the defendants duly excepted.

7. If the jury find that the plaintiff either fell or was thrown from the buggy by reason of the fact that the bit in the mouth of one of the horses drawing the buggy broke and the horse became unmanageable, the jury will answer the first issue "No."

This instruction was given by the Court. (600)

8. If the jury find the facts to be as set out in either of the prayers for instructions, Nos. 4, 6, and 7, they will answer the second issue "Yes."

The court declined to give this instruction, and the defendants duly excepted.

9. If the jury believe from the evidence that, when the conveyances passed each other in the road, the plaintiff's buggy was on an incline of only 12 or 18 inches, and that this was insufficient to capsize the buggy or throw plaintiff out, so that there was no reasonable ground for apprehension on his part that he would be thrown out, and under these circumstances he jumped out, the result of his fall cannot be charged against the defendants.

This instruction was given by the court.

10. If the jury believe from the evidence that the incline or tilt of the plaintiff's buggy was not great enough to throw from it a man in the exercise of ordinary care, under the circumstances when the plaintiff was thrown from the buggy, the fact is to be attributed to want of care on his part, and the defendants cannot be held responsible for the effects of his fall.

This instruction was given by the court.

11. If the jury believe from the evidence that the driver of Ivie Bros., the defendants, as soon as he knew there was a conveyance meeting him in the road, turned his team to the right and moved to the right as far as he could with safety to himself and team, and that between his conveyance [and] the opposite side of the road there remained sufficient space for the plaintiff's conveyance either to pass safely or to stand safely till he passed with his conveyance, then the defendants' driver exercised all the care which the law required of him, and the defendants cannot be held to account for the injury complained of by plaintiff, and this would be so, even though defendants' driver had been (601) driving at a rapid gait just before that time.

The court refused to give this instruction, and defendants excepted.

The court gave the instruction, with an addition thereto, as follows:

"Provided the driver of defendants, before he knew he was meeting a conveyance, was not driving so recklessly and carelessly as to reasonably cause plaintiff's driver to believe at the time he turned out of the road that his buggy would be struck if he remained in it."

The defendants excepted to the modification of this instruction.

12. If the jury believe from the evidence that the plaintiff had passed over the road often and was familiar with its condition and thought it was too narrow for two conveyances to pass safely, and if he apprehended, when he saw the defendants' conveyance approaching, that danger was imminent, and had time and opportunity to do so, it was his duty to get out of his conveyance until they did pass, and, failing to do so, he is guilty of contributory negligence and cannot recover.

This instruction was given by the court.

13. If the jury believe from the evidence that the plaintiff's conveyance was passed safely by the defendants' conveyance and it was not necessary for the plaintiff's conveyance to have moved any farther with its outside wheels elevated on the embankment, and if because of the bridle bit of one of his horses breaking, or for any other reason, the plaintiff's buggy did move farther on the incline before coming back into the road, and thereby the plaintiff was thrown from his buggy, this was no fault of the defendants' driver, and the defendants cannot (602) be held responsible for the plaintiff's injury.

The court declined to give this instruction, and defendants excepted.

The court modified the instruction, as follows:

"If the jury believe from the evidence that the plaintiff's conveyance was passed safely by the defendants' conveyance, and it was not necessary for the plaintiff's conveyance to have moved any farther, with its outside wheels elevated on the embankment, and it would have so appeared to a man of ordinary prudence under the circumstances, and if, because of the bridle bit of one of the horses breaking or for any other reason, the plaintiff's buggy did move farther on the incline before coming back into the road, and thereby the plaintiff was thrown from his buggy, this was no fault of the defendants' driver, and the defendants cannot be held responsible for the plaintiff's injury."

To the modified instruction the defendants excepted.

14. If the plaintiff's buggy was driven farther to the right and up the embankment on that side than was necessary under the circumstances for the safe passage of the buggy by the team of defendants, and the injury to the plaintiff was caused thereby, the jury cannot impute negligence to the defendants as the cause of the injury to the plaintiff, and the first issue should be answered "No."

The court declined to give the instruction, and the defendants duly excepted.

15. If the plaintiff hired the team of Crafton & Ogburn for the purpose of being carried from Reidsville to Leaksville and Spray, and back to Reidsville, any negligence of his driver, Whit Hunt, which may have caused or contributed to plaintiff's injury, is by law imputed to, and to be taken and considered by the jury as, the negligence of the plaintiff himself.

The court declined to give the instruction, and the defendants duly excepted. (603)

16. If the negligence of the driver, Whit Hunt, proximately caused the plaintiff's injury, the jury will answer the first issue "No"; and if there was any negligence of the defendants in causing the injury, and the negligence of Whit Hunt contributed thereto, the jury will answer the second issue "Yes."

The court declined to give instruction, and the defendants duly excepted.

17. Even if the plaintiff, Crampton, was placed in a position of danger or peril, the law requires that he should exercise ordinary firmness in avoiding the peril of his position, and if he became frightened and jumped from the buggy, when a man of ordinary firmness would not have jumped, under the same circumstances, any injury received by him in consequence of, or as the result of, his act, cannot be imputed to the negligence of the defendants, but would be considered as the result of his own negligence.

This instruction was given by the court.

The first sentence of the first prayer could not have been given. It did not fit the facts in the case. The remaining portion of that prayer was properly refused, as were the third and eleventh prayers, for they left out of consideration entirely the view of the alleged negligence of the defendants' driver prior to the meeting of the teams. His Honor's addition to the third prayer was proper. The fourth prayer left out of consideration the idea of reasonable apprehension of danger on the part of the plaintiff's driver, and was properly refused. Its modification by his Honor was correct. There was no error in the refusal to give the sixth instruction, for there was no testimony upon which it could be based. Hunt, the plaintiff's driver, was asked, on his cross-examination, if he did not tell Hampton that the plaintiff had (604) told him that if he had not gotten his feet tangled up in the lap robe he would not have fallen out of the buggy. To which the witness said he had made no such statement to Hampton. To affect Hunt's credibility, the defendants introduced Hampton as a witness, who said that Hunt told him that Crampton, in jumping out, had hung his feet in the lap robe and that caused him to fall. That evidence was not sufficient to justify the giving of the sixth instruction. The eighth prayer

was properly refused. There was no error in his Honor's refusal to give, without qualification, the thirteenth prayer, but, with the modification added by his Honor, it became a proper instruction.

The fourteenth, fifteenth, and sixteenth prayers were founded on the defendants' views of the law, that if the plaintiff's driver contributed to the injury of the plaintiff, the law would impute that negligence to the plaintiff himself, and that if the negligence of the plaintiff's driver was the proximate cause of the injury, the defendants would not be liable, even if their driver had been negligent. The sixteenth prayer contained both propositions of law, and the view of the court was that one was a correct proposition and the other was not, and his Honor declined to give it as it was framed. But he did give the first section of the sixteenth prayer, substantially, in the following words: "Even if Smallwood (defendants' driver) was driving negligently, and Hunt thought it necessary to drive upon the bank to avoid a collision, yet if an ordinarily prudent driver, under the circumstances, would not have had reason to believe there was danger of collision, or probably would not have driven on the bank, you will answer the first issue 'No,' for in such case the defendants' negligence was not the natural cause of Hunt's
driving on the bank. Hunt's negligence did not contribute with,
(605) and, together with defendant's negligence, constitute the proximate cause. It was of itself the direct, the proximate, cause of the injury." The other sections of the sixteenth prayer his Honor refused to give. On the contrary, he instructed the jury: "Now, even if Hunt was negligent in the manner of his driving while passing defendants' conveyance, as, for example, by turning out more suddenly or higher up on the bank than an ordinarily prudent man would have done, his negligence under these circumstances would be considered as concurring and contributing with defendants' negligence in, together, being the proximate cause of any injury sustained by plaintiff, if plaintiff was thrown out by the driving upon the bank while passing. Defendants would not be relieved from liability by this concurring negligence of Hunt, which coöperated with his own driver's producing the injury." That instruction was, in our opinion, proper.

The view of the law is ably stated in the opinion of the Court in *Little v. Hackett,* 116 U. S., 366. There, the plaintiff below was injured by the collision of a railroad train with the carriage in which he was riding. The plaintiff had gone on an excursion from Germantown to Long Branch. At the latter place, having some spare time before taking the cars on his return home, he hired a carriage and directed the driver to go through a public park near the railroad station. The driver, upon receiving the order, turned the horses to go to the park, and in crossing the railroad track near the station, for that purpose, the vehicle was

struck by the engine of a passing train, and the plaintiff was injured. The carriage belonged to a livery-stable keeper, and was driven by a person in his employment. It was an open carriage, with the seat of the driver about 2 feet above that of the person riding. (That circumstance, however, did not in any way affect the reasoning of the court in the decision of the case.) The evidence went to show (606) that the collision was the result of the concurring negligence of the trainmen and of the driver of the carriage. The railroad company set up the defense of contributory negligence, contending that the driver's negligence was to be imputed to the plaintiff. On the trial his Honor instructed the jury as follows: "I charge you, that when a person hires a public hack or carriage which at the time is in the care of the driver for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another, he may recover damages from any party by whose fault or negligence the injury occurred, whether of that of the driver of the carriage in which he is riding, or of the driver of the other; he may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver if he was negligent at the same time. The passenger in the carriage may direct the driver where to go—to such a park or such a place that he wishes to see. So far, the driver was under his directions; but my charge to you is, that as to the manner of driving, the driver of the carriage or the owner of the hack—in other words, he who has charge of it and has charge of the team—is the person responsible for the manner of driving, and the passenger is not responsible for that unless he interferes and controls the matter by his own commands or requirements." That instruction was sustained. In the opinion of the Court the contrary doctrine announced in the case of *Thorogood v. Bryan,* decided by the Court of Common Pleas, in 1849, 8 C. B., 114, is referred to and disapproved. *Justice Field,* who wrote the opinion of the Court, said: "The doctrine resting upon the principle that no one is to (607) be denied a remedy for injuries sustained without fault by him or by a party under his control and direction, is qualified by cases in the English courts wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, and that he can only recover against a wrong done when they who are in charge can recover. In other words, that their contributory negligence is imputable to him, so as to preclude his recovery for an injury when they, by reason of such negligence, could not recover. The

leading case to this effect is *Thorogood v. Bryan.*" The Court further said, in *Little v. Hackett, supra:* "The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or owner, without his personal coöperation or encouragement, is a gratuitous assumption. There is no such identity. The parties are in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." In that opinion it is stated that in this country *Thorogood v. Bryan* has not escaped criticism in the English courts, and, in this country, has not been generally followed, and the cases in which it has not been followed are cited. There is

NO ERROR.

CLARK, J., dissenting: *"Proxima, sed non remota, causa spectatur."* The court charged the jury: "Now, even if Hunt was negligent in the manner of his driving while passing defendants' conveyance, as, for example, by turning out more suddenly or high upon the bank (608) than an ordinarily prudent man would have done, his negligence under these circumstances would be considered as concurring and contributing with defendants' negligence in, together, being the proximate cause of any injury sustained by plaintiff, if plaintiff was thrown out by the driving upon the bank while passing. Defendants would not be relieved from liability by this concurring negligence of Hunt, which coöperated with his own driver's producing the injury." This is clearly error. In such case the negligence of his own driver, which threw the plaintiff out and injured him, was subsequent to, and independent of, the negligence of the defendants. It was not the necessary consequence of defendants' negligence, and was not concurrent with it, and was the proximate, direct cause of plaintiff's injury. The defendants' negligence was the remote cause. The court, in substance, told the jury that if defendants' negligence made the plaintiff's driver turn out of the road, and the negligent manner of plaintiff's driver in so doing injured the plaintiff, the defendants are liable. This cannot be sustained by precedent or in reason, and, if followed up, would have no limit. For instance, if the barkeeper had not sold defendants' driver whiskey, he would not have been negligent, and if not negligent he would not have frightened the plaintiff's driver into turning out, and the latter would not, by his negligent manner of driving, so have injured the plaintiff. And it could be carried still further back, one cause depending on another, in the manner of the "house that Jack built." But the charge presupposes

that the injury was caused by the negligence of plaintiff's driver (609) in running the buggy upon the bank and throwing the plaintiff out, and if so, the law can go no further back than this direct cause.

*Little v. Hackett,* 116 U. S., 366, has no application. There, the conveyance in which the plaintiff was driving was struck by defendant's train and he was injured. The driver of the conveyance and the engineer were both negligent, and it was held that, the negligence being concurrent, the plaintiff could sue both the owner of the conveyance and the railroad company. Clearly, if he could not, he could sue neither, for it took the negligence of both concurring to do the injury. And that would have been the case here if the two conveyances had run together, both drivers being negligent, causing injury to plaintiff.

But, here, the negligence of defendants caused plaintiff's driver to do something, which something he did in a negligent manner, whereby the plaintiff was injured, and the court told the jury that, if so, the negligence was concurring. Clearly not so, for plaintiff's driver need not have turned out in a negligent manner, and, if he had not, the plaintiff would not have been injured. Here is the proximate cause, which alone the law can consider. Anything beyond that opens the door to a wide and illimitable field of speculation. The negligence of plaintiff's driver was not concurrent with that of defendants, but subsequent thereto, and due to his own want of nerve or skill.

This instruction went to the marrow, and, being erroneous, a new trial should be granted.

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

*Cited: Bradley v. R. R.,* 126 N. C., 742 (on one point).

*Overruled on rehearing: Crampton v. Ivie,* 126 N. C., 894; *Johnson v. R. R.,* 163 N. C., 444.

(610)

WEATHERS & CROWDER v. M. D. AND J. S. BORDERS.

(Decided 5 May, 1899.)

*Petition to Rehear—Practice—Errors Assigned—Facts—Law—Statutory Lien—Married Women—The Code, Section 1826.*

1. A petition to rehear should contain a plain, concise statement of facts, or law overlooked or erroneously decided, and not a mere argument.

2. No case should be reheard upon petition unless it was hastily decided, and some material point was overlooked or some direct authority was not called to the attention of the Court.

3. There can be no statutory lien without a debt for the lien to rest upon.

4. The Code, sec. 1826, confines the capability of a married woman, unless a free trader, in making contracts affecting her real and personal property to the instances therein mentioned, unless with the written consent of her husband.

5. The building of a house on a lot belonging to a wife does not fall within any of the exceptions embraced in section 1826, nor would a judgment against her on a debt embraced within those exceptions constitute a lien on her real estate, although her personal estate would be liable.

6. Although coverture may not be pleaded, if it appears in the case, it is the duty of the court to see that a *feme covert* has the benefit of this defense.

PETITION TO REHEAR. Case reported in 121 N. C., 387.

*Webb & Webb for petitioners.*
*No counsel contra.*

(611) FURCHES, J. This case was heard at Fall Term, 1897, and reported in 121 N. C., 389.

It has been held that a petition to rehear a case, which had been decided by this Court, should contain a plain, concise statement of the facts or law overlooked, or erroneously decided; but that it should not undertake to establish such alleged errors by a course of reasoning. *White v. Jones,* 92 N. C., 388.

This petition is an argument containing ten pages of printed matter with citation of authorities to sustain the argument, and was used as a brief by the petitioner in his argument. This rule may not always have been observed by attorneys in preparing their petitions to rehear. But, still, we understand that this is the rule established by this Court, and that it should be observed in preparing such petitions.

This Court has repeatedly held that "no case should be reheard upon a petition to rehear unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court." *Watson v. Dodd,* 72 N. C., 240; *Hicks v. Skinner,* 71 N. C., 539; *Haywood v. Daves,* 81 N. C., 8; *Devereux v. Devereux, ib.,* 12; *Smith v. Lyon,* 82 N. C., 2; *Lockhart v. Bell,* 90 N. C., 499; *University v. Harrison,* 93 N. C., 84; *Dupree v. Ins. Co., ib.,* 237. "Where the grounds of error assigned in the petition are substantially the same as those argued and passed upon in the former hearing, the Court will not disturb its judgment." *Lewis v. Rountree,* 81 N. C., 20.

It is alleged in this petition that *Smaw v. Cohen,* 95 N. C., and *Farthing v. Shields,* 106 N. C., 289, were probably overlooked by the *Chief Justice* in writing the opinion of the Court. We have examined these cases, and in our opinion neither of them sustains the contention of the petitioner, but are authority against him. *Smaw v. Cohen, supra,* is authority for holding that where the *debt* sued for is (612) less than $200, the action should be brought before a justice of the peace; and that where the *debt* is established by the judgment, the *statute* creates the lien. But where the debt is less than $200, and it is sought to establish an equitable lien, the action *must be brought in the Superior Court,* as a justice of the peace has no equitable jurisdiction—citing *Dougherty v. Sprinkle,* 88 N. C., 300.

This action was commenced before a justice of the peace, the amount claimed being less than $200. And to this extent *Smaw v. Cohen, supra,* sustains the jurisdiction of that Court, if it is an action of *debt,* and where the statute is relied on to fix the lien. But if plaintiffs' action could be sustained, as an equitable lien on the house, as it is argued in the petition that it can be, then the action should have been brought in the Superior Court, as a justice of the peace has no equitable jurisdiction. So we see that, according to *Smaw v. Cohen,* in order to give a justice of the peace jurisdiction it must be *an action of debt.* If it is an action to establish an *equitable lien,* a justice of the peace has no jurisdiction, and the plaintiff is out of court.

The case of *Farthing v. Shields, supra,* is also authority against the petitioner, as we will show further on. If the petitioner had grounds for an equitable lien, as he claims, he should have commenced his action in a court that had equitable jurisdiction. He could not succeed in this action, as the Superior Court has no greater jurisdiction than the justice of the peace had, from whom the appeal was taken. So the petitioner must rely on the statute, The Code, sec. 1826. This section provides: "No married woman during her coverture shall be capable of making any contract to affect her real or personal estate, except her

(613) necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed."

The *feme* defendant was the owner of a lot of land in Shelby. She and her husband contracted *verbally* with the plaintiffs to build a house on this lot belonging to the wife. The plaintiffs built the house, and they admit that they have been paid for the same, except $37. The plaintiff brought this action before a justice of the peace against the husband and wife for the balance due him for building the house, and in this action he claims a mechanic's lien on the house for his debt. He recovered judgment against the husband, but the court refused to give judgment against the *feme* defendant, and also refused to declare a lien on the house in favor of the plaintiff. This judgment of the Superior Court was affirmed by this Court, when it was here before. (121 N. C., 387.) The petitioner says this was error, which he asks to have corrected.

To entitle a party to a statutory lien (as this must be, if a lien) there must be a valid indebtedness. The debt is the cause of action, and the lien is only incident to the debt. There can be no statutory lien without a debt for the lien to rest upon. *Wilkey v. Bray,* 71 N. C., 206; *Baker v. Robinson,* 119 N. C., 289; *Clark v. Edwards, ib.,* 115.

It therefore follows that plaintiff can have no lien on the house and lot, unless he has a *debt* against the *feme* defendant, upon which he could recover a personal judgment against her.

This brings us to a consideration of section 1826 of The Code, quoted above. And we find that this section fails to give the petitioner any right to recover judgment against the *feme* defendant. The statute declares that no married woman shall be *capable* of making any contract affecting either her personal or real estate, *except for her* (614) *necessary personal expenses or for the support of the family,* or such as may be necessary to pay her debt, unless with the *written* consent of her husband, existing at the time of her marriage, unless she be a free trader. It is admitted that she is not a free trader; and it is perfectly apparent to us that the building of a house on a lot belonging to the *feme* defendant does not fall under any one of the exceptions contained in section 1826. It is not her *necessary personal expenses;* it is not what could be termed *expenses incurred for the support* of the family, and it is not claimed that it is for a debt due at the time of her marriage. With this interpretation of section 1826, which seems to us to be so manifestly correct that we hardly see how it could be understood otherwise, we fail to see the error in the former opinion and judgment of this Court, which the petitioner seeks to point out.

But if the plaintiff had been able to establish a debt and to have obtained a judgment against the *feme* defendant for any of the excepted matters in section 1826, for which she may contract, such judgment would not have been a lien on the *real estate* (the house and lot) of the *feme* defendant, although her personal estate would be liable for the payment of such judgment. This doctrine has been announced by this Court in a great number of cases, some of which we cite as follows: *Loan Assn. v. Black,* 119 N. C., 323, in which case the following cases are cited to sustain this position: *Thurber v. La Roque,* 105 N. C., 301; *Farthing v. Shields,* 106 N. C., 289; *Hughes v. Hodges,* 102 N. C., 236; *Lambeth v. Kennery,* 74 N. C., 348; *Littlejohn v. Edgerton,* 76 N. C., 468. We therefore see no grounds upon which plaintiffs' claims could be declared a lien on the house and lot, the "real estate of the *feme* defendant," even if he could get a judgment against her.

It is contended in the petition to rehear (used as a brief) that (615) the *feme* defendant did not plead her coverture. But it appeared all through the case that she was a *feme covert,* and, this appearing, it was the duty of the court to see that she had the benefit of this defense. *Moore v. Wolfe,* 122 N. C., 711, and authorities there cited.

PETITION DISMISSED.

CLARK, J., dissenting: The Constitution, Art. X, sec. 6, guaranteed the property rights of married women. It provides, "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 and 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." This made her as absolute owner of her property as she was before marriage, or as her husband was of his, with the single exception that in conveyances of her property she must have the written assent of her husband, and there is no distinction in that or any other respect between her rights over real or personal property.

The Code, section 1826, in restricting her rights to make contracts affecting her property, without the written assent of the husband—except in three cases named, is in direct conflict with this provision of the Constitution, and is a curious instance of the survival of preconceived opinions, based on the former Constitution, whose provisions had been swept away by the march of public opinion, which had been formulated in the new organic instrument. But for such preconceived ideas it would have occurred to no one that a married woman was less

(616) competent to make contracts affecting her property than one who had not been married or who had become a widow. The requirement of the written assent of the husband to conveyances by the wife was regarded by the Constitution as a sufficient guarantee of the rights of the husband.

The Code, section 1256, in requiring the privy examination of the wife, is another instance of the same kind, for the Constitution guarantees the wife the right to convey her property, "with the written assent of the husband" (not with privy examination of the wife), "as if she were unmarried." The Legislature cannot restrict the freedom given by the Constitution to the wife in dealing with her property, as to which her rights were to *"remain"* as if she were unmarried, save as to acquiring the written assent of the husband to her conveyances. The Constitution says a married woman may convey her property with the written assent of her husband. The Code, section 1256, says she cannot. Which controls?

These two sections (1256 and 1826) are the only ones which attempt to restrict the freedom of the wife's property rights (for section 1246 (5) merely provides "when a privy examination is necessary," how shall it be taken), and neither of those sections contain any basis for the theory of "a charge in equity" which is a reverter to a condition of things absolutely abolished by the Constitution, and to the times when a married woman was placed in the same class with "infants, idiots, lunatics and convicts." The distinction between law and equity has been abolished, and in neither of the only two sections dealing with the subject—1256 and 1826—antagonistic though they be to the free control of their property guaranteed married women by the Constitution—is there any hint of a return to the system of "charging the property" of a married woman any more than "if she had remained unmarried."

But if we are to concede that section 1826 is not in conflict with (617) the Constitution, yet, on its face, it does not restrict in the three cases therein specified a married woman's right to make contracts affecting her property, "real or personal." If she can do so as to personal property (as the opinion states) she can do so equally as to her realty. This section is the same as to both, and there is no other statute which makes a distinction, and the Constitution is still more liberal. Upon what then is based the doctrine that a married woman cannot in those three instances, at least, make contracts affecting her real as well as her personal estate without the written assent of her husband?

The Legislature of 1899 struck "married women" out of the company and category of "infants, idiots, lunatics and convicts," in which classification they were placed by The Code secs. 148 and 163, but the courts have been still slower than the Legislature in grasping the fact of the

emancipation of married women and of their property rights guaranteed them by the Constitution. It is still held as law in North Carolina, strange as it may seem, not only that a married woman cannot alien her property with merely "the written assent of her husband," as the Constitution says, but that her earnings from her own labor belong to her husband. In this connection it is appropriate to quote the following extract from 6 American Law Review, 72 (1871):

"Many of the States have passed statutes allowing married women to hold and manage property, and giving them a right to a greater or less extent to their separate earnings. Such a law was passed in England in 1870. We read in Gibbon that 'after the edicts of Theodosius had severely prohibited the sacrifice of the pagans they were still tolerated in the city and temple of Serapis; and this singular indulgence was imprudently ascribed to the superstitious terrors of Christians themselves, as if they feared to abolish those ancient rites (618) which could alone secure the inundations of the Nile, the harvests and the subsistence of Constantinople.' But the temple was at last destroyed and the statue of Serapis was involved in ruin. 'It was confidently affirmed that if any impious hand should dare to violate the majesty of the god, the heavens and the earth would instantly return to their original chaos. An intrepid soldier animated with zeal and armed with a heavy battle-axe, ascended the latter; and even the Christian multitude expected, with some anxiety, the event of the combat. He aimed a vigorous stroke against the cheek of Serapis; the cheek fell to the ground; the thunder was still silent, and both the heavens and the earth continued to preserve their accustomed order and tranquility. The victorious soldier repeated his blows; the huge idol was overthrown and broken in pieces; and the limbs of Serapis were ignominiously dragged through the streets of Alexandria.' The law of the status of woman is the last vestige of slavery. Upon their subjection, it has been thought, rests the basis of society; disturb that, and society crumbles into ruins. By the married woman's property acts the first blow has been struck. The cheek of the idol has fallen to the ground; the thunder is silent, and the earth preserves its accustomed tranquility. The huge idol will sooner or later be broken in pieces."

In North Carolina, the Constitution of 1868 struck the last shackles from married women as regards their property rights. It provides that her rights over property "should be and remain" the same in all respects as if she were unmarried, save that in conveying her property rights there must be "the written assent of her husband." Notwithstanding this emancipation, married women are still held in medieval leading strings by our courts, and still wait for the salvation of Israel. A married woman is still treated as one possessed of no discretion. We

(619) still talk of "charges upon her property" when that is not required "if she remains single," and exact "privy examination" when the Constitution requires it only as to her consent to the conveyance by the husband of his homestead. We still hold that her husband is entitled to her earnings, and though the statute says she can sue and be sued, it is only recently that the Legislature has taken her, as to the statute of limitations, out of the classification with "convicts, idiots, lunatics" and those not arrived at years of discretion, and therefore not *sui juris.*

The rights of married women, like those of other classes, are to be determined not by what "sages of the law" in a former age thought good enough for them, but by the plain provisions of a written Constitution.

DOUGLAS, J., concurring: As the decision in this case apparently depends upon my view of the law, it seems proper that I should briefly state it in its moral as well as strictly legal aspect. In *Sanderlin v. Sanderlin,* 122 N. C., 1, and in *Slocomb v. Ray,* 123 N. C., 571, in speaking for the Court, I expressed my opinion of the law, but it is now urged that those views are contrary to the spirit of the Constitution and the enlightened progress of the age. I certainly did not intend the slightest reflection upon married women by continuing to give them the same protection afforded to *"infants,* idiots, lunatics and convicts"; nor have I heard any complaint from those married women whose opinions would naturally influence my conduct. This protection was accorded to them by the sages of the law for their benefit, and I see no reason to take it from them simply because they share it with others, some of whom may be less worthy than themselves. The mother, holding upon her lap the child to whom she has given life, and for whom she would give her own life, feels that she is in the best company, far better (620) than if she were with the so-called "reformer." She feels no degradation in being upon an equality with that "infant" in the love of a father and the protection of a husband; and her instincts would prompt her willingly to accord to the humblest convict the equal protection of the law. I am not an iconoclast, and I feel neither the desire nor the obligation to shoulder my judicial battle-axe in a crusade against the wisdom of the ages. Much as I may admire Gibbons' intrepid soldier, who shattered with his battle-axe the pagan idol, I cannot regard the provisions of the common law as the offspring of paganism and superstition. Even if my opinion in this case were otherwise, no matter how strong, the mere fact that it differed from the practical consensus of decisions would lead me to doubt its correctness; and while the conscience of the man must remain forever sacred, the individual opinion of the judge on questions of law may well yield to

superior wisdom and learning. It is true many of the rules of the common law, being fitted to then existing conditions, have become inapplicable to our present surroundings, and must be abandoned or reformed. The rules governing the ancient stage-coach and mail driver must be refitted to the exigencies of the railroad and telegraph, while their views of the kingly prerogative find but little place in the government of a republic. But while we have repudiated the divine right of kings, we still hold the diviner right of wife and mother.

Having thus disposed of the *quasi*-moral aspect of the case, at least to my own satisfaction, I can add but little to the opinion of the Court as delivered by *Justice Furches,* with which I fully concur. Article X, section 6 of the Constitution, expressly provides that "the real and personal property of any female . . . may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." As the written assent of the husband (621) is necessary, I think it is clearly within the province of the Legislature to provide how that assent shall be legally expressed. I cannot assent to the suggestion that this constitutional provision applies only to a conveyance in its strictly technical sense. I think it is equally applicable to any transaction that may naturally effect an alienation. Of what use would it be for the Constitution to prevent the wife from conveying the property and receiving the money therefor if it permitted her to spend the money and let the sheriff sell and convey the property? Such a construction of the Constitution would simply defeat its manifest intention.

I do not wish to be considered as opposing the legitimate progress of the age, but we should not forget that true progress depends more upon the direction in which we are going than it does upon the speed with which we are traveling. In some directions we may well say with the ancient philosopher, *"festina lente."*

*Cited: Hodgin v. Bank,* 125 N. C., 503, 511; *Cansler v. Penland, ib.,* 581; *Peebles v. Graham,* 130 N. C., 263; *Smith v. Ingram,* 132 N. C., 967; *Harvey v. Johnson,* 133 N. C., 355; *Kearney v. Vann,* 154 N. C., 316; *Stephens v. Hicks,* 156 N. C., 244; *Jackson v. Beard,* 162 N. C., 112; *Norwood v. Totten,* 166 N. C., 651; *Weston v. Lumber Co.,* 168 N. C., 98; *Wallin v. Rice,* 170 N. C., 419; *Foundry Co. v. Aluminum Co.,* 172 N. C., 705; *Comrs. v. Sparks,* 179 N. C., 584, 586.

NOTE.—Headnote 5 is not now the law, C. S., 2434; *Finger v. Hunter,* 130 N. C., 529, *and citations thereto in 2 Anno. Ed.*

(622)

MOREHEAD BANKING COMPANY v. L. L. MOREHEAD, PETITIONER.

(Decided 5 May, 1899.)

*Promissory Note—Executors and Administrators—Personal Liability—Equity Jurisdiction.*

1. A personal representative who executes a note as executor or administrator, without qualification or reservation as to personal liability, thereby incurs a personal legal liability as maker.

2. Equity, for many reasons, will reform and correct facts; but, as a general rule, it does not correct errors of law. There must be some fact, some inducement, some fraud, connected with the transaction, that raises the equity.

3. Although equity is now administered in the same court and may be in the same action, the rules that govern now are the same they formerly were—to entitle a party to equitable interference and equitable relief, the same equities must exist as would have availed before 1868.

PETITION TO REHEAR. Case reported in 122 N. C., 313.

*Winston & Fuller, Burwell, Walker & Cansler for petitioner.*
*Manning & Foushee for Duke & Green.*
*Boone & Bryant and John W. Graham for plaintiff.*

FURCHES, J. This case was here at Spring Term, 1898, 122 N. C., 313. It is here now on a petition to rehear. The facts now are necessarily what they were then, and it is for us to say whether the
(623) construction then put upon this transaction was correct or erroneous. If upon examination it is found to be erroneous, the error should be corrected; if correct, it should be affirmed.

We do not deem it necessary that we should state the facts, as they are stated in the reported case, *supra*. It will there be seen that the defendant's testator, with the other defendants, Duke & Green, as his sureties, made a note to a New York bank for $6,000, which was unpaid at the death of the testator; that this note was sent to the plaintiff for collection, and the defendant Morehead arranged with the plaintiff for the satisfaction and payment of the New York note by giving the note sued on with Green & Duke as sureties, and paying the plaintiff the difference between the New York note and the $5,000 note sued on, and the plaintiff paid off and satisfied the New York note. There has been judgment heretofore entered against the sureties, and this action is now being prosecuted for the purpose of recovering a personal judgment against the defendant Morehead.

It was admitted on the argument by counsel for defendant Morehead that his client was liable to a personal judgment upon the note as it stands; that is, as we understand the counsel, that she is personally liable for the note at law, but that in equity she was not.

This admission that she is personally liable for the note at law, or upon the note as it stands, gave her case away. We do not mean to say that defendant's counsel made a slip or mistake by which his client was damaged, but that it was the admission of a legal proposition which, if true, was equivalent to admitting the plaintiff's contention.

Equity, for many reasons, will reform and correct facts; but as a general rule it does not correct errors of law. It is said there are exceptions to this general rule; but what are called exceptions by some writers are in fact not exceptions. When they are examined it (624) will be found that there is some fact, some inducement, some fraud connected with the transaction that raises the equity. 2 Pomeroy Eq. Jur., sec. 843; *Thomas v. Lines,* 83 N. C., 191; *Kornegay v. Everett,* 99 N. C., 30.

In this case it appears that the transaction took place between the defendant Morehead and Morgan, the cashier of the plaintiff bank. Morgan says he drew the note as he was directed to draw it, and the defendant Morehead says that she signed it as it was drawn, knowing how it was drawn. There was not a word said then or before by either Morehead or Morgan as to whether she would be personally liable or not, and no such question was raised until long after this action was commenced. Finally the question was raised as to whether the defendant Morehead was personally liable or not; and then she said she did not think when she signed the note that she was making herself personally liable, and Morgan said he did not think when she signed the note that she was personally liable. Upon this evidence the defendant Morehead asks a Court of Equity to come to her relief and say she is not liable for this debt, although she admits that in law she is liable.

Suppose the jurisdiction of law and equity were in separate courts, as they were before the Constitution of 1868, and the plaintiff had recovered judgment against the defendant Morehead in a court of law, and she had gone into a Court of Equity to restrain and enjoin its collection, upon what ground would she put her relief? There is not a suggestion of fraud, deceit or mistake of the draftsman in drawing the note; nor a suggestion but what it was drawn just as the parties wanted it, and intended it should be drawn. Indeed this is admitted. We must confess that we are at a loss to see any ground for an equitable interference. And though equity is now administered in the (625) same court, and may be in the same action, the rules that governed before 1868 are the same now that they were before that time.

To entitle the defendant Morehead to equitable interference and equitable relief, she must have such equities as would have availed her before 1868.

After giving this case all the investigation and reflection we are able to do, under the light of the very able argument of defendant's counsel, we do not see the error alleged in the former opinion. It is said at the conclusion of the former opinion that judgment appealed from is "reversed." This is a technical error, but does not affect the opinion as to the merits of the controversy.

There being no disputed facts—they having been agreed upon—there was nothing to submit to the jury. The province of the jury is to pass upon disputed facts, and to find how they are. Where there are no disputed facts, it becomes a question of law for the court, and the jury has nothing to do with it. There being no disputed facts in this case, it became a question of law for the court; and upon the undisputed facts the court should have directed a personal judgment to be entered against the defendant Morehead. As that judgment should have been entered at the trial, it will be so entered upon this opinion, being certified to the Superior Court of Durham County.

PETITION DISMISSED.

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

DOUGLAS, J., dissents.

*Cited:* *S. c.*, 126 N. C., 283, 285.

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(626)

JOHN J. HARBISON, JOSEPH B. HARBISON, OWEN GATHRIGHT, JR., AND WALTER WALKER, TRADING AS HARBISON & GATHRIGHT, v. JOSEPH S. HALL.

(Decided 5 May, 1899.)

*Conflict of Evidence—Corroborative Testimony—Business Usage—Account—Payment.*

1. Where there is a conflict of evidence as to the payment of the account in suit—the defendant testifying that it was paid, and one of plaintiffs testifying that it was not paid—evidence of the custom of the plaintiff firm in regard to their system of entries in their books, when checks and moneys were received, and that their books failed to show any evidence of payment by defendant, is admissible as corroborative testimony.

2. Circumstances showing the business methods and usages of the firm might assist the jury in arriving at the truth of the matter.

ACTION on an account for $88.38, for goods sold and delivered, heard on appeal from the justice's court at November Term, 1898, of GRANVILLE.

*H. M. Shaw for plaintiffs.* (630)
*Edwards & Royster and J. B. Batchelor for defendants.*

FAIRCLOTH, C. J. Action for goods sold and delivered. Plea: payment. The defendant testified that he had paid the entire account. One of the plaintiffs testified that the account had not been paid. The plaintiffs then offered to show by their cashier and bookkeeper, in corroboration of their testimony, the custom of the firm in regard to their system of entries in their books, when checks and moneys, etc., were received, and that an investigation of the books failed to show any evidence of payment by the defendant. This evidence was excluded by the court, and the plaintiffs excepted and appealed.

There is error. The evidence was competent in support of the positive testimony of the plaintiffs. These were circumstances showing the business methods and usages of the firm, which might assist the jury in arriving at the truth of the matter. Such usage has been held competent. *Bank v. Pinkers,* 82 N. C., 377; *Vaughan v. R. R.,* 63 N. C., 11; 1 Greenleaf Ev. (1896), secs. 116 and 118.

ERROR.

*Cited: White v. Tripp,* 125 N. C., 524.

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(631)

SIBLEY, LINDSAY & CURR v. E. L. GILMER.

(Decided 5 May, 1899.)

*Husband and Wife—Separation—Husband's Liability—Wife's Agency.*

1. A husband can make his wife his agent, and he will be bound by her acts by the same rules of law, as would prevail in the case of other agency.

2. Where a husband, by his course of acquiescence in the dealings between the plaintiffs and his wife and by his payment of the accounts, held his wife out to the plaintiffs as empowered to purchase goods from them—such agency by implication is as binding as if he had expressly authorized her to buy the goods on his account.

3. The implied agency having been established, the plaintiffs had a right to presume that the authority would be continued until they had reason to know that it had been discontinued.

4. When the whole transaction shows that the credit was extended to the husband, the manner in which the goods were charged to the wife would not affect his liability, especially where monthly statements of the accounts were furnished to him, some of which he paid without objection.

ACTION upon an account for goods sold and delivered, tried on appeal from the justice's court, before *Robinson, J.*, at a Special January Term, 1898, of GUILFORD.

(634) *A. M. Scales for plaintiffs.*
*Bynum & Taylor for defendant.*

MONTGOMERY, J. The only question presented in this case is: Is the husband liable for the price of goods (ladies' apparel), not necessaries, sold to his wife, after separation, by one who had, previous to the separation, sold to her, on credit at various times, goods which were afterwards paid for by the husband, the seller having been ignorant of the separation at the time of the last sale? What constitutes "necessaries," and what are the nature and extent of the husband's liability for "necessaries" furnished to his wife, either while they are living together or living apart, though discussed at length on the argument here, are not matters necessary to be considered by the Court.

In the case on appeal, it appears that the plaintiffs, on the trial below, abandoned the count for necessaries and relied upon the agency of the wife. His Honor instructed the jury that if they believed the evidence, to answer the issue, "Is the defendant indebted to the plaintiffs, and if so in what sum?" "Nothing."

The defendant's wife had, before their separation, bought goods from the plaintiffs in New York City, and they had sent out monthly statements of account therefor to the defendant at his home in Greensboro, N. C. He never made objection to the course of his wife, and the husband paid some of the bills by his personal checks. After the separation the plaintiffs sold other goods to the defendant's wife, the price of which this action was brought to recover, the plaintiffs having no notice of the separation, although it was known generally in North Carolina and at Greensboro where the defendant resided.

(635) A husband can make his wife his agent, and he will be bound for her acts by the same rules of law as would prevail in the case of any other agency, and the agency may be express or implied, as in other cases. Schouler Dem. Rel., sec. 72; Story on Agency, sec. 7; Meacham on Agency, sec. 62; *Webster v. Laws,* 89 N. C., 224. That

being the true statement of the law, we are of the opinion that upon the facts in this case the instruction of his Honor was erroneous. The matter is one entirely of agency in general; and the agency growing out of the relation of husband and wife by operation of law is not the question involved. The defendant, by his course of acquiescence in the dealings between the plaintiffs and his wife, and by his payment of the accounts, held his wife out to the plaintiffs as empowered and authorized by him to make purchases of goods from them, and such an agency by implication is as binding as if he had expressly authorized her to buy the goods on his account. The implied agency, having thus been established, the plaintiffs had a right to presume that the authority would be continued until they had reason to know that it had been discontinued. *Cowell v. Phillips,* 11 L. R. A., 182; *Story, supra,* sec. 470; 1 A. & E., 1230, and cases there cited.

The main contentions of the defendant were, first, that the purchase of the goods on credit was the contract of the wife herself and, therefore, void, and as corollary that the defendant husband could not ratify a contract, void and against public policy; second, that the wife's implied authority from the husband to purchase the goods from the plaintiffs, if it ever existed, was revoked by the separation by force of law as in the case of the death of a principal; and, third, that if there ever existed an implied agency between the defendant and his wife, the plaintiffs had notice of its revocation by reason of the fact that the separation was generally known in Greensboro, where the defendant (636) resided.

We think that although the goods were charged on the books of the plaintiffs to the wife, the whole transaction showed that the credit was extended to the defendant, and the manner in which they were charged could not affect his liability, especially as monthly statements of the account were sent to the defendant, some of which he paid by his personal checks without even a word of objection or protest to the purchases by his wife.

In support of the second mentioned contention of the defendant, his counsel cited *Pool v. Everton,* 50 N. C., 241. In that case the husband and the wife were living apart, and the plaintiff, a physician, attended her in a case of sickness. A public notice by advertisement had been given by the husband, of the separation, and that he would not be liable for her debts, and the plaintiff was aware of such notice having been given at the time he rendered the service. The Court held there, that the plaintiffs could not recover on the ground that he had not shown that the wife had good cause of separation. The question there was not one of general agency, but one of operation of law, *i.e.,* the liability of the husband for necessaries, the husband and the wife living apart. The

Court said among other things that a married woman could make a contract for her husband that would bind him, and that the agency might be constituted either by express authority or by implication. The defendant's reliance is upon the following language used by the Court in that case: "But this implication of agency can only be made while the parties continue to live together. If they separate and live apart, the idea of an implied agency is out of the question. The effect of the notice (such as was given in this case) is merely to inform the public of (637) the fact of the separation, which operates as a revocation of any implied agency that existed while they lived together." The language of the eminent judge who wrote the opinion in that case may not convey as clear a meaning as usually characterized his opinions, but we think the reasonable construction of his words must be that, in cases where the husband and wife had separated, no notice of separation need be given to prevent his liability for debts contracted by the wife during the separation—even for necessaries—the law being that if the separation was without good cause on the part of the wife, her debt contracted even for necessaries was not only not binding on the husband, but such creditors made themselves liable to the husband in an action for damages for extending such credit. And we think that while there may be some confusion about the language in the last sentence of the extract from that opinion, the meaning was that the notice given in that case could only affect such creditors as had been, before the separation, dealing with the wife as agent by implication of the husband in respect to matters not strictly to be classed as necessaries for the support of the family.

We think the Court had in mind just such agencies as the one we are treating in this case, as the ones to be affected by the notice.

There was error in the instruction given by his Honor, and there must be a

NEW TRIAL.

DOUGLAS, J., dissents.

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(638)

JOHN S. CUNNINGHAM ET ALS. v. W. C. SPRINKLE ET ALS.

(Decided 9 May, 1899.)

*Board of Agriculture—Power of Appointment—Constitution, Art. III, Sec. 17—Act of March 4, 1899.*

1. The Constitution, Art. III, sec. 17, provides that the General Assembly shall establish a Department of Agriculture, Immigration and Statistics. This section is not self-executing, but is mandatory upon the Legislature.

2. Members of the Board of Agriculture are not constitutional officers, but being of legislative creation, are within the power of legislative appointment, and are not exclusively, nor of necessity, within the power of executive appointment.

3. The act of 4 March, 1899, which enlarges the number of the Board of Agriculture, naming the additional members, is not in conflict with the Constitution.

MANDAMUS heard before *Brown, J.*, on 28 April, 1899, at chambers, upon complaint and demurrer during April Term of WAKE.

*Simmons, Pou & Ward and Battle & Mordecai for plaintiffs.* (639)
*J. C. L. Harris and T. M. Argo for defendants.*

DOUGLAS, J. This is an action for a *mandamus,* brought by the plaintiffs as members of the Board of Agriculture, elected under the act of the General Assembly, ratified 4 March, 1899, to require the defendants, members of said Board of Agriculture by appointment of the Governor under Laws 1897, ch. 85, to admit the plaintiffs to all the rights of members of said board along with the defendants, as prayed for in the complaint.

The answer of the defendants admits all the material allegations of fact in the complaint, and denies only the conclusions of law, and, therefore, in effect, it is but a *demurrer.*

The plaintiffs, in accordance with the act of 4 March, 1899, met with the defendants, and the plaintiff, John S. Cunningham, was elected chairman of the board, and routine business was transacted, without any question being made as to the rights of the plaintiffs as members. An adjournment of that meeting was had to 26 April, 1899, at 4:30 p. m., at which time the plaintiffs (with one or two exceptions) presented themselves at the place of meeting, and the defendants refused admission of the plaintiffs to the rooms of the board, and denied the validity of their election as members, and refused to admit them as members.

The only question in this action is, whether the plaintiffs were legally elected members of the board—the act of 4 March, 1899, under which they were elected, being alleged by the defendants to be unconstitutional, upon the following grounds: (640)

1. They alleged that the office of member of the Board of Agriculture is a constitutional office, and that the General Assembly has no power to elect to such offices.

2. That if it is an office created by the General Assembly the power of appointment is an *executive* function and that it cannot be exercised by the General Assembly.

The following judgment was rendered by the court below:

This cause coming on to be heard before *George H. Brown, Jr., Judge,* at chambers, in the courthouse at Raleigh, North Carolina, on 28 April, 1899, by consent of both plaintiffs and defendants; and the said cause being heard upon the pleadings, no issue of fact being raised thereby; and the court being of opinion upon the facts stated in the complaint and admitted by the answer that the plaintiffs and each and every one of them are members of the Board of Agriculture, duly elected and qualified—

Hereupon it is considered, ordered and adjudged, as follows:

1. That the plaintiffs and each and every one of them are duly elected and qualified members of the Board of Agriculture, and entitled by virtue of their election and qualification to all the powers and emoluments pertaining to the office of members of the Board of Agriculture, and to participate with the defendants in the exercise of the duties and powers and functions imposed upon and vested in the Board of Agriculture.

2. That a writ issue for the Superior Court of Wake County to be directed to the defendants in this action, and each and every of them, commanding them to permit the plaintiffs in this action, and each and every of them, to have possession jointly with said defendants,
(641) of and access to the apartments, books, records, documents and effects belonging or pertaining to the Department of Agriculture and the Board of Agriculture; and also to admit the said plaintiffs, and each and every of them, to participation in the affairs, duties and powers pertaining to said Board of Agriculture.

3. That the plaintiffs recover of the defendants their costs in this action expended.

The defendants appealed.

The points is this case, however important, are comparatively simple and clearly presented. There is no effort to remove the defendants from office, or to deprive them of any rights of property therein. It is true that their influence may be materially diminished by so large an addition to the membership of the board, as one vote in nine is worth more than one in twenty-four; but they still have the right to cast their votes when and how they please. So there appears to be no abstraction of property rights. The question is purely upon the rights of the plaintiffs to act as members of the board. After the elaborate opinions of the courts, as well as those concurring and dissenting, filed at this term upon questions of title to office, but little is now left to be said. Upon the authority of *State Prison v. Day, ante,* 362, and *Cherry v. Burns, post,* 761, together with the cases therein cited, we feel compelled to say that members of the Board of Agriculture are not constitutional officers; and

that being of legislative creation, they are equally within the power of legislative appointment. It is true that Article III, section 17, of the Constitution, as amended by the Constitution of 1875, provides that: "The General Assembly shall establish a Department of Agriculture, Immigration and Statistics, under such regulations as may best promote the agricultural interests of the State, and shall enact laws for the adequate protection and encouragement of sheep industry." This section does not profess to establish any such department, but (642) simply *directs* the Legislature to do so, leaving to it the largest latitude of regulation. Admitting that this section is mandatory, it is not self-executing; as further action, and intelligent action, would be necessary on the part of the Legislature to bring the new department even into existence, much more to give it form and action. While the imperative duty and unquestioned power rest with us to declare null and void any act of the Legislature that may be in violation of the Constitution, we must concede to that coördinate branch of government absolute freedom of discretion in the lawful exercise of its constitutional prerogatives.

The second objection is well answered in *University v. McIver,* 72 N. C., 76, 85, where this Court says: "But it is again objected that in electing the trustees the Legislature usurped an executive power, which is forbidden by the theory, if not the words of the Constitution. Now the election of officers is not an executive, legislative or judicial power, but only a mode of filling the offices created by law, whether they belong to one department or the other. The election of a judge is not a judicial power, nor the election of a governor an executive power; for if so, all elections by the people would be an infringement upon the executive department. The true test is, where does the Constitution lodge the power of electing the various public agents of the government; and it is conclusive upon the judicial mind, whether this power is found to be lodged in the one or the other branch, or concurrently in all these departments into which the supreme authority of the State is divided."

This view of that learned Court was strictly in accordance with the constitutional history of this State. The Constitution of 1776 in sec. 4, Declaration of Rights, declared that: "The legislative, executive and supreme judicial powers of government ought to be forever (643) separate and distinct from each other." Yet Articles XIII, XIV and XV proved that the Legislature should, by joint ballot, *elect* the Governor, and *appoint* Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, Attorney-General, Generals and field officers in the militia, and all officers of the regular army of this State. The Governor continued to be elected by the Legislature until the Convention of 1835, and the Judges until the Constitution of 1868. It is

thus clear that the power of appointment was not regarded as exclusively an executive prerogative. The judgment of the court below is, therefore, AFFIRMED.

*Cited: Salisbury v. Croom,* 167 N. C., 226.

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CHARLOTTE OIL AND FERTILIZER COMPANY v. J. P. RIPPY, ADMR. OF WILLIAM RIPPY.

(Decided 9 May, 1899.)

*Petition to Rehear—Evidence Under Section 590 of the Code—Transactions and Communications With Deceased Persons by Parties to the Action, or Persons Interested in the Event.*

1. Before the adoption of The Code, a person interested in the event of the action could not be a witness. This rule is now restricted to parties or persons falling within the exceptions contained in section 590.

2. In an action upon a firm promissory note against the administrator of an alleged deceased member thereof, evidence by one of the partners, offered by plaintiff, that the deceased was a member of the firm is inadmissible under section 590, because the witness is interested in the event of the action, although not a party thereto.

(644) PETITION TO REHEAR. This cause decided at September Term, 1898, 123 N. C., 656.

*Burwell, Walker & Cansler for petitioners.*
*D. W. Robinson contra.*

FURCHES, J. This case was before the Court a year ago, and is reported in 123 N. C., 656, and is before us now upon plaintiff's petition to rehear.

The action is upon a promissory note, made payable to the plaintiff, executed by D. F. Bridges on 15 November, 1894, for the sum of $430, signed "D. F. Bridges & Co." The action is brought against J. P. Rippy, administrator of William Rippy alone, and the allegation of plaintiff is that, at the date of the note, there was a copartnership existing and doing business in Cleveland County under the firm name and style of "D. F. Bridges & Co.," composed of D. F. Bridges and William Rippy, the intestate of defendant; that William Rippy has since died, and the defendant is his personal representative.

The defendant answers and denies that his intestate, William Rippy, was a member of said partnership, if any such partnership ever existed.

On the trial the plaintiff introduced D. F. Bridges as a witness for the purpose of proving that there was such a partnership as "D. F. Bridges & Co.," and to prove that William Rippy, defendant's intestate, was a member of said partnership at the time the note sued on was given. This evidence was objected to by the defendant under section 590 of The Code, and excluded by the court. The correctness of this ruling is the only question presented by the petition to rehear. And owing to the fact that when the case was here before, the Court held that plaintiff was entitled to the evidence, if the witness knew the fact outside of any "transaction or communication" with the deceased, so this (645) petition must be treated and considered as asking the Court to say that D. F. Bridges is a competent witness to prove communications and transactions he may have had with defendant's intestate.

The question presented is not free from difficulty. It again brings before the Court for construction that much construed section, 590, of The Code, and, the great number of constructions it has received, does not relieve the question of embarrassment.

Section 589 of The Code, does away with all disabilities on account of interest. But this section is immediately followed by 590, which contains the following: That *"a party or a person interested in the event* of the action shall not be examined as a witness in his own behalf or interest . . . against any executor, administrator, or survivor of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator . . . is examined in his own behalf . . . concerning the same transaction or communication." These should be treated as exceptions to 589, and as taking them out of the operation of that section. If this be true, the parties included in these exceptions stand upon the same footing they did before the adoption of The Code.

Before the adoption of The Code, a party interested in the result of the verdict and judgment could not be a witness. This rule is now restricted to parties falling within the exceptions contained in section 590, and the only question to be considered is whether the witness, D. F. Bridges, falls within these exceptions, or not.

It must be conceded that he is interested in an action brought (646) upon a note given by him, and for which it is admitted that he is liable to the full extent of the note. And if this evidence establishes the partnership alleged by plaintiff, the estate of defendant's intestate is liable to the plaintiff for the whole of the note; and the witness can only be compelled to contribute to defendant one-half of what he has had to pay.

It is admitted that plaintiff proposes to ask him to testify as to personal transactions and communications with deceased's intestate. It is admitted that he is not a party to this action; and the only question left for our consideration is, whether he is "interested in the event of the action." If he is, he is disqualified; if he is not, he is competent.

It seems to us that if this question is an open one, and to be determined upon reason—logical deduction—sustained by quite an array of authorities, it must be held that he is incompetent.

"It makes no difference in any of these cases whether the witness is called by the plaintiff or the defendant; for in either case, the *test* of interest is the same; the question being whether a judgment, in favor of the party calling the witness, will procure a direct benefit to the witness." 1 Greenleaf Ev., sec. 395. "So, in a suit against one on a joint obligation, a coöbligor, not sued, is not a competent witness for the plaintiff to prove the execution of the instrument by the defendant; for he is interested to relieve himself of a part of the debt, by charging it on the defendant." *Ibid.* Speaking of the competency of one partner, who is liable for the debt to a party sued and who would be liable to contribution, if it be shown that he is a partner, he is incompetent to prove that fact, Mr. Starkey says: "It seems that in general where a witness was *prima facie* liable to the plaintiff in respect to the cause of action for which he was sued, he was not a competent witness for the plaintiff to prove the defendant's liability; for this evidence tends to pro-
(647) duce payment or satisfaction to the plaintiff at another's expense; and the proceeding and recovering against another would afford some if not conclusive evidence against the plaintiff in an action against the witness. Thus it was held that where the witness was *prima facie* liable to the vendor of goods, which he had bought in his own name, he was not a competent witness for the vendor against a third person to prove that the defendant was either solely or jointly liable for the goods; for in such case the witness had a direct interest in causing another either to pay or to contribute to the payment of the debt." Starkey on Ev. (10 Ed.), 120.

"In a suit against one on a joint obligation, a coöbligor, although not sued, cannot be called as a witness for the plaintiff to prove the execution of the instrument by the defendant. The interest of such witness is against the defendant, for he may relieve himself of a part of the debt by charging the defendant." *Marshall v. Trailkell,* 12 Ohio, 275.

29 A. & E., 576, speaking of the right of one partner to be a witness against another, says that "According to the weight of authority he was not competent for the plaintiff to prove either the partnership or the liability of the defendant, because he was directly interested in increas-

ing the number of persons who should share the burden for which he was liable by his own admissions."

During the war of 1812 a company bought a vessel called the "Spitfire," which was sent to the plaintiff to be repaired and fitted up to be used as a privateer. The work was done but the plaintiff was not paid, and he brought his action for making the repairs. The action was brought against Webb & Webb, who denied that they had any interest in the "Spitfire," and denied that they were liable to the plaintiff for anything. On the trial the plaintiff called a witness by the name of Gomes, who was not a party, for the purpose of proving that (648) the defendants were part owners of the "Spitfire," and were liable to the plaintiff for the repairs he had made to the vessel. Defendants objected to the witness Gomes, upon the ground of interest, and the Supreme Court of New York, after a careful consideration of the question, held that he was incompetent; and in rendering the opinion the Court said: "The inquiry was whether the defendants were part owners of the vessel, and, as such, chargeable in the first instance with plaintiff's whole demand for repairs. . . . The witness confessed on his *voir dire* that he was a part owner of the 'Spitfire'; he was then sworn in chief to prove that defendants were also part owners of the same vessel. He was undoubtedly interested to render the burden upon himself as light as possible, and to throw it on the defendants, in part. It is true the witness was liable to contribution, but the defendants could never controvert afterwards, with the witness, in case they sued him for contribution, that they were not part owners of the vessel. They could not take the ground that a verdict had been recovered against them by the present plaintiff, wrongfully. The very basis of a suit to be brought by them for contribution must be that they were a part owner. Upon any other principle he would be remediless—the recovery in this case would be evidence of the amount he was compelled to pay. The witness being confessedly, by his own admissions on his *voir dire* a part owner, would be liable in contribution, and his interest in making the defendant below an owner was promoted by increasing the number of those chargeable, and thereby mitigating his own loss. . . . It is conceived that Gomes did not stand indifferently between the parties; for though from his own disclosure, he would be liable to the plaintiff below, if they failed in this action, as a part owner, he was increasing the number of those who would be contributory, and thus lessening the amount which he was eventually to pay." *Marquand v.* (649) *Webb,* 16 N. Y. (Johnson), 89.

We are, therefore, irresistibly led to the conclusion that the witness, D. F. Bridges, has a *direct pecuniary interest "in the event"* of this action. Like the witness Gomes, he admits that he is liable for plaintiff's

demand; and like Gomes, he is interested in making the intestate's estate share the liability with him. And the defendant in this case is like the defendants, Webb & Webb, in the case quoted from; the only thing he could do would be to admit that his intestate was a partner, and sue the witness Bridges for contribution. If this question was *res integra,* it would seem to us that this ought to and would end the discussion of this question.

But it is contended that the witness must not only be interested, but that he must also be a *party* to the action, to exclude his testimony. This position cannot be sustained, unless it be by statements made by some learned judges in the discussion of cases under consideration, when it was not necessary that they should have been made to support the judgment, and with great deference we think, without that consideration which usually characterizes their opinions. To adopt this rule of construction —that a witness must be a *party* to the action in which he is called as a witness, so that the judgment would be *inter partes,* and that where the judgment would be *res inter alios acta,* as to the witness, that he would be competent to testify as to the communications and transactions of the deceased—would be to substantially destroy the exceptions contained in section 590. The Code says that if the witness is a *party* to the action, this without anything else disqualifies him; and if he has to be a *party* before he is disqualified, why add "or *interested in the event*" of the action? It was both senseless and meaningless to do so. (650) The section must be construed so as to give meaning and vitality to this important provision of the statute. In *Williams v. Johnson,* 82 N. C., 288, it is held that Monroe Williams was disqualified on account of interest, though not a party to the action.

We are not inadvertent to the fact that it has been said by this Court (*Jones v. Emory,* 115 N. C., 158), that if we abandon the ground that the witness must be a party so that he would be bound by any judgment rendered in the case, we cut loose from all moorings, and are like a mariner at sea without a compass by which he may take his bearings and be guided. That the question of disqualification will become one of likes and dislikes—sentimental in its operation—we do not agree to this proposition. It did not become so before the passage of the statute (sec. 590), and we see no reason why it should become so now. It was then held that the interest of the witness, to disqualify must be a direct *pecuniary* interest in the event of the action. Why should it not be so now?

It is admitted that there is a distinction, as pointed out, in the petition to rehear, between the case of *Lyon v. Pender,* 118 N. C., 150, and this case. In that case, the witness was a party; in this case, he is not

a party. If this case is correctly decided, it did not matter whether the witness was a party or not, and *Lyon v. Pender* was properly decided, although the Court in discussing the case stated a ground that, upon further investigation is found not to be tenable. The judgment in this case when here before was correct. And after a careful investigation of this somewhat troublesome question, we are of the opinion that the petition must be dismissed.

PETITION DISMISSED.

*Cited: Moore v. Palmer,* 132 N. C., 978; *Bonner v. Stotesbury,* 139 N. C., 7.

(651)

STATE EX REL. JAMES A. BRYAN ET ALS. v. D. W. PATRICK ET ALS.

(Decided 9 May, 1899.)

*Board of Internal Improvement — President and Directors of the Atlantic and North Carolina Railroad Company—Public Office—Term of Office.*

1. A proviso for an appointment to office "*biennially*" *ex vi termini,* implies a two-years term of office.
2. A *term* of office embraces the ideas of tenure, duration, emolument and duties.
3. An office is property, and is protected by the rule, which applies to property of a more tangible character.
4. An act undertaking to deprive the legal incumbent of his office without his consent is void.

CLARK and MONTGOMERY, JJ., dissenting.

ACTION for the recovery of the offices of president and directors of the Atlantic and North Carolina Railroad Company, tried before *Hoke, J.,* upon facts agreed, at Spring Term, 1899, of EDGECOMBE.

*Simmons, Pou & Ward for plaintiffs.* (657)
*J. C. L. Harris and MacRae & Day for defendants.*

FAIRCLOTH, C. J. This action is for the possession and control of the property of the Atlantic and North Carolina Railroad Company. From the agreed facts and admissions we are informed as follows: That said

road was chartered in 1852, and said charter was amended in 1854-5, wherein it is provided that the State is entitled to eight directors, and the private stockholders to four directors; also that the board of
(658) internal improvements, consisting of the Governor and his two appointees, shall appoint the eight State directors; that said board has continuously till the present time annually made such appointments; that said board of internal improvements, of which the Governor is *ex officio* president, is to be appointed *biennially* with the advice of the Senate, and is a corporate body, Code, sec. 1688; that said board of internal improvements was appointed by the Governor and confirmed by the Senate on 8 March, 1897, and their commissions were issued on 9 March, 1897, for two years, in the face of the commission; that defendant, Patrick, in September, 1898, was duly elected president of the road for the term of one year.

By an act of the Assembly, ratified 10 February, 1899, The Code, sec. 1688, was declared repealed, and a substitue therefor was adopted, making the Board of Internal Improvements consist of nine members, to be elected by the General Assembly on joint ballot, incorporating the same and requiring it to meet on 24 February, 1899.

On 12 February, 1899, the Legislature elected a new Board of Internal Improvements, who met and organized on 24 February, 1899, and ordered that the State proxy and the board of directors (defendants) be removed from their offices, and that said offices be declared vacant, and elected the plaintiffs to fill said vacancies.

These new directors met on 28 February, 1899, and elected the plaintiff, Bryan, president of said company, and on the same day demanded of the defendants possession of the property, etc., of the road, which was declined.

It will be observed that if defendants' office was for two years, it did not expire until 9 March, 1899, and that plaintiffs' claim rests on legislation in February, 1899. The single question, then, is, Has the Legislature power to remove one from his office and confer it on
(659) another? The plaintiffs' counsel, in his well-considered argument, insists that "to be appointed biennially" means that the appointment must be made every two years, but that it does not fix any term of office, if we understood him. Suppose that the Legislature enacts that an official board (for it is not disputed that the members of the Board of Internal Improvements are officers) shall appoint A B *biennially* to perform the duties prescribed in the act, it would fail to occur to intelligent minds that A B has an office between any two such appointments. The long recognition of such a conclusion would at least raise a doubt of the plaintiffs' construction. Do the duties of the board cease as soon as it has made a biennial appointment? Suppose the

State proxy or any State director should prove unfaithful to the State's interest in the railroad at any time during the two years. how would he be removed and his place be supplied, except by the action of the board? which it could not do, according to the plaintiffs' contention. Laws 1897, ch. 122, sec. 1, expressly requires the board to remove for cause and fill the vacancy in such cases, and the act ratified 6 March, 1899, does not repeal said section 1, but only amends it by eliminating the word "Governor" from the board. It appears to this Court that "to be appointed *biennially" ex vi termini* implies a two-years term of office.

The simple question of the power of the General Assembly to remove a legal incumbent from his office and confer it on another has been so much discussed, decided and settled, that it seems to have become axiomatic. The law is a legal standard, based on experience in the past, and established to avoid uncertainty, that it may be known of all men. Facts seldom repeat themselves exactly, but in different cases they approach each other so closely that they fall into the same class and are necessarily governed by the same legal standard. (660)

This question of legislative power over the property of the citizen was presented to this Court in 1805, in the interesting case of *University v. Foy,* 5 N. C., 58. By the act of 1789, the Legislature granted to the trustees of the University all the property that has escheated or should thereafter escheat to the State. The act of 1800 repealed the act of 1789 and declared that any property, real or personal, that had in the meanwhile escheated and was held by the University should revert to the State as the property of the same, as if the act of 1789 had not been passed. In the meantime, valuable property in the Wilmington district had escheated and was sued for by the University. The Court, after elaborate consideration, held that the University should recover, and that the act of 1800 was invalid as to that property. The opinion was so clear and strong that Mr. Webster, in his able argument in the famous *Dartmouth College case,* cited and quoted from the opinion, and the Court he was addressing adopted the same principle that had been announced in the above case against Foy. Some modernized suggestions have been made against the Dartmouth College opinion, but none of them have offered any reason or cited any authority to support their suggestions, presumably for the reason that none were convenient.

In 1833 a similar question arose in *Hoke v. Henderson,* 15 N. C., 1. This referred to property in an office. It is now admitted that an office is property, and that it is protected by the rule which applies to property of a more tangible character. It was held that the act undertaking to deprive the legal incumbent of his office without his consent was void.

It may not be amiss to remark here that the people of North Carolina, when assembled in convention, were desirous of having some rights secured to them beyond the control of the Legislature, and those
(661) they have expressed in their bill of rights and Constitution.

The principle involved in *Hoke v. Henderson* has been followed by a full list of decisions, without exception, to the present time. That principle is the basis of the recent decisions in *Wood v. Bellamy,* 120 N. C., 212, and *State Prison v. Day, ante,* 362.

It has been suggested, further, not by the counsel, that if one Legislature can confer an office for two years, and the officer cannot be removed by the next Legislature, without his consent, otherwise than by abolishing the office, then it may confer an office for life, for fifty years, for one hundred or five hundred years. However logical such a proposition might be in a monarchial form of government, it has no standing or logic under our government. When our people were organizing a new State, they did not leave themselves to any mere chance. They intended and did relieve themselves from burdensome fetters and trammels, and did whatever was necessary for their safety and to promote the general welfare. This reasoning is not a mere question of construction. Passing by the unreasonableness of the proposition we are considering, we turn to positive law against it. It is declared in the Constitution, Art. I., sec. 7, "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services"; in section 30, "No hereditary emolument, privileges, or honors ought to be granted or conferred in this State"; and in section 31, "Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed."

If, therefore, the apprehended danger should be attempted, which has not for a century, the fundamental provisions mentioned would prove efficient. Take for illustration section 14 of the same article,
(662) which forbids unusual punishments, etc. Bail may be required, fines imposed, and punishments inflicted, but if they are excessive, unusual, or grossly unreasonable, a remedy will be found under such provisions of the organic law. It was found and promptly applied, for unusual punishment, in *S. v. Driver,* 78 N. C., 423.

The truth is, under our system of government, with checks and balances in all the departments, the suggested danger is imaginary, and may be dismissed.

The reasoning in the cases we have referred to on this subject has been so often stated and so often written that there is no need to rewrite them in the present case.

"An office is a special trust or charge, created by competent authority. If not merely honorary, certain duties will be connected with it, the

performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer." *Troop v. Langdon,* 40 Mich., 673 (*Cooley, J.*).

"The term embraces the ideas of tenure, duration, emolument, and duties." *U. S. v. Hartwell,* 6 Wall., 385, 393.

The taking of the oath of office is not an indispensable criterion, for the office may exist without it. It is a mere incident, and constitutes no part of the office. *S. v. Stanley,* 66 N. C., 59; *Comrs. v. Evans,* 74 Penn. St., 124, 139 (*Sharswood, J.*).

"Like the requirement of an oath, the fact of the payment of a salary or fees may aid in determining the nature of the position, but it is not conclusive, for while a salary or fees are usually annexed to the office, it is not necessarily so. As in the case of the oath, the salary or fees are mere incidents and form no part of the office." *S. v. Kennon,* 7 Ohio St., 716; *U. S. v. Hartwell,* 6 Wall., 385; *Howerton v. Tate,* 68 N. C., 547. (663)

The duties to be performed by an officer may be changed and reduced, and thereby the emoluments diminished, for in those respects he takes the office subject to the power of the Legislature to make such changes as the public good may require. *Bunting v. Gales,* 77 N. C., 283. We see now that the compensation may become very small, as the Legislature may deem proper for the public good, but the position still remains an office. Our opinion is, that the plaintiffs are not entitled to recover, for reasons stated in *Wood v. Bellamy,* 120 N. C., 212, and *State Prison v. Day, ante,* 362.

REVERSED.

CLARK and MONTGOMERY, JJ., dissenting.

*Cited: R. R. v. Dortch, post,* 663 and 668; *Greene v. Owen,* 125 N. C., 215; *Dalby v. Hancock, ib.,* 327.

*Overruled: Mial v. Ellington,* 134 N. C., 159.

No. 2.

ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY, APPELLANT, v. H. P. DORTCH ET AL.

*MacRae & Day and J. C. L. Harris for plaintiff.*
*Simmons, Pou & Ward for defendants.*

FAIRCLOTH, C. J. The facts here are the same as in *Bryan v. Patrick, ante,* 651. The defendant was elected State's proxy by the new board in February, 1899. This action is brought to restrain him from attempting to represent the State in the stockholders' meetings or interfering with the present State's proxy in any manner.

In *Bryan v. Patrick* we have held that the new board was without authority to act in the premises and could not legally elect the defendants.

REVERSED.

(664) MONTGOMERY, J., dissenting: I have given to the questions involved herein a most thorough investigation and the best thought that I am capable of bestowing on them, and in the end am compelled to dissent from the opinion of the majority of the Court. I do so, however, with the utmost respect for the opinions of my brethren of the majority, for I know they have conscientiously and laboriously striven to arrive at a correct conclusion as to the law of the case.

The main contention of the defendants is, that the old Board of Internal Improvements, consisting of the Governor and two commissioners—C. A. Cook and J. C. L. Harris—commenced a term of office of two years from 8 March, 1897; that the members of the old board were public officers, and, therefore, that the action of the new board in undertaking to remove the old board on 24 February, 1899, and before the expiration of the term of office of the old board, was invalid, because it deprived them of the vested rights of property in their office. The cases of *Hoke v. Henderson,* 15 N. C., 1; *Wood v. Bellamy,* 120 N. C., 212, and *State Prison v. Day, ante,* 362, were relied on for their position.

I am of the opinion that there is a clear and well defined distinction between the character and nature of the offices which are here the subject of dispute and those offices which the Court were considering in the cases above mentioned. The office concerning which the litigation occurred in the case of *Hoke v. Henderson, supra,* was that of clerk of the Superior Court of Lincoln County. The duties of that office required the continuous services of the incumbent, and the fees and prerequisites were the consideration for which he gave his time and services. The office was one of profit, for the fees were naturally more to be considered, when taken in connection with the duties of the office, than the honor attached to the place. The Court, in that case, said: "He (665) (the clerk) is not merely a public servant and political agent. If he were, and had no interest of his own, he might be discharged at pleasure. The distinction between agencies of the two kinds is obvious. The one is for the public use exclusively and is often neither

lucrative nor honorary, but onerous. To be deprived of such an office is often a relief, and never can be an injury. The other is for the public service conjointly with a benefit to the officer. To be deprived in this last case is a loss to the officer." The kind of office which the Court had in view in that case is further illustrated in the opinion, where it is said: "The office is created for public purposes, but it is conferred on a particular man, and accepted by him as a source of individual emolument. To the extent of that emolument it is private property." It is true, as was said in *State Prison v. Day, supra,* "The duties of the office are of the first consequence, and the agency from the State to perform those duties is the next step in the creation of an office. It is the union of the two factors—duty and agency—which makes the office; but that which practically makes the office property is the emoluments."

Now to apply the above tests to the offices which are in controversy in this action: By statute, the compensation of each member of the Board of Internal Improvements is fixed at $3 per day for the time he may be employed in the public service, and his traveling expenses. On the very face of the law it is apparent that the office is purely honorary, there being no salary or fees attached or allowed, except as a reimbursement for actual expenses incurred by the officer for the public benefit, the mileage and per diem being on the face only sufficient for that purpose. There can be no profit or emoluments in such an office; its duties are mostly supervisory, and the members act, not for their personal gain or profit, but for the public welfare entirely. In the appointments the board may make, and in the exercise of the powers conferred on them by law, they are required, by both a sense of duty and by a (666) clear inference from their oaths of office, not to receive any private advantage therefrom, but in all things to do their duty without reward or the hope of reward or any private motive whatsoever. Can it be said, then, that such an office as that filled by a member of the Board of Internal Improvements is property in the incumbent, and that the incumbent would be injured by the transfer of such an office to another, on the ground that his property had been taken from him by law and given to another? Truly, it would seem that such an office, while honorary, would be onerous. It certainly is not a lucrative office.

My conclusion on that question, then, is, that while the members of the Board of Internal Improvements are public officers, yet the offices are not lucrative ones; that they, therefore, can be transferred to others at any time, regardless of the term of office, without a violation of any of the rules governing property, and that the appointment or election by the General Assembly, at its session of 1899, of the plaintiffs as members of the new Board of Internal Improvements was regular and valid.

In reference to the questions whether or not the offices of president and directors of the Atlantic and North Carolina Railroad Company are public offices, I have arrived at the conclusion that they are not. They are in no sense such officers as are the presiding officers of the several asylums and the penitentiary. Those institutions are "a part of the government and part of the State polity," while the president and directors of the Atlantic and North Carolina Railroad Company are only officers in a corporation chartered by the State, and in which the State has a large interest. That corporation is simply a business enterprise, in which the State is interested pecuniarily. When the
(667) State became a stockholder it laid aside its character as sovereign and made itself equal, and only equal, with the individual stockholders. The president and directors are merely the agents—the employees—of the State, and are removable at the will of the State in any manner the State may choose to exercise that right, with or without an assigned cause. The amended charter of the corporation gives that power to the Board of Internal Improvements, and chapter 122 of the Laws of 1897 is not restrictive of that power, but only conferred on the Governor and the board the power to remove for cause whenever the *Governor* becomes satisfied that such removal should be made. That act is now amended so as to deprive the Governor of all power in the matter.

I am not inadvertent to the fact that in *Eliason v. Coleman,* 86 N. C., 235, the Court, in giving example of such officers as had been declared public officers, mentioned that of the president of the Western North Carolina Railroad Company, who had been elected through the directors of the State. But the Court, in the last-named case, mentioned as the reason for including that officer amongst public officers that the Court had sustained an action by that officer (Howerton) in *Howerton v. Tate,* 68 N. C., 548. Upon an examination of the last-mentioned case it will be seen that the Court did not decide that question, and in touching upon it, it seems that the case was decided more upon the weakness of the defendants' title than upon the strength of the plaintiffs'. The Court said: "Admit for the sake of argument that directors in a railroad company are not officers, in the strict meaning of that term, but only officers in a corporation in which the State has a large interest, still the reason of the rule in *Clark v. Stanley,* 66 N. C., 59,
(668) applies and destroys the foundation upon which the defendants have built."

The defendants, there, were claiming under legislative appointments, and the plaintiffs under the appointment of the executive. The plaintiffs in this action, although they are not public officers, can yet maintain the action by a statute permitting it—subsection 1 of section 607 of The Code. I think the judgment below should be affirmed.

CLARK, J., dissenting (in both cases): About two-thirds of the capital stock of the Atlantic and North Carolina Railroad Company is owned by the State of North Carolina, and the amendment to its charter, enacted in 1854-55, provides (section 4) that the stockholders shall elect four directors, and the other eight of its twelve directors shall be appointed annually and be removable by the Board of Internal Improvements. The Code, sec. 1688, provides that the Board of Internal Improvements shall consist of the Governor *ex officio* and of two commissioners, to be appointed biennially by the Governor, with the advice of the Senate, any two of whom shall constitute a board for the transaction of business, and in case of vacancies occurring in the board the same shall be filled by the other members. The General Assembly, by an act ratified on 10 February, 1899, repealed the above section 1688 of The Code and substituted for it an enactment that the Board of Internal Improvements shall consist of nine members, one from each congressional district, to be elected by the General Assembly. On 12 February the new Board of Internal Improvements were thus elected; they met on 24 February, and by virtue of the aforesaid provision in the charter removed the eight State directors, thus removing also the president, as the charter requires that he be a director, and appointed eight others as directors, who met on 28 February, with two of the directors elected by the stockholders, and chose one of their number president. These are the plaintiffs in this action, and the defendants are the eight State directors appointed by the former Board of Internal Im- (669) provements, together with one of the directors elected by the stockholders, who adheres to them. This action is for possession and control of said railroad and for the offices of president and directors, which the defendants refuse to surrender.

It is conceded and, indeed, is beyond controversy, that the Legislature could repeal section 1688 of The Code and abolish the former Board of Internal Improvements, and that, being legislative offices, the General Assembly, by virtue of the constitutional amendments of 1875, can elect the new Board of Internal Improvements itself. *Ewart v. Jones,* 116 N. C., 570.

But it is contended that the old Board of Internal Improvements, having been appointed on 8 March, 1897, under an act providing for their appointment "biennially," could not be replaced by a new board till after 8 March, 1899, and, therefore, the removal of the eight State directors and the appointment of eight others in their stead by the new board on 24 February, 1899, is null and of no effect, and for that the defendants rely upon *Hoke v. Henderson,* 15 N. C., 1 (decided in 1833). That decision holds that, while the Legislature can abolish any office whose term is not fixed by the Constitution, it cannot change the occu-

pants of the office if the office is not abolished, provided it is an office with pay. But it also holds that, if no pay is attached, the Legislature can change the officer without abolishing the office (p. 21), for the reason therein given, that where there is any pay attached the officer has a private interest in such office "to the extent of his emoluments" (p. 18), and his right thereto is property, of which he cannot be deprived unless the office is abolished.

Now, under section 1688, the Governor serves *ex officio,* and without compensation, on the Board of Internal Improvements; it is no part of his duty as Governor, conferred on him by the Constitution, but (670) is simply an honorary appointment, conferred on him by legislative enactment, and, therefore, under *Hoke v. Henderson,* it is clear, such duty can be taken from him, not only by abolishing the office of director of internal improvements, but by legislative enactment, even when the office is continued. But the other two directors get $3 for each day they were in session, and as it appears from the Auditor's reports (of which official statements, made by authority of law, the courts take judicial notice) that this board sits on an average only one, or sometimes two days, per year, and has, therefore, a salary of $3 per year, or, at most, $6 per year, it is claimed that the Legislature was powerless to abolish the old board and substitute a new board of nine elected by themselves to take charge of this great property of the State till after the term of the two old directors had expired. It is extremely improbable that the old board would have held another meeting before 8 March, or that they have lost one cent of emoluments, which alone *Hoke v. Henderson* protects, yet for that possibility of that infinitesimal salary we are asked to set aside a solemn act of the Legislature in providing for the management of a great State property. It is true that if the salary, and not the public interest, is the test, a small salary is as sacred as a large one, but this emphasizes the logical result of the doctrine that the salary of the officer takes precedence of the right of the people to change the control of their State institutions.

Let us look this proposition squarely in the face. The statute (The Code, sec. 1688) directed the appointment of these two directors *biennially,* conferred on the board the power to fill up vacancies occurring in their own body and to appoint the directors (section 1718) for the State in all corporations in which the State shall hold stock, and (671) "shall have charge of all the State's interests in all railroads, canals and other works of internal improvements, and also all public buildings which are the property of the State." The charter of the Atlantic and North Carolina Railroad Company also provides that the eight directors on the part of the State shall be appointed by the Board of Internal Improvements. Now, if by reason of their receipt of

compensation, averaging $3 per year, the directors of the Board of Internal Improvements are beyond legislative change until after the lapse of the term of two years, then if the Legislature had written in the act "fifty years" instead of "biennial" as the term of office, inasmuch as a part of their office is to fill up vacancies in their own body from time to time, and the appointment of directors for the State by them is provided in the charter of the railroad company, it follows that for fifty years a self-perpetuating body could control this great work in which the people of the State have invested $2,000,000, and no Legislature for fifty years could in any way control the State's interest therein, because the members of said Board of Internal Improvements have $3 a year salary, and hence have a "property" in their offices, though it would be entirely otherwise and the incumbents of the office could be changed at the will of the Legislature if this onerous duty (usually one day's session per year) had been devolved upon its members without pay.

If this is a correct interpretation of *Hoke v. Henderson,* the absurdity of that decision is so palpable, and its direct conflict with provisions of both State and Federal constitutions is so clear, that it should not be deemed authority for a moment, yet it is upon this construction, with its inevitable *reductio ad absurdam* that rests the right of the defendants to set at defiance the will of the people, as expressed by their chosen representatives, in reference to the management of a (672) property in which, as appears from the record, the State has invested $2,000,000. The $2,000,000 the people have invested in the property is outweighed by the $3 per year which two officeholders have been receiving, and of which "property" it is said they must not be deprived!

It is clear that if a biennial office can keep the people from touching the management of the property for two years, an office for one hundred years, with power given the Board of Internal Improvements in section 1688 of filling vacancies in their own body, would deprive the people from taking the management into their own hands for one hundred years.

Once concede that a Legislature, by giving a term of two years or four years to officers put in charge of State property or State institutions, can deprive the State of taking charge again by an act of the next Legislature, then it can deprive not only the next Legislature, but the next ten Legislatures or the next fifty Legislatures from doing so. It is suggested that the Constitution forbids perpetuities and hereditary offices, but an office for twenty years or for fifty years (with power given the board by section 1688 of filling its own vacancies) is not hereditary, nor is it a perpetuity, especially when almost every charter is for ninety-nine years; besides, where is the constitutional provision

giving the court power to prescribe the number of years which the Legislature must not exceed in fixing the term of an office? Or the Legislature might simply fill the offices "for life," as was the case with the defendant in *Hoke v. Henderson,* and for the lifetime certainly of the officeholders (if any salary, if only $3 a year, is attached) the State will be powerless to resume control of its own property and its own institutions. The taxpayers can have the privilege of paying the expenses, but a temporary Legislature, elected to sit for sixty days, can appoint officeholders, who as long as they live must control the State's institutions, on the ground (not to be found in the Constitution)
(673) that the right of an officeholder to his salary is a contract, and that the State cannot abolish his office or get rid of him unless it permanently abolishes the institution to which the office is attached, or at least does not re-create it, or one similar to it, at the same session. *Wilson v. Jordan, ante.*

But *Hoke v. Henderson* does not justly bear the construction placed upon it by the defendants. That case was decided in 1833, not very long after the *Dartmouth College case* had held that a charter of a corporation was not a privilege, but a contract, and if granted by one Legislature, could not be repealed by another. The irretrievable ruin that would have been wrought by that decision, if allowed full sway, had not then been perceived. North Carolina had not then been roused to protect herself from it, as she has since done by inserting in her Constitution Article VIII, section 1—that all charters may be altered from time to time, or repealed, by the Legislature—a course which other States have pursued. Henderson was clerk of the Superior Court, and held for life.

All the courts were at that time of legislative creation, and though the terms of the judges, unlike Henderson's, were prescribed by the Constitution to be for life, it seemed to the Court bad public policy, as indicated in their opinion, that the Legislature should put another person in Henderson's life office without abolishing his office. This is said without reflecting in the remotest degree upon the members of that distinguished Court, but to call attention to the different standpoint as to public policy which they occupied at a time when even the courts were of legislative origin and without the present constitutional guarantees.

The Court, under such circumstances, held that an office created by legislative enactment is not a public agency, revocable at will of
(674) the power creating it (as is held everywhere else), but that it was a contract, and therefore property to the extent of the salary, for it is expressly held that if no salary is attached, the office can be transferred by the Legislature to another. Indeed, on page 18 it is said,

"to the extent of the emolument it is private property." And on page 22 it is said that "the transfer of the emolument" is the loss or injury sustained by the officer. These are not mere disconnected expressions, but the very basis upon which the opinion rests. Though the Court held that it is property, it is a singular kind of property, for it further held that the Legislature could abolish it—that the Legislature could at will increase or diminish the duties or reduce its compensation (so it did not starve the incumbent out); that, though property, its holder could not sell it or assign it—very singular attributes for property. Another striking feature of the decision is, that the Court intimates that the proper tenure of office is for life, giving as a reason (page 23) that if an office is conferred for an absolute term of years, upon the death of an incumbent during his term, his office would go to his executors or administrator, "and an incompetent person might be introduced into it." A decision with these features cannot be held entirely sacred or flawless. Nowhere else has it ever been held by any court, in any country, at any time, that there was or could be private property in a public office which is created *pro commodo populi*—for public, not private, benefit. Black. Const. Pro., sec. 95, and cases there cited. The Court rested its ruling to that effect in *Hoke v. Henderson* upon the ground that there is a contract with the officeholder for his salary, since it expressly excludes offices without salary. Since then, the foundation of the decision is the contract for the salary; it necessarily follows that the true construction of *Hoke v. Henderson* is, that if the officer is removed without abolishing his office, his grievance is for breach of the contract for "the transfer of the emoluments," as is expressly (675) said (page 22); and as, by virtue of the Eleventh Amendment to the Constitution of the United States, the State cannot be sued and forced to perform any contract whatsoever, the officeholder has his sole remedy by petition in the Supreme Court, under Article IV., sec. 9, of the Constitution of North Carolina. The only property of which the defendant could be deprived (since the decision held that it did not apply to offices without a salary) is the contract of the State to pay a salary and to grant a mandamus against the State to restore the officer, that he may draw his salary, would be to do by indirection what the Court cannot do directly, to wit, give the removed officeholder judgment against the State for the emoluments of the office. When the term of office is fixed by the Constitution, the Legislature cannot interfere with it, not because it is property, not because there is any contract by the State to pay the salary, but because by the organic law the Legislature is disabled from legislating in regard to it, there is that express limitation put upon its power, not by any judicial construction, but by the will of the sovereign people. Constitutional offices are mere public agencies,

like all others, but they are made irrevocable by the Legislature. They can be, and have been, revoked by the people in convention, as in this State in 1868. In a republic every officeholder, from the highest to the lowest, is strictly and truly a mere *public servant.*

There is this striking difference between *Hoke v. Henderson* and cases like the present, and *State Prison v. Day, ante,* 362, which has not heretofore been mentioned. In *Hoke v. Henderson* the defendant was clerk of the Superior Court. He received no pay from the State, and his only emoluments were fees from individuals for services to be rendered in his office, and the Court may have thought that the only way to get
(676) them was for him to remain in office. But in cases like the present and the *Day case* the salary comes entirely from the State, and to put the officer back after the State, through the Legislature, has passed an act which removes him, is in effect an action against the State to compel the State to pay him a salary, and for the courts (as said above) to do by indirection what they are forbidden to do directly. Henderson's was a county office, and counties can be sued. The officers removed in this case and in the *Day case* are State officers, and to reinstate them is in effect a judgment against the State, which no court has power to render.

In *Caldwell v. Wilson,* 121 N. C., at p. 468, *Mr. Justice Douglas* calls a halt as to the extension of *Hoke v. Henderson,* and well says the varied and extraordinary claims made thereunder, and the fact that we are the only State in the Union recognizing the doctrine, may well cause us to pause and consider if we have not carried it to its fullest legitimate extent. If this is to remain a government "of the people and for the people," it must continue to be a government "by the people," and it is of the last, of the highest and most solemn importance that the will of the people as to governmental matters shall be expressed by their representatives in the lawmaking department of the government, and that, when so expressed, the action of the Legislature shall be subject to review in every instance and in all matters by the people themselves through the next or any succeeding Legislature, and no Legislature can postpone that review of their conduct by filling an office (or doing any other act) for a term that is fixed beyond change by the succeeding Legislature. The Constitution alone can place limits upon legislative power. The Constitution nowhere restricts the power of a Legislature to review, repeal or change the action of any preceding Legislature in any particular. When *Chisholm v. Georgia* seemed to do so, as to State
(677) indebtedness, the Eleventh Amendment to the United States Constitution set the people free; and when the *Dartmouth College case* limited legislative power as to corporations, the new provision in the State Constitution (Art. VIII, sec. 1) removed the restriction as

to all charters granted since its adoption; and if a construction can be placed upon *Hoke v. Henderson* which will limit the freedom of each Legislature to review, repeal, or change any action of a preceding Legislature because it may interfere with the salary of an office created by legislative enactment, then either that construction should be rejected or the decision itself overruled, as has been the fate of many another. *Hoke v. Henderson* is no more sacred than any other decision. The sacredness is in preserving to the people the fullest liberty in legislating in regard to the institutions and the property of the State, and in all matters which can come within the lawmaking power of a free people, and in always maintaining the right of the people to pass upon the action of their representatives through the next or any succeeding Legislature.

The $3 per year paid two of the members of the Board of Internal Improvements cannot have the effect to prohibit the State from abolishing the board and creating a new board of nine members to take charge of its investment of two million dollars in the Atlantic and North Carolina Railroad whenever the Legislature may see fit. It did see fit to do so on 10 February, 1899, and I can find no authority conferred on this Court to set aside and declare null that action of the General Assembly, as if it were "a horse trade between two individuals," as one of my brethren holds, *post,* 681.

FURCHES, J., concurring: In considering this case in conference, the discussion took a much wider range than that taken by counsel who argued the case. I shall be compelled to notice some of the matters thus called to our attention, which seem to have influenced a part of the Court, in order that I may answer them, if I can. And I do (678) not mean by this that I propose, in this concurring opinion, to notice all the arguments advanced by my dissenting brethren; many of them, to my mind, were too discursive and too speculative in their character to be answered or to require an answer. Many of them are statements as to facts that do not appear from the record, and, it seems to me, were not proper to be considered in determining a purely legal question. For instance, it was stated that the State's interest in the Atlantic and North Carolina Railroad Company is worth $2,000,000. This does not appear in the record, and I don't know what it is worth. But I see from a published statement, made by Treasurer Worth on 27 April, 1899, that it is worth $253,320. I do not see what difference it makes, in deciding the question of law involved in this case, whether it is worth $2,000,000 or $253,320.

It was stated that the Board of Internal Improvements had only drawn $3 each for the years 1897 and 1898. This does not appear in the

record, and upon what authority it was stated I do not know; but whether it was true or not, it seems to me to be a matter that we cannot consider, as it does not appear in the record. And if it did appear in the record, it could not influence my opinion upon the question of law involved in the case.

The law as it stood before February, 1899, created a "Board of Internal Improvements," who held their offices from 8 March, 1897, for a term of two years. This board appointed eight directors for the State in the Atlantic and North Carolina Railroad Company, as it was their duty to do, and the defendants were elected by these directors and other directors elected by the private stockholders of the road.

(679) The Legislature, on 10 February, 1899, repealed section 1688 of The Code and reënacted the same by giving themselves the power to elect the Board of Internal Improvements, which they proceeded to do. The board elected by the Legislature met and organized on 24 February, 1899, and proceeded to remove the State's proxy and the old board of directors from office and to elect a new board of directors. This new board demanded possession of the road, which was refused, and this action was brought.

If the new board had the right to remove the old board and appoint directors on 24 February, 1899, the plaintiffs are entitled to recover, and if they did not, they were not entitled to recover.

It seems to me that the doctrine upon which the case depends has been settled by *Hoke v. Henderson,* 15 N. C., 1; *Wood v. Bellamy,* 120 N. C., 212; *Penitentiary v. Day, ante,* 362; *Wilson v. Jordan, post,* 683, and many other cases. I know that *Hoke v. Henderson* is fiercely attacked by one member of the Court, and it is even intimated that this opinion, delivered by *Chief Justice Ruffin, Judges Gaston* and *Daniel,* was given under fear that they might lose their offices if they should hold that the Legislature could remove an officer before his term expired. I suppose, if there ever were three judges on the Supreme Court bench of North Carolina who lived, and still live, in the hearts of the people and of the legal profession, they were *Ruffin, Gaston,* and *Daniel;* and I must be pardoned for saying that I regret that any such reason as this should have been assigned for the decision in that case by any successor of theirs.

But it is further said that these offices were not lucrative, and the small amount of pay received for their services is ridiculed, and it is contended that *Hoke v. Henderson* only applies to lucrative offices.

(680) The same question was presented by the facts in *Wood v. Bellamy,* but it was not even insisted on in the argument, nor was it discussed by the Court rendering the opinion, which was concurred in by the whole Court, constituted then as it is now. Nor was this fact

(the smallness of the pay the board received for their services) insisted upon by the learned counsel for the plaintiff on the argument of this case. I do not mention this with the view of insisting that this Court should not consider a question of law plainly presented by the record, though it may have been overlooked by the ablest counsel; but it seems to me that the Court ought not to go outside of the record to find facts to enable it to present a question not insisted on by the learned counsel who argued the case. The Court cannot afford to make itself their attorney in the matter. But suppose it were true (which is not admitted) that the members of the Board of Internal Improvements have only drawn $6 each for 1897 and 1898, is this to be used against them and they to be turned out of office on that account? If so, it would have probably been better for them if they had put their hands deeper into the public treasury. I cannot agree to such a proposition; and while I do not agree to the proposition that there is nothing in a public office but the number of pennies it may put in the pocket of the officer, still if it is treated on this low plane, I propose to show that this digression from the record does not help plaintiff's case. I expect to show this from general principles and also from the case of *Hoke v. Henderson.*

It seems to me that it should be conceded by this time that a public office is property in North Carolina, and is held by the officer as by contract. To dispute this would be to dispute not only *Hoke v. Henderson,* but every case ever decided by this Court involving the question, including *Wood v. Bellamy.* If it is treated simply as a contract—as a horse trade—depending on a pecuniary considera- (681) tion, $3 would be as effective, in the absence of fraud, as $300 would be. This proposition, it seems to me, will not be disputed by any good lawyer. Then, putting the rights of defendants upon no higher ground than that of contract, it seems to me that plaintiffs must fail in this action.

But I said that I did not agree to the proposition that there was nothing in a public office except the number of pennies it might produce, and that I expected to show that it was not so considered by the Court in *Hoke v. Henderson.* It may be that sentences may be found in the opinion which, considered disconnectedly, seem to sustain such proposition; but when it is all read and considered together, in my opinion, it does not. Quoting from pages 22 and 23 of that opinion, it says: "For the term for which the law assures the office to him, he claims, and can claim, to continue to be the agent of the public, to discharge the duties of the place while there are duties remaining to be discharged, and he is ready and willing to perform them. Certainly that is not introduced solely for the benefit of the person holding those offices, but upon the great public consideration that he who is to decide

controversies between the powerful and the poor, and especially between the government and an individual, should be independent, in the tenure of his office, of all control and influence which might impair his impartiality, whether such control be essayed through the frowns of a bad man or through the adulation of an artful one, or such influence be produced by the threats of the government to visit nonconformity to their will, by depriving him of office or rendering it no longer a means of livelihood." Again, on page 24, when speaking of the term of office, it is said: "When they did so (fixed the term) it was quite within their competency to alter it subsequently. But such alterations must (682) operate prospectively and as regulations for future appointments and future enjoyment. As to those to whom the grant was made for life, an estate, a property vested, which cannot be divested without default or crime."

Again, speaking of offices where the term is not fixed by the Constitution, it is said that it was strongly urged in the argument that as the Legislature had the right to fix the term of office, the officer took it with knowledge of that power and subject to the same. The opinion admits the fact that the Legislature could fix the term of such officers, but denies the conclusion of law, and says: "The question is, what is the effect of a grant for a particular period? Can the duration be afterwards lessened, to the prejudice of a grantee? We think not, because he acquires a property."

But I will not quote further from this great opinion, as I think what I have quoted establishes the proposition that a public office is property, and that the officer holding the same has a property therein.

I am, therefore, of the opinion that the Board of Internal Improvements could not be removed by legislation until their terms of office expired; that the new board had no power to remove them, and no power to appoint the new directors (the plaintiffs) until after 8 March, 1899.

*Cited:* *Greene v. Owen,* 125 N. C., 223.

*Overruled:* *Mial v. Ellington,* 134 N. C., 159.

(683)

ZEB. V. WALSER, ATTORNEY-GENERAL OF NORTH CAROLINA, IN THE NAME OF THE PEOPLE OF THE STATE OF NORTH CAROLINA, ON THE RELATION OF W. H. WILSON, v. JOHN Y. JORDAN.

(Decided 9 May, 1899.)

*Statutes in Pari Materia—Unconstitutional Statutes—Criminal Court Clerk's Office.*

1. All acts of the same session of the Legislature upon the same subject-matter are considered as one act, and must be construed together, under the doctrine of "*in pari materia.*" They should be considered *in pari materia,* whether passed at the same session or not.

2. Where a former act has been repealed, or has expired by its limitation, when it is *in pari materia,* it must be considered in connection with the last act, and if necessary, a part of it.

3. Where there are different statutes *in pari materia,* though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other.

4. The Acts of 1899, viz.: The act of 27 February, entitled "An act to abolish the Criminal Circuit Court, composed of the counties of Buncombe, Madison, Haywood, Henderson and McDowell"; the act of 3 March, entitled, "An act to establish the Western District Criminal Court"; and the act of 6 March, entitled "An act to abolish the criminal circuit composed of the counties of Buncombe, Madison, Haywood, Henderson and McDowell" —must be considered together, and are *in pari materia* with Laws 1895, ch. 75, entitled "An act to establish a Criminal Circuit Court, to be composed of the counties of Buncombe, Madison, Haywood and Henderson," and with Laws 1897, ch. 6 amendatory of the act of 1895—and being thus considered, the acts of 1899 are but amendments to the act of 1895 and the act of 1897, and do not abolish the criminal court of Buncombe County.

5. Where a public office is not abolished by legislation, the public officer elected thereto has a property in the office, of which he may not be deprived by legislation. *Hoke v. Henderson,* 15 N. C., 1.

CIVIL ACTION in the nature of a *quo warranto* to try the right (684) to a public office, to wit, the office of clerk of the Western Criminal District Court for BUNCOMBE, tried before *Starbuck, J.,* at March Term, 1899, of BUNCOMBE, upon complaint and demurrer.

The complaint in substance alleges that, under the act of 1895, chapter 75, entitled "An act to establish a criminal circuit court to be composed of the counties of Buncombe, Madison, Haywood and Henderson," the plaintiff, at the general election in November, 1896, was duly elected and qualified as clerk of said criminal court for Buncombe County for four years, and entered upon his office on the first Monday in December,

1896, and that his term was not yet expired; that the defendant, under color of an appointment by the Judge of the "Western Criminal District Court," had entered upon, usurped and illegally taken possession of his office, and ejected him therefrom, his Honor, the judge making the appointment, claiming to act under the authority of several acts of the Legislature of 1899, viz.: the act of 27 February, entitled "An act to abolish the Criminal Circuit Court, composed of the counties of Buncombe, Madison, Haywood, Henderson and McDowell"; the act of 3 March, entitled "An act to establish the Western District Criminal Court"; and the act of 6 March, entitled "An act to abolish the Criminal Circuit, composed of the counties of Buncombe, Madison, Haywood, Henderson, and McDowell"; that none of the acts, separately or combined, had the legal effect of abolishing the office which had been given to plaintiff by the people, and out of which he had been wrongfully ousted, and he asks to be reinstated.

The defendant demurred to the complaint, claiming the office of clerk by the appointment of the judge under authority of the acts of the session of 1899, cited in the complaint.

The court sustained the demurrer, and rendered judgment dis- (685) missing the complaint.

The plaintiff excepted and appealed.

*V. S. Lusk and Frank Carter for plaintiff.*

*Moore & Moore, Carter & Weaver and Shepherd & Busbee for defendant.*

FURCHES, J. The Legislature of 1895, chapter 75, established criminal courts in Buncombe, Haywood, Henderson and Madison counties. These courts only had criminal jurisdiction. It was provided in that act that these counties should compose a criminal circuit, and that there should be a judge elected, styled a criminal circuit judge, who should preside over and hold these courts.

The Legislature of 1897 (chapter 6) amended the act of 1895 by giving these courts a civil as well as criminal jurisdiction, and by changing the name to "Circuit" instead of "Criminal Circuit Courts." And the same Legislature (chapter 7) created a similar court in McDowell County, with the same jurisdiction of those of Buncombe, Henderson, Haywood and Madison, and placed it in the "Circuit" with those counties, and to be held by the same judge. Under this legislation these courts were organized, a judge and clerks elected by the people. The plaintiff, being elected for the county of Buncombe, gave his bond

and was inducted into office as clerk for a term of four years, which has not expired; and the plaintiff is still entitled to this office, unless he has been removed therefrom by the legislation of 1899.

The Legislature of 1899, by an act passed 27 February, enacts as follows: "Section 1. That the Criminal Circuit Court, composed of the counties of Buncombe, Madison, Haywood, Henderson and (686) McDowell, be, and the same are hereby, abolished"; and it provides that all the business pending in those courts be transferred to the Superior Courts of their respective counties; that on 3 March, four days thereafter, the Legislature passed another act, entitled "An act to establish the Western District Criminal Court." This act is elaborately drawn, being almost a perfect copy of the act of 1895, except as will be pointed out hereafter; and on 6 March, three days after the passage of the act to "establish the Western District Criminal Court," the Legislature passed another act, entitled "An act to abolish the Criminal Circuit composed of the counties of Buncombe, Madison, Haywood, Henderson and McDowell."

If the act of 27 February, 1899, stood alone, we would hold that it "abolished" the Criminal Court of Buncombe County, though it does not say that it abolishes this court. It says "that the Criminal Circuit Court," composed of the counties of Buncombe, Madison, Haywood, Henderson and McDowell, is abolished. If no other act had been passed reëstablishing this court, the intention of the Legislature would be manifest, and it would be our duty to hold that this court was "abolished." If the Criminal Court of Buncombe County has been abolished and not restored by this legislation, the clerkship being but an incident depending on the existence of the court, it is also abolished, and the plaintiff has no office and no right to maintain this action. If it is claimed that the act of 6 March is the act that abolished this court, then the act of 3 March was passed when plaintiff was in office, and the act of 3 March legislated him out of it.

The act of 3 March, as we have said, is almost an exact copy of the act of 23 February, 1895, and, so far as the powers and (687) jurisdiction and territorial extent of the courts established by the two acts are concerned, they are the same.

The act of 1899 differs from the act of 1895 in these respects: It is extended to the counties of Burke, Surry, Yancey, Forsyth and Caldwell. It provides that the commissioners of the counties, included in this act, shall not draw less than twelve nor more than twenty-four jurors for the first week of the Superior Courts embraced in this criminal circuit. It provides a solicitor to be appointed by the judge for the most of the counties embraced in the circuit. It provides that these solicitors, so appointed by the judge of this criminal circuit, shall go

into the Superior Courts and prosecute for the State. It increases the judge's salary from $1,800 to $2,750; and while it provides for the appointment of clerks, it fails to provide that he shall enter into bond for the discharge of his duties, and it fails to provide any fees for the clerk, except as may be provided in section 13 of the act, which is as follows: "That it shall be the duty of the board of county commissioners of each of said counties to provide for the payment of fees of the solicitor and the fees and compensation of the clerks and the sheriffs of said counties respectively, and the pay of jurors and witnesses as is now provided by law, and all other expenses incident to said court, by order on the county treasurer of said respective counties." And it only vests the court with criminal jurisdiction, as did the act of 1895, before the amendment of 1897. If there be other changes made in the act of 1895 by the act of 1889, they are of minor importance, or have escaped our attention.

All acts of the same session of the Legislature upon the same subject-matter are considered as one act, and must be construed together, (688) under the doctrine of *"In pari materia." S. v. Bell,* 25 N. C., 506; Black on Interpretation of Laws, sec. 86; Endlich on Interpretation of Laws, sec. 45; 20 Tex., 355. They should be considered *in pari materia,* whether passed at the same session or not. *Simonton v. Lanier,* 71 N. C., 478; *Rhodes v. Lewis,* 80 N. C., 136.

Where a former act has been repealed or has expired by its limitation, when it is *in pari materia,* it must be considered in connection with the last act, and, if necessary, a part of it. Potter's Dwarris, 190. "It certainly appears strange," said *Williams, J.,* in a late case, "that when an act of Parliament is *per se* 'abolished,' it shall virtually have effect through another act. But in that case the former act was substantially reënacted. *Reg. v. Merionethshire,* 6 Adol. and Ellis, 343. It does indeed seem to be the prevailing doctrine (and it is more rational in itself than consistent with coeval maxims) that where one statute refers to another, which is repealed, the words of the former act must still be considered as if introduced into the latter statute." Potter's Dwarris, p. 192.

In *Rex v. Laxdale,* 1 Burr., 445, it is held (*Lord Mansfield* delivering the judgment of the Court), "That where there are different statutes *in pari materia* though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other." The same doctrine is held in New York. *Smith v. People,* 47 N. Y., 330, which is very much in point.

It is now seen that the acts of 27 February, 3 March, and 6 March, 1899, were passed in rapid succession by the same session of the Legislature; that the act of 3 March is in substance a reënactment of the

act of 1895; that they are *in pari materia,* and must be construed (689) as one act. Thus considered, it becomes a matter of judicial construction as to the effect of this legislation upon the office of clerk of the Criminal Court of "Buncombe County." To enable us to do this, it becomes necessary to consider the whole act of 3 March, 1899, in connection with the other acts, although some parts of them do not directly bear upon the clerkship of Buncombe County, for the purpose of properly understanding and construing them.

The third section of the act of 3 March, 1899, provided: "That the said courts shall have exclusive original jurisdiction to inquire of, hear and try all crimes, misdemeanors and offenses committed in the counties of Buncombe," etc. This takes away from the Superior Courts all original jurisdiction in criminal cases, and it takes from justices of the peace all criminal jurisdiction, as they have no appellate jurisdiction—their jurisdiction being only original. This would seem to be in conflict with Article IV, section 27 of the Constitution, which expressly provides that "Justices of the peace shall have jurisdiction of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days." The section further provides "that in all criminal matters the party against whom judgment is given may appeal to the Superior Court, where the matter shall be heard anew." It (the act of 1899) further on, in the same section, provides that these criminal courts shall have jurisdiction of all these crimes and offenses "fully and to the same extent as the Superior Courts of the State." But this does not seem to limit their exclusive jurisdiction, but to declare the extent of their power, their jurisdiction, to try and dispose of these matters. Whether this act, taking from the Superior Court its criminal jurisdiction as provided by section 12, Article IV of the Constitution, is in conflict (690) with the Constitution, it is not necessary for us to decide in this case, and we simply refer to *Rhyne v. Lipscombe,* 122 N. C., 650, and Cooley Const. Law (6 Ed.), 156. The question of apparent conflict with the Constitution is more directly presented in the 18th section of the act which provides that the county commissioners shall draw not less than 12 nor more than 24 jurors for each week of the Superior Court. We had a jury system here before, and at the time of the adoption of all our Constitutions—a grand jury of 18 and petit jury of 12. Our Constitution and judicial system must have recognized this policy—this law of the organization of our Superior Courts. *Rhyne v. Lipscombe* and Cooley, *supra.* Superior Courts are established by the Constitution and cannot be abolished by the Legislature. Nor can the Legislature deprive them of their rightful jurisdiction. The Legislature may give other courts a part of the jurisdiction of the Superior Courts,

but it cannot deprive them of their constitutional jurisdiction. Here are nine counties where the commissioners may refuse to draw more than 12 jurors. It would be impossible for the court to draw a grand jury of 18 out of a panel of 12 jurors. But it is said we have provided a criminal court for these counties to try criminal offenses. That is so. But we are discussing the constitutional question—the right of the Legislature to dismantle and disable the Superior Courts. If the Legislature has the right to do this in these nine counties, it has the right to do so in any other nine counties, or in all the other counties in the State. And the fact that they have established a criminal court in these counties does not affect the question of their constitutional power to destroy the criminal jurisdiction and usefulness of the Superior Courts.

(691) If the Legislature has the power to do this in counties where it has established criminal courts, it has the *power* to do so in counties where there are *no criminal courts.* It would seem that it might divide the jurisdiction between the Superior Courts and inferior courts, but it cannot destroy the constitutional jurisdiction of the Superior Courts.

But section 5 of the act of 1899 provides that the solicitors of these criminal courts, appointed by the judge of these criminal courts, shall prosecute for the State in the *Superior* Courts, and receive the fees, in case of conviction, that the solicitors of the Superior Courts are entitled to. This would seem to be in direct conflict with section 23, Article IV of the Constitution, which provides that "A solicitor shall be elected for each judicial district by the qualified voters thereof, as is provided for members of the General Assembly, who shall hold office for the term of four years, and *prosecute on behalf of the State in all criminal actions* in the *Superior Courts.*"

These provisions of the act—some of them so plainly in conflict with the Constitution—and the imperfections of the act in failing to provide for any fees for the clerk, and in failing to provide that he shall give bond, are referred to for the purpose of showing that, as an independent act, it would be incomplete and imperfect legislation. But to treat the three acts together, *in pari materia,* as it seems to us they must be treated under the authorities we have cited, they then become but amendments to the act of 1895. There are no clauses in these acts but what could be, and would be, by all the rules of interpretation, treated as amendments to the act of 1895, except that which declares that the court is abolished. This does not make it so, if it is not so. Treating them as amendments does not cure any violations of the Constitution.

It was declared in the act of 1895, with regard to the Insane Asylum, that the board of directors was abolished, and this Court held

(692) that it was not. *Wood v. Bellamy,* 120 N. C., 212. The act

of 1899, with regard to the penitentiary, declared the office of superintendent abolished, and this Court held that it was not. *State Prison v. Day, ante,* 362. It is shown by the authorities cited, and quoted above, that these opinions are in line with the text-writers, and with English and American adjudications. Taking out of these acts the sentence that the "Court is hereby abolished," and everything else would be properly construed as amendatory. Although these courts were put into a "Criminal Circuit" by the act of 1895, and into a "Circuit Criminal" by the act of 1899, that makes no difference. The court of each county embraced in the "Circuit" is a separate and independent court—the court in one county in no way depending upon the court in another county. The fact that the circuit was enlarged and more counties included in it, makes no difference. The court in Buncombe County is just the same as it was before other counties were included. The act of 1897 put McDowell County in that circuit, but this did not abolish or change the criminal court of Buncombe County. The Superior Courts of one county have frequently been taken out of one judicial district and put in another, and judicial districts have been changed so as to include more counties; and this did not abolish the court or change the powers or jurisdiction of the court. The fact that the act of 1899 did not undertake to establish civil jurisdiction, attempted to be given by the amendatory act of 1897, nor the fact that it provides for appeals to the Superior Courts instead of the Supreme Court, makes no difference, as these amendments had been declared to be unconstitutional and void. *Rhyne v. Lipscombe, supra.* If it was desirous to make these changes they were the proper subjects of amendment. (693)

It is claimed that the Court should look for the object to be attained by the enactment—what was the wrong and what was the intended benefit to be effected by the legislation. But when we apply this rule, and look for the evil under the act of 1895, and the benefit to be accomplished under the act of 1899, we find none, as the Court under the act of 1895 and under the act of 1899 is precisely the same, except as to the personnel of the clerk. The plaintiff is out and the defendant is in. We can find no reason for this change, unless we were to enter a field of inquiry that we, as a coördinate department of the government, have no right to enter, and which we have no more disposition to enter than we have the right to do so. That field of inquiry to us is a "sealed book."

So, finding that according to the precedents, judicial interpretation, the fact that the act says that it is "abolished" does not make it so, if the act itself shows that it is not, we proceed with our investigation. And in doing so, we find the act of 3 March, referring to and recognizing the criminal courts established by the act of 1895, the act that defendant

claims to have been "abolished" by the act of 27 February, which provides in section 22, as follows: "That all criminal causes, indictments and proceedings by *scire facias* or otherwise against defendants or witnesses and their sureties, now pending in the circuit courts of the counties of Buncombe, Madison, Haywood, Henderson, McDowell or the Superior Courts of any of the counties composing said Western Criminal Court, shall be and are hereby transferred and removed to the Western Criminal District Court created by this act."

(694) Thus it is seen that this act recognizes the existence of the criminal courts established by the act of 1895, by providing that all the cases *now pending* in said courts shall be, and are *"hereby"* transferred, that is by the act of 3 March, 1899, to the courts created by that act.

This court being purely a creature of legislation has no function or powers except those given it by the Legislature. It has no clerk except as given it by legislation. It has no judge or other officer except as given it by legislation. Its officers have no fees except as prescribed and fixed by legislation. None of its officers, witnesses or jurors, except the judge and solicitor, have their fees and compensations fixed by the act of 1899, without referring to the act of 1895. The act of 1895 prescribed and fixed all these fees and compensation. The act of 3 March provides that they shall be the same as *now fixed by law*. The act of 1895 is the only *law* fixing the fees of the officers of this court, and must be the law referred to in the act of 1899.

We are thus led to the conclusion that the acts of 1899 must be considered together, and are *in pari materia* with the act of 1895 and act of 1897, creating a criminal court in McDowell County, and putting it in the criminal circuit with Buncombe and other counties. Thus considered, they are but amendments to the act of 1895 and the act of 1897, and do not abolish the criminal court of Buncombe County. And this being so, the relator, Wilson, is entitled to his office under the doctrine of *Hoke v. Henderson,* 15 N. C., 1; *Wood v. Bellamy* and *State Prison v. Day, supra,* and every other case decided by this Court since *Hoke v. Henderson* where the question has been involved. This case has been the pride of the bench and of the bar of this State for more than 60 years; and whatever others may say, we find it to be the settled law of this State, based as we believe, upon just principles and sound reasoning.

(695) We have recently heard the argument advanced that a public officer has no interest in the office, but only in the salary and fees of the office. This is new doctrine to us. The salary and fees are but incidents of the office, and if one has no office he has no interest in the fees. Take the office from its owner, and you take from him the fees. *Hoke v. Henderson* recognizes this right, this property in an officer, and

protects it as the property of the owner. But we do not feel called upon at this late day to defend *Hoke v. Henderson.* It has been defended by every decision of this Court from 1883 to the present time.

From the intimations made by a member of this Court we are induced to say: That we have discussed the legal questions arising in this case as they appeared to us; we do not invite criticism, we have no right to object to fair criticism, and we do not do so. If such criticism shall be indulged in, as is not just or legitimate, we believe that an intelligent and learned profession will discriminate between that which is legitimate and that which is not.

It has been suggested by a member of this Court, that the Legislature has the power to impeach a judge—that it has recently done so, and that there is no appeal from its judgment. Such a suggestion as this, has never occurred in the history of this Court until now. This suggestion added nothing to the strength of the argument advanced for the defendant. Why it should have been made, we do not know. But remembering our position as members of this Court, we will not express our sentiments as to such suggestions, and will only say that, in our opinion, any member of any court, who would allow himself to be influenced by such suggestions is unfit to be a judge.

There is error and the demurrer should have been overruled. (696) The plaintiff is entitled to the relief he demands.

REVERSED.

CLARK, J., dissenting: By chapter 75, Laws 1895, the Legislature established "The Criminal Circuit Court of Buncombe, Madison, Haywood and Henderson counties," said act providing among other things, "There shall be a clerk for the said criminal court for Buncombe County," to be elected by the voters of said county, and to hold for a term of four years. The relator was elected under said provision at the general election in November, 1896, and was inducted into office on the first Monday in December of that year. By chapters 6 and 7, Laws 1897, the above cited act was amended by adding McDowell County to those composing the circuit, conferring civil jurisdiction concurrent with the judges of the Superior Court in those counties and changing the title of the court to the "Circuit Court of Buncombe, Madison, Haywood, Henderson and McDowell counties."

The General Assembly, by an act ratified 27 February, 1899, and to take effect from its ratification, abolished the "Criminal Circuit Court, composed of the counties of Buncombe, Madison, Haywood, Henderson and McDowell," and directed therein that all criminal causes pending in said criminal circuit court should be transferred to the Superior Court for their respective counties, and the clerks of said courts should

immediately turn over to the clerks of the Superior Courts in their respective counties all records belonging to their respective offices, and that all crimes heretofore punishable before said criminal courts should be cognizable only before the Superior Courts of the several counties. As the Legislature had unquestioned power to abolish said court and the offices appurtenant, and as we can gather the legislative intention only from the act itself, this would seem a very clear abolition. Hence-
(697) forward, the criminal circuit court of the five counties was only a memory—

"Like the lost Pleiad,
Seen no more on earth below."

While the exact title of the abolished court was not very accurately recited, it was sufficiently so, for the description left no doubt as to what court was abolished, and the act repealed "all laws and clauses of laws contrary to this act." But out of abundant caution the General Assembly passed another act, ratified 6 March, 1899, to abolish the criminal court, reciting therein that the above recited acts establishing the court and amendatory thereto, to wit, chapter 75, Laws 1895, and chapters 6 and 7, Laws 1897, were repealed. This having been already most effectually done by the act of 27 February, the duplicating act of 6 March, was simply of no effect, most certainly it cannot be construed as again reviving and putting in life the court which had been abolished on 27 February, for the momentary purpose of again killing it.

On 3 March, the Legislature not having increased the number of Superior Court districts as had been proposed, evidently came to the conclusion (judging its motives by its enactments, the only course permissible to us) that the Superior Courts of many counties had been overloaded, and proceeded to create an entirely new court, "The Western Criminal District Court," and placed it in the following counties: Buncombe, Haywood, Burke, Surry, Yancey, McDowell, Henderson, Caldwell, Madison and Forsyth—double the number of counties and covering more than double the territory of the court which had been abolished 27 February. This was held in the very recent case of *Ward v. Elizabeth City,* 121 N. C., 1, to be sufficient to destroy the identity of the two courts, it being there said "the plaintiff, who was city attorney
(698) under an abolished corporation has no claim to the salary of city attorney in a substantially different corporation created by the General Assembly, though it embraces the whole of the territory and population contained in the former corporation, much more being added to the new corporation." Why should this Court be called upon to overrule this most recent and unanimous decision in order to defeat the legislative will as expressed in the act of 27 February? But in many other respects besides the vastly increased territory (now reaching down

towards the center of the State), and the difference in its name, the court created on 3 March differs materially from that which was destroyed on 27 February, among these other differences are: The acts creating the abolished circuit for five counties purported to confer both civil and criminal jurisdiction and appeals were to lie direct to the Supreme Court, while in the new district court, composed of ten counties, only criminal jurisdiction is conferred, and appeals lie to the Superior Courts instead of to this Court. It is true this particular modification was doubtless due to decisions of this Court rendered in regard to the jurisdiction of criminal courts, but none the less it is a change from the provisions creating the former court. Then the clerks and solicitors in the court abolished on 27 February were elected by the people of the respective counties; in the new court they are appointed by the judge. Under the old court there was one solicitor for the entire district; under the new, there is a solicitor for each county, with many new duties, and different from those prescribed for the solicitor under the old court. There are many other differences between the courts showing that the Legislature, when it created the new court on 3 March, did not intend to resurrect and recreate the old court it had abolished on 27 February, an intention which was further negatived by the second (699) abolition act of 6 March, duplicating and reiterating the abolition of the old court, yet it is only upon the ground that the new court was *intended by the Legislature* to recreate and continue in force the old court, that the court can hold that the old court was not abolished by the act of 27 February. In *Wood v. Bellamy,* 120 N. C., 212, the Court arrived at this intention from the fact that the abolishing act, and the recreating act were one and the same, and that on its face it purported to be, and in fact was, merely amendatory of the original act creating the Insane Asylum, and because there was no substantial change, at the most the titles of a few offices being altered, the Court saying (p. 222), "There is nothing in the act but the same old offices, with changed names, with the same duties, rights and privileges, as were provided under the old law." But it is absolutely impossible to read the act of 3 March and find therein or draw therefrom any legislative intention to resurrect and keep in force a different court embracing less than half the territory, with different jurisdiction, with officers selected in a different mode, with many other differences, which had been unequivocably abolished on 27 February.

There can be no question of the meaning of the act of 3 March creating the new court, but it is suggested that a different meaning can be read into it by reading it in connection with the act of 27 February, as *in pari materia,* on the ground that all acts passed at the same session of the General Assembly are in effect one and to be construed together.

If so, the subject-matter is changed with the delightful frequency to be found elsewhere only in a dictionary. But the old fiction that all acts are parts of one and the same enactment, like The Code, for instance, is utterly untrue in fact, and is contradicted by the modern
(700) custom of making each act take effect from the date of its ratification.

The act of 27 February, abolishing the old court, was within the power of the General Assembly to enact, and the courts can only declare it nullified and set it aside when in conflict with some provision in the Constitution; it cannot be done by virtue of a fiction created merely by judicial construction in the remote past when Parliament sat often not more than a day or two at a session—a fiction, too, which has long since been exploded.

But it is further contended that the two acts being *in pari materia* must be construed together. That is "begging the question" at issue. It is contended that the two acts, if they could be construed together, would be *in pari materia* and, therefore, being *in pari materia,* ought to be construed together. They were both passed at the same session and they are both in regard to courts, but that does not make them *in pari materia.* A reading of them shows that they are anything else than *in pari materia.* One act is abolishing a court for five counties having criminal and civil jurisdiction; the other is an act passed on a different day creating a court for ten counties, restricted to criminal jurisdiction and with many other features, some of which are above recited, distinguishing it from the court which was abolished on 27 February. When two or more acts are *in pari materia,* the Court will construe them together solely for the purpose of ascertaining the legislative intent, but it will never assume that the acts are *in pari materia,* when they are totally different, for the purpose of construing them together, and hold that because construed together the clearly expressed and unmistakable intent of one act is negatived and set aside by the other.

The closing words of the speech of the learned counsel of the
(701) plaintiff in his argument to this Court (and which is, though less distinctly, set out in his brief) summed up and stated in a compact form the true ground on which he relied to bracket together the act of 27 February, and that of 3 March, in the hope to get a judicial decree annulling and setting aside the act of 27 February, which abolished the court, and with it, the office of his client. Said he, in substance and nearly in *totidem verbis,* "When the Legislature on 27 February abolished the old court it was lusting for the offices it furnished, and at that time the Legislature intended to create this new court, and this Court should construe the two acts together and set aside the act of 27 February, and defeat the fraud thus intentionally perpe-

trated upon my client." The argument was frank and stated the only ground upon which the act of 27 February can be nullified, or construed to mean a continuance of the plaintiff's office when it decreed just the opposite—its immediate and utter abolition. If the courts have jurisdiction of the acts of the Legislature, can divine and declare its motives, and set aside an act of that greatest of the departments of the government just as it can pass upon the *bona fides* of a deed between individuals, and set it aside for fraud, then the plaintiff might have ground to maintain this action provided he had introduced evidence to sustain the charge of *mala fides,* and a jury had sustained his contention, neither of which has been done in this case, and no court in an English speaking community has deemed itself vested with such jurisdiction.

A frequent recurrence to first principles is essential to the maintenance of liberty. The Legislature is the great and chief department of government. It alone is created to express the will of the people. As said in a recent opinion by *Faircloth, C. J., Ewart v. Jones,* 116 N. C., 570: "The sovereign power is exercised by the General Assembly, (702) the only limitation upon this power is found in the organic law as declared by the delegates of the people in convention assembled from time to time." Whereas the two coördinate departments—the judiciary and the executive—have no powers whatever except those granted by the Constitution or by the Legislature, and the last can be resumed or withdrawn at the legislative will. The Legislature has all the power the people themselves have, except where restricted by the Constitution; the executive and judiciary have none except what is given by the Constitution. The supreme power in every government of every kind is the lawmaking power, wherever it may be vested. With us that power is vested in the people, who exercise it through their representatives in Congress and in the several State Legislatures, subject to review by the people themselves at the next election, when they may choose new representatives who can repeal what has been done. In no other country than in the United States, not even in those with written constitutions, has any court claimed or exercised the power to declare an act of the Legislature invalid because in conflict with the Constitution, and in this country it is conferred upon no court by any constitutional provision. It has been assumed by the courts upon their own motion, and though it has been more or less exercised for over one hundred years no State has ever yet recognized it by inserting a provision in its Constitution empowering the Court to declare any act of the Legislature unconstitutional. Eminent statesmen and jurists have denied the power and asserted that neither the executive nor the Legislature is bound by such decrees of courts, which they have no constitutional warrant to authorize. In truth, this assertion of authority by the courts to annul

(703) an act of the Legislature upon the ground that the court thinks it in conflict with the Constitution has been tolerated rather than conceded, upon the reiterated declarations of courts that they would never hold any act unconstitutional unless it was plainly and beyond reasonable doubt in violation of the Constitution. Notwithstanding this toleration in the exercise by the courts of this power thus limited, when recently the sudden change of opinion by one judge, set aside a great public measure which had been passed by the two houses of Congress and approved by the President, and thus transferred over $60,000,000 of annual taxes (of which North Carolina's share is one and a half million) from those most able to bear it, the receivers of large incomes, and placed it upon those least able to bear it, the laboring masses, the nation awoke to the immense liability to abuse of this irresponsible power assumed by the judiciary, without any express constitutional warrant, to nullify and set at naught the will of the people as expressed through their constitutional organs, their Legislatures and Congress. This is not an auspicious time for the courts to "amplify their jurisdiction" in that direction. North Carolina is one of the States that has never given its executive even a modified veto upon legislative action, and there is nothing in its Constitution indicating any intention to give the judiciary any supervision or control over the law-making power. On the contrary, while the courts cannot pass, in any the most remote degree, upon the title to his seat of any member of the Legislature, that body can sit in judgment upon any member of the executive or judiciary branches of the State government by impeachment, and remove him from office. This indicates that the ultimate supervisory power is in the Legislature, not in the judicial department.

(704) The Legislature is the great depository of power subject to review by the people themselves at the next election, as the real sovereign. It only has the power, which belongs to the sovereign alone, of levying taxes, of granting and withholding supplies, by which power governments are stopped or put in motion—the power which alone subordinates the military to the civil authority and prevents usurpation from any quarter.

I would not be understood as contending that the power which the courts have so long exercised (often for good, sometimes not) by declaring legislative acts unconstitutional, is invalid. But it is well to recall that it is not derived from any provision in the Constitution, that during all this time popular sentiment has not yet so far endorsed it as to guarantee it by a constitutional amendment, that it is not inherent in, nor necessary to, the courts, as none outside of the United States exercise it, and that being thus without constitutional warrant every extension jeopardizes its extinction. The independence of the judiciary does not

require that it shall have the power to intervene in a coördinate department and set aside its actions as invalid. When this is done, it is upon other grounds than the independence of the judiciary.

Prior to the Revolution, the only branch of the government in North Carolina in which the people had a voice was the legislative. The executive and judiciary were appointed by the Crown and were oppressive and obnoxious. As a consequence, when the convention at Halifax in 1776 framed our first State Constitution, the government was made almost entirely legislative. The Governor and all the State officers were elected by the Legislature, the Governor and Treasurer for terms of one year, and the judges were elected in the same mode for life. This remained unaltered for nearly 60 years, when the Convention of 1835 amended the Constitution by making the Governor elective by the people for a term of two years. The present Supreme Court was created by legislative enactment in 1818, and while the judges held for life, (705) their offices were subject to be abolished at any time by legislative enactment.

In 1868 the Governor and chief executive officers, Secretary of State, Treasurer, etc., were made elective by the people for terms of four years, and the Supreme Court was made a coördinate department of the government. The judges of the Supreme and of the Superior Courts were made elective by the people for terms of eight years, but all other courts remained, as before, to be created or abolished at the will of the Legislature, who could also regulate the exercise of their powers by all courts below the Supreme Court (Constitution, Art. IV, sec. 12), and power is expressly reserved to the Legislature to abolish any of the Superior Court judgeships. Constitution, Art. IV, sec. 10. The independence of the Supreme Court only (and not of the entire judicial department) is provided for. Art. I, sec. 8. From this it will be seen that, while the Supreme Court is made independent of the Legislature, instead of being a legislative creation, as theretofore, there is nothing which looks to giving the Supreme Court supervisory control over the Legislature which voices the will of the sovereign, subject to a referendum every two years of their conduct in the election of a new General Assembly who can pass upon and repeal any act whatever of their predecessors; and no power is given the courts to interfere with this review and rejection by the popular vote of the action of their agents in a former General Assembly. Whatever powers are given the judiciary and executive are grants set out in the Constitution. On the other hand, the Legislature are the agents of the people, speaking their will, and only restricted where the Constitution has limited their powers, and their actions are subject always to review at the ballot box. This is our government. In it there is no room for a judicial hegemony. The sovereignty remains (706)

always in the people to be exercised readily and promptly. It cannot be tied up and put beyond their reach by a sixty-days Legislature creating officers for four years or 50 years or for life, and putting them in charge of the State institutions and the State's property. The emoluments of such officeholders cannot be more sacred than the right of the people to control their own government, and to change the management of their own property whenever they think proper.

In the present case, the General Assembly had the undenied power to pass the act of 27 February, abolishing the criminal circuit and with it the plaintiff's office. Beyond all controversy this was done by that act. If the act of 3 March, creating the new court is defective in any way, it does not concern the plaintiff, but the incumbents of office under the new court. There is nothing in the act of 3 March which refers in the slightest degree to the act of 27 February, or which by any reasonable construction can be held as indicating a legislative intention to repeal the clear expressions of that act. The only logical ground is that expressed by the counsel for the plaintiff, that the act of 27 February was passed with the intention to reënact the court on 3 March, with some insubstantial variation, and, therefore, the act of 27 February should be set aside as a fraud perpetrated upon his client. It is only by that process that the acts of 27 February and 3 March can be put together and construed *in pari materia,* for there is nothing in the face of the acts to indicate that the Legislature intended they should be construed together. That position has not in any respect been endorsed by this Court, and unless it was, it is clear to my mind that the act of 27 February, abolishing the plaintiff's office is still in full force, and
(707) that his Honor, *Judge Starbuck,* was correct in sustaining the demurrer to the plaintiff's complaint upon that ground.

DOUGLAS, J., concurring: In view of the number of important cases involving the title of office which we have been called upon to decide under the principles laid down in the celebrated case of *Hoke v. Henderson* (15 N. C., 1), I deem it proper to define my position in a concurrent opinion where I have greater latitude of expression than I would feel justified in using as the mouthpiece of the Court. I believe it is the unquestioned right of a judge to express, in a fair and respectful manner, his dissent or concurrence upon every question that may come before the Court of which he is a member, and this right I shall not hesitate to exercise within the limitations of my judgment and my conscience. This is equally the right of others, to whom I shall always cheerfully concede the same absolute integrity of motive and conduct that I claim for myself. In fact, I always prefer to give expression to my individual views in a separate opinion rather than inject them into

an opinion of the Court, where they are unnecessary for its determination, and thus force my brethren, who freely concur in the result, into an apparent concurrence in *dicta* that may not fully meet their approval. There is also danger that such *dicta* appearing in the opinion of the Court may subsequently be mistaken for the decision of the Court. Two years ago when I came upon this Bench, its only new member, and in every way its junior, I was at once confronted with the class of cases represented by *Wood v. Bellamy,* 120 N. C., 212. After the most careful consideration, and certainly with no possible personal bias, I concurred with a *unanimous* Court in the decision of those cases, thus giving to the great principles enunciated in *Hoke v. Henderson* (708) the deliberate assent of my judgment and my conscience. This assent I see no reason now to withdraw. If it was the law then, it is the law now; and those who now invoke those identical principles are entitled to their equal protection.

Fearing, however, that under the circumstances I might have been too much influenced by the *unanimous* opinion of my brethren of the Court, I have again carefully read *Hoke v. Henderson* and considered the principles therein involved. I can truly say that I can recall no abler opinion of any court, nor could there be a nobler monument to the memory of the great *Chief Justice* who still retains the admiration of our profession and the grateful veneration of our people. That opinion was delivered at the December Term, 1833, of this Court by *Chief Justice Ruffin,* and concurred in by his associates, *Judges Daniel and Gaston.* This great Court sat together unchanged for more than ten years, and has had no superior here or elsewhere, either in the ability and integrity of judicial conduct or the purity of private life. Their honored portraits hang above our Bench, and the impression of their features upon that canvas is no clearer than the indelible impress of their characters upon the jurisprudence of our State. I deeply regret the suggestion that in this celebrated case their judgment was influenced by a desire to protect themselves from being legislated out of office by a hostile Legislature; in other words, that their most noted opinion was not the honest result of sincere conviction, but the illegitimate offspring of moral cowardice.

Even if they had not been protected by constitutional safeguards, such a suggestion, appearing neither in the record nor in the argument of counsel, would be equally unjust to them and to any Legislature that could ever receive the suffrages of our people.

I do not wish to seem invidious by selecting one with whose (709) memory I have so many personal associations, but the rounded character of *Gaston* was admittedly the *beau ideal* of a North Carolinian. It may well be said of him that among the great men of his generation, few have left a more splendid, and none a less stainless,

name. It is the deliberate judgment of his countrymen that throughout a long and distinguished life, he ever bore the trenchant blade of heroic manhood with the spotless shield of Christian chivalry. As far as I am aware, that opinion has never before been questioned, but on the contrary has been repeatedly cited and approved, affirmed and reaffirmed, until its very name has become the embodiment of a vital principle. I find it cited with approval upon one point or another in the following cases:

*Houston v. Bogle,* 32 N. C., 496; *S. v. Moss,* 47 N. C., 66; *Thompson v. Floyd,* 47 N. C., 313; *S. v. Glenn,* 52 N. C., 321, 327; *Cotton v. Ellis,* 52 N. C., 545; *Barnes v. Barnes,* 53 N. C., 366; *Galloway v. R. R.,* 63 N. C., 147; *S. v. Smith,* 65 N. C., 369; *King v. Hunter,* 65 N. C., 603; *Clark v. Stanley,* 66 N. C., 59; *Brown v. Turner,* 70 N. C., 93; *Bunting v. Gales,* 77 N. C., 283; *Van v. Pipkin,* 77 N. C., 408; *Prairie v. Worth,* 78 N. C., 169; *Lyon v. Aikin,* 78 N. C., 258; *McNamee v. Alexander,* 109 N. C., 246; *S. v. Cutshall,* 110 N. C., 545; *Board of Education v. Kenan,* 112 N. C., 568; *S. v. Womble,* 112 N. C., 867; *Trotter v. Mitchell,* 115 N. C., 193; *McDonald v. Morrow,* 119 N. C., 676; *Wood v. Bellamy,* 120 N. C., 216; *Ward v. Elizabeth City,* 121 N. C., 3; *Caldwell v. Wilson,* 121 N. C., 468; *Miller v. Alexander,* 122 N. C., 721.

In the above list I have included those cases directly citing it by name, omitting those merely tending to sustain it.

(710) In *Ward v. Elizabeth City, supra,* on page 3, *Mr. Justice Clark,* in delivering the opinion of the Court, says: "The only restriction upon the legislative power is that after the officer has accepted the office upon the terms specified in the act creating the office, this being a contract between him and the State, the Legislature cannot turn him out by an act purporting to abolish the office, but which in effect continues the same office in existence. This is on the ground that an office is a contract between the officer and the State, as was held in *Hoke v. Henderson,* 15 N. C., 1, and has ever since been followed in North Carolina down to and including *Wood and Bellamy, supra,* though this State is the only one of the 45 States of the Union which sustain that doctrine." In reviewing the list of the judges who wrote the above opinions, or concurred therein, we find the name of every *Chief Justice* who has since presided over this Court, and of all the *Associate Justices,* with one or two exceptions, before whom the question does not appear to have been distinctly raised. None appear ever to have questioned it.

Had I felt it my duty to have dissented two years ago from an otherwise *unanimous* Court, I would have done so; but I would have felt awfully lonesome.

An examination of the constitutional history of the State I think will clearly show that the principles so clearly enunciated in *Hoke v. Hen-*

*derson* have not only received the practically unanimous approval of succeeding judges, but have by direct implication been repeatedly ratified by the people themselves.

The following are usually regarded as the fundamental constitutions of North Carolina taken in their chronological order: Charter of Queen Elizabeth to Sir Walter Raleigh (or Ralegh, as she persists in spelling his name) dated 25 March, 1584; "Charter of Carolina," dated 24 March, 1663, given by Charles II to the Duke of Albemarle, Lord Craven, Lord Berkeley, Lord Ashley, Sir George Carteret, Sir (711) William Berkeley and Sir John Colleton; the "Charter of Carolina," dated 30 June, 1665, and given by Charles II to the same parties with the addition of the Earl of Clarendon; and "The Fundamental Constitutions of Carolina," dated 1 March, 1669, and framed for the Lords Proprietors by John Locke and amended by the Earl of Shaftesbury; to which may be added the grant of 1630 to Sir Robert Heath, of the nature of which I know nothing. The Mecklenburg Resolutions of 20 May, 1775, may also be considered as somewhat constitutional, as they clearly enunciate fundamental principles, although I am not prepared to say to what extent, if any, they were ever binding or operative.

This brings us down to the first "Constitution of North Carolina," which was framed by a "Congress" elected and chosen for that particular purpose, which assembled at Halifax on 12 November, 1776. This Constitution was not submitted to the people for ratification, but appears to have met with general acceptance, and to have remained unchanged until the amendments of 1835. It was this Constitution whose provisions were construed in *Hoke v. Henderson.* I have endeavored to make a synopsis of the opinion, but I find that no synopsis of which I am capable would do it justice; and so I will give only one or two extracts taken *verbatim.* The original headnote is as follows: "A clerk appointed under the act of 1806, has an estate in his office, and although the Legislature may destroy the office, and by consequence the estate in it, yet the act of 1832, which continues the office, but transfers the estate in it to another, is unconstitutional and void." Fuller notes appear in Tourgee's and Womack's digests. The following extracts appear to give the keynote of the opinion: "In the act under consideration, as far as it concerns the controversy between these parties, there is no ambiguity; the words are plain, the intention unequivocal, and the true (712) exposition infallibly certain. We cannot, under the pretense of interpretation, repeal it, and thus usurp a power never confided to us, which we cannot usefully exercise, and which we do not desire. Since the meaning of the act cannot be doubted, and according to that meaning Mr. Henderson had not, but Mr. Hoke had, the right to the office of

the clerk at the time the judge refused to admit the latter, the ground of decision of the Superior Court, as stated in the record, recurs before this Court, and must now unavoidably be examined.

"The act transfers the office of clerk from one of these parties to the other, without any default of the former, or any judicial sentence of removal. The question is, whether this legislative intention, as ascertained, is valid and efficacious, as being within the powers of the Legislature in the constitutions of the country, or is null, as being contrary to and inconsistent with the provisions of those instruments. *To the determination of this question, the judicial function is competent.* It involves no collateral considerations of abstract justice or political expediency. It depends upon the comparison of the intentions and will of the people as expressed in the Constitution, as the fundamental law, unalterable except by the people themselves, with the intentions and will of the *agents* chosen under that instrument, to whom is confided the exercise of the powers therein delegated or not prohibited. Such agents are all public servants in this State, and the agency is necessarily subordinate to the superior authority of the Constitution, which emanated directly from the whole people. Legislative representatives may order and enact what to them may seem meet and useful, upon all subjects and in all methods, except those on which their action is restrained by the Constitution; and such order and enactment is obligatory alike on all citizens, including those who are by a public duty to execute (713) the laws, as well as those on whom they are to be executed.

Courts, therefore, must enforce such enactments; for they are laws to them by the mere force of the legislative will. But when the representatives pass an act upon a subject upon which the people have said in the Constitution they shall not legislate at all, or when upon a subject on which they are allowed to legislate, they enact that to be law which the same instrument says shall not be law, then it becomes the province of those who are to expound and enforce the laws, to determine which will, thus declared, is the law. Neither the reasons which determined the will of the people on the one hand, nor the will of the representatives on the other, can be permitted to influence the mind of the judge upon the question, when reduced to that simple point. His task is the humbler and easier one of instituting a naked comparison between what the *representatives* of the people *have* done, with what the people themselves have said they *might do,* or *should not* do; and if upon that comparison it be found that the act is without warrant in the Constitution, and is inconsistent with the will of the people as there declared, *the Court cannot execute the act,* but must obey the superior law, *given by the people alike to their judicial and to their legislative agent.* . . .

But even these sanctions are not sufficient to overturn the Constitution, if the repugnance do really exist and is plain. For although the imputation is altogether inadmissible, that the Legislature intend wilfully to violate the Constitution, and still less that the people themselves contemplate violence to the instrument consecrated by their own voices and the consent of our ancestors; yet all men are fallible, and in the dispatch of business, the heat of controversy, and the wish to effect a particular end, may inadvertently omit to scrutinize their powers, and adopt means adequate indeed to the end, but beyond those powers. It ought not to surprise that such an event should sometimes (714) happen. . . . When unfortunately such instances do occur, the *preservation of the integrity of the Constitution is confided by the people, as a sacred deposit, to the judiciary.* In the discharge of that duty, the *approbation of the Legislature itself is to anticipated;* for the principle of virtue which restrains them from a known and wilful violation of it, will induce them to rejoice at the rescue of the Constitution from their own incautious and involuntary infraction of it. . . . In other words, *public liberty requires that private property should be protected even from the government itself.* The people of all countries who have enjoyed the semblance of freedom, have regarded this and insisted on it as a fundamental principle. Long before the formation of our present Constitution it was asserted by our ancestors on various occasions; and, in one sense, *its vindication produced the revolution.* At the beginning of that struggle, while the jealousy of power was strong, and the love of liberty and of right was ardent, and the weakness of the individual citizen against the claims of unrestricted power in the government was consciously felt, the people formed the Constitution of this State; and therein declared "that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or *deprived* of his life, liberty or property, but by the law of the land. (Bill of Rights, sec. 10.) By the fourth section it is declared "that the legislative, executive and supreme judicial powers of government ought to be forever separate, and distinct from each other."

"In absolute governments, whether hereditary or representative, the division of the powers of government is unimportant; because that body in which resides the *superior authority, can, at will, make it supreme,* and *absorb* all the other departments. It does not follow, therefore, that because the British Parliament, whose supremacy is (715) acknowledged, decides questions of private right and puts that decision, as it does its other determinations, into the form of a statute, that whatever it does is legislative in its nature. It can adjudicate and often does substantially adjudicate when it professes to enact new laws.

That faculty is *expressly denied* to our Legislature, as much as legislation is denied to our judiciary. Whenever an act of Assembly, therefore, is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right; which is not a legislative, but a *judicial, function.*"

This question was more fully elaborated in the remainder of the opinion, citing: Anon, 2 N. C., 29; *Bayard v. Singleton,* 1 N. C., 5; *University v. Foy,* 5 N. C., 58, and 3 N. C., 310; *Hamilton v. Adams,* 6 N. C., 161; *Allen v. Peden,* 4 N. C., 638; *Robinson v. Barfield,* 6 N. C., 391.

The Court thus plainly and directly asserts its jurisdiction to pass upon the constitutionality of any act of the Legislature, and to declare such act null and void when constitutionally objectionable. It then proceeds to hold that an officer has a qualified right of property in his office which the courts will protect even against legislative interference. It says further, on page 17: "The sole inquiry that remains is, whether the office of which the act deprives Mr. Henderson, is property. It is scarcely possible to make the proposition clearer to a plain mind, accustomed to regard things according to practical results and realties, than by barely stating it. For what is *property?* that is, what do we (716) understand by the term? It means, in reference to the thing, whatever a person can possess and enjoy by right; and in reference to the person, he who has that right to the exclusion of others, is said to have the property. That an office is the subject of property thus explained, is well understood by every one, as well as distinctly stated in the law books from the earliest times. An office is enumerated by commentators on law among *incorporeal* hereditaments; and is defined to be the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging (2 Bl. Com., 36). . . . For if one usurp an office which belongs to another, the owner may have an *action* for *damages* for the expulsion, for the fees of office received, and a remedy by *quo warranto* to inquire into the right of the usurper, and by *mandamus* to be himself restored. When we find these remedies established to enforce the right of admission into office, to secure the possession of it and its emoluments, we can no longer doubt that, in law, an office is deemed the subject of property to the officer, as well as an institution for the convenience of the people. If it be so, it falls within those provisions of the Constitution which secure private interests and cannot be divested without some default of the officer, or the *cessor* of the office itself. These are the general principles that lead the Court to the conclusion that the act of the Assembly *is invalid.*"

Some of the italics are mine. This decision was rendered at the December Term, 1833, reported in 15 N. C., 1. Since that time there

have been five separate and distinct Constitutional Conventions, *all* of which might, but *none* of which *have,* abrogated or modified the principles of that opinion.

In 1835 a constitutional convention met on 4 June, and framed amendments to the Constitution of 1776, which were ratified by the people. In 1861 a convention met and on 20 May passed the Ordinance of Secession, with some other amendments, none of (717) which were submitted to the people. In 1865 a convention met on 9 October, repealed the Ordinance of Secession and passed an ordinance prohibiting slavery. This convention reassembled in May, 1866, and further amended the Constitution; but with the exception of the above ordinances relating to secession and slavery, the amendments were rejected upon submission to the people.

A convention, called by General Canby, under the reconstruction acts of Congress, assembled on 14 January, 1868, and framed the "Constitution of 1868," which was ratified by the people. In 1875 a convention assembled on 6 September, and amended the Constitution in several particulars, their action being ratified by the people at the election of 1876. In addition to these conventions, several amendments have been made by legislative action and popular ratification, such as the celebrated "Free Suffrage" amendment of 1854, and those prohibiting the payment of the special tax bonds, relating to the election of trustees of the University, increasing the number of *Justices* of the Supreme Court, and some relating to other particulars set out principally in chapters 81, 82, 83, 84, 85, 86, 87 and 88, of the Laws of 1872-73. The various amendments made many changes of far-reaching results, including the successive repudiations of the governments of the United States and of the Confederate States, but the underlying principles of *Hoke v. Henderson* remained unchanged. In fact, the Convention of 1835, by necessary implication, appears to have endorsed the opinion. Assembling within less than eighteen months after its rendition, *Judge Daniel* and *Judge Gaston,* though still *Justices* of the Supreme Court, appeared as delegates to the convention from their respective counties of Halifax and Craven, and actively participated in its deliberations. In fact, *Judge Gaston,* as chairman and spokesman of the committee appointed "to consider and report the manner in which it will be expe- (718) dient to take up the business of this convention," became its leading spirit.

In *Hoke v. Henderson,* on page 23, this Court positively asserted the independent life tenure of the judicial office, as "being constitutional and unalterable," and free from any legislative control; but declined to express an opinion as to whether the Legislature could reduce their salaries under Article XXI, of the Constitution of 1776, which provided "that

the Governor, Judges of the Supreme Court of Law and Equity, Judges of Admiralty and Attorney-General, shall have *adequate* salaries during their continuance in office." With *Daniel* and *Gaston* upon the floor, and the opinion fresh in their memory, the convention expressly provided in Article III, sec. 2, that: "The salaries of the Judges of the Supreme Court, or of the Superior Courts, shall not be diminished during their continuance in office." This practically completed the independence of the judiciary. I have thus carefully reviewed the case of *Hoke v. Henderson* in connection with its surroundings because the present dissent is in effect a direct attack upon the fundamental principles involved in that case. We are told that "the *supreme* power in every government of every kind is the law-making power, wherever it may be vested." That is true, because it is vested in the people; but it is *not true* that the people exercise this power *supremely* through their representatives in the Legislature. This *supreme* lawmaking power they exercise only through a constitutional convention or by ratification upon a direct referendum to themselves. The law-making power granted to the Legislature is carefully restricted. In the Constitution the word *"Supreme"* is nowhere applied to the Legislature; but only to the
(719) Governor and the Supreme Court. Article II, sec. 1, says that: "The *legislative authority* shall be vested in two distinct branches, both dependent upon the people." Article III., sec. 1, says: "The executive department shall consist of a governor, in whom shall be vested the *supreme* executive power of the State," etc. Article IV., sec. 8, says: "The *Supreme Court* shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference."

Article I, sec. 8, says: "The legislative, executive and *supreme judicial* powers of the government ought to be forever separate and distinct from each other." Article I, the "Declaration of Rights," comprises thirty-seven sections, nearly all of which necessarily apply to the legislative authority alone; while its last section closes with the significant declaration that: "This enumeration of rights shall not be construed to *impair* or *deny* others retained by the people; and *all powers not herein delegated, remain with the people.*" The first section of the declaration says: "That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain *unalienable* rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." This is an express declaration that there remain in the citizen certain inherent rights that are independent even of constitutional recognition. Again we are now told that "The Legislature is the great and chief department of government." The people have not said so in their Constitution, but have said directly to the contrary, as it provides for three coördinate departments, which

shall be forever separate and distinct. In my opinion there could be no political heresy more dangerous than to assert the superiority of any one department; because, as is well said by *Chief Justice Ruffin,* "that body in which resides the *superior* authority, can at will make it *supreme,* and absorb all the other departments." Again, we are (720) now told that this Court has no powers except those given by the Constitution; but we are expressly given jurisdiction over all matters of *law or legal inference;* and what greater powers could be given to us of a judicial nature?

Again, we are now told, but not by counsel, that we are liable to impeachment. Of course we are. No man in this country is above the law; and as, holding the supreme judicial power, we cannot try ourselves nor try each other for our judicial acts, there must be some tribunal to which we are amenable. I am sure there is no member of this Court would have it otherwise; and while we would scorn to let the fear of possible consequences influence our action in the slightest degree, we shall be ever ready to answer before any legitimate tribunal, and meet the fullest consequences of our deliberate act. This is no mark of legislative superiority, but simply a wise provision for that just responsibility which should attach to every public servant.

Again, we are now asked why is the opinion of *Hoke v. Henderson* so sacred. I have endeavored to answer in the preceding pages; but in any event, why is it less sacred now than it was two years ago when it received the *unanimous* endorsement of this Court? If it was sacred enough two years ago to keep in Bellamy, why is it not sacred enough now to keep in Wilson? Again, it is now said that in *Hoke v. Henderson* there was no attempt to abolish the office, and that we have extended the principle to cases wherein the office is professedly abolished. But this extension was made two years ago by a *unanimous* Court in *Wood v. Bellamy.* While this case may be somewhat different in the application of the principle, the principle itself is the same; as I see no practical difference between abolishing and recreating the office in successive sections of the same act, and accomplishing the same result by means of two successive acts. (721)

It is needless to review the facts of the case at bar, as in that respect I can add nothing to the opinion of the Court. My object now is to state the basis of my judgment not only in this, but in all other cases of a similar nature. I cannot but feel that a great principle is at stake, one vitally affecting the integrity and independence of this Court. In this connection I take the liberty of inserting an extract from the admirable address of Hon. Junius Davis, recently delivered before us in presenting the portraits of *Judges Iredell* and *Moore,* as follows:

"In 1786, following the passage of the Confiscation Acts, the question of the power of the Court to declare void an act of the Legislature because in conflict with the Constitution, was raised in this State by some of the bar, and was vigorously supported by Iredell in an exceedingly strong and able pamphlet published by him."

In the celebrated case of *Bayard v. Singleton,* 1 N. C., 5, in which Iredell, Johnston and Davie were counsel for plaintiffs, and Moore and Nash for defendant, that question was first discussed and decided in the courts of this State. In reading the report of this case, one is struck with the great and proper reluctance of the judges to approach the decision of the point, so novel and strange. They suggested to the litigants first one and then another method of compromise and settlement, but driven to it, at last faced the issue manfully as true men. Mr. Haywood in his argument in *Moore v. Bradley,* 3 N. C., 140, attributes the merit of that opinion to *Judge Ashe,* and says that he illustrated his opinion by this forcible language: "As God said to the waters, 'so far shall ye go and no further,' so said the people to the Legislature."

(722) Afterwards, when upon the Supreme Bench of the United States, in *Calder v. Bull,* 3 Dallas, 386, and again in *Chisholm v. Georgia, Iredell* took occasion to declare in emphatic language his opinion to be 'If any act of Congress, or of the Legislature of a State, violates those constitutional provisions, it is unquestionably void; though I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority but in a clear and urgent case. This doctrine so clearly and admirably stated in these few and concise words is now the law in every State in this Union, and is universally taken to have been so settled by the opinion of *Marshall* in *Marbury v. Madison,* 1 Cranch, 137. I cannot but think it singular that in his opinion in this case *Marshall* makes no reference whatever to either of the three cases above mentioned or to the earlier cases in Rhode Island and Virginia. The language of *Iredell* in *Calder v. Bull* is so clear cut and logical that it could not have escaped the notice of the *Chief Justice.* In our busy life we seldom pause to reflect upon the far-reaching results, the inestimable blessing of these decisions. How often in our history has Congress and Legislature in the mad lust of power and the wild riot of party hate striving to accomplish unholy and unwholesome legislation, been halted by the stern mandate, 'so far shall ye go and no further?'

"England's greatest statesman once said, 'the honest man may in his cottage bid defiance to all the forces of the Crown—it may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement.' But this

vaunted liberty of the British subject can bear no comparison with that of the American citizen, who, dwelling under the shadow of the mighty Constitution is secured by it in the fullest enjoyment of his life, his property and his liberty." These words seem the more forcible because they deal with a great principle, and had no intentional (723) reference to the case at bar.

In conclusion, I can only repeat what was said when speaking for the Court in *Caldwell v. Wilson,* 121 N. C., 425, 471: "We realize the responsibilities of this Court in settling the line of demarcation between the legislative, executive, and supreme judicial powers, which, by constitutional obligation, must be kept forever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm and even hand, free alike from the palsied touch of interest or subserviency and the itching grasp of power."

I concur in the opinion of the Court.

*Cited: R. R. v. Dortch, ante,* 673, 679; *Arendell v. Worth,* 125 N. C., 122; *Greene v. Owen, ib.,* 215; *McCall v. Webb, ib.,* 245; *Abbott v. Beddingfield, ib.,* 260, 267, 287; *Dalby v. Hancock, ib.,* 327; *White v. Auditor,* 126 N. C., 585, 593, 607; *Mott v. Comrs., ib.,* 876, 882; *Taylor v. Vann,* 127 N. C., 245, 251; *Jackson v. Commission,* 130 N. C., 400; *S. v. Patterson,* 134 N. C., 620; *Pullen v. Corporation Comm.,* 152 N. C., 559; *Keith v. Lockhart,* 171 N. C., 456; *S. v. Johnson,* 181 N. C., 642.

*Overruled: Mial v. Ellington,* 134 N. C., 159.

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MINERVA V. WILKINSON ET ALS. v. WILLIAM R. BRINN AND WIFE, SALLIE BRINN.

(Decided 9 May, 1899.)

*Mortgage—Foreclosure—Purchaser.*

1. In an action for foreclosure, where the parties in interest are all before the Court, and decree of sale is made, and sale reported, the purchaser cannot avoid complying with his bid on the ground that the name of the husband of one of the grantors, who, with his wife, executed the deed to the defendants, mortgagors, does not appear in the body of the deed—the mortgage being given to secure the purchase notes.

2. It is immaterial to a purchaser at a judicial sale, who gets a good title, where the money goes—the court, after collecting the proceeds of sale, will see that they are properly distributed.

ACTION for foreclosure of mortgage of land described in complaint.

There was a decree of foreclosure and commissioner appointed
(724) to make sale; the sale was made and T. J. Topping reported as purchaser, who failed to comply with his bid.

At February Term, 1899, of BEAUFORT, before *Bowman, J.*, motion, upon notice, was made by the commissioner for summary judgment against Topping, the purchaser, for the amount of his bid and payment of same.

His Honor adjudged that the motion for judgment be denied and that Topping be released and discharged from his bid, and recover his costs. From this judgment the commissioner and plaintiffs appealed.

*John H. Small for plaintiffs.*
*Charles F. Warren for Topping.*

(725) FAIRCLOTH, C. J. At the death of J. B. Wilkinson in 1887 his land, the same now in controversy, descended to his four children, subject to the dower of his widow, Minerva Wilkinson. Said children, their husbands and the widow, sold and conveyed by deed said land to defendant Brinn, who, with his wife, executed a mortgage deed to the grantors to secure the purchase price, both deeds being duly probated and registered. Among said grantors was Mattie V. Campbell, and her husband signed the deed to Brinn, but his name does not appear in the body of the deed. Subsequently Mattie V. died intestate, leaving infant children and her husband surviving. An action was brought to foreclose said mortgage, the minor children of Mattie V., having no general guardian, were represented by A. H. Wilkinson as their next friend. A decree of sale was ordered, the sale was made and T. J. Topping was the best bidder and was declared and reported as the purchaser. In this action all interested are parties plaintiffs, including the widow, Minerva, Charles A. Campbell (husband of Mattie V. Campbell) individually, and on motion has been made a party as administrator of his wife in this Court under The Code, 965.

On notice to Topping, the purchaser, to show cause why a summary judgment should not be entered against him for the amount of the purchase-money now due, he responds that he cannot get a good title to the land under a decree of the court confirming said sale, and a deed made by its commissioner under its direction: (1) Because, by reason of Campbell's name not appearing in the body of the deed, his wife's interest did

not pass to Brinn, that it was not their deed; (2) because Campbell, on the death of his wife, acquired an interest in her estate, and will be entitled to share in the distribution of the proceeds of the sale if confirmed. There is no question raised as to the interest of any other of the parties interested. (726)

There is no force in the respondent's contention. Without in any manner considering the regularity or irregularity of the deed to Brinn, the plaintiffs, including the widow, the children of Mattie V., her husband individually and as her administrator, are concluded and will be estopped effectually by a foreclosure decree in this action and deed thereunder, as to all material questions presented in this record.

Topping has no interest in the question presented by his second reason for refusing to pay his note for the land. He gets a good title, and it is immaterial to him where the money goes. The court, after collecting the proceeds of sale, will see that they are properly distributed.

By consent, the facts above stated were found by the court. We see no reason why the plaintiffs should not have judgment in their favor.

REVERSED.

*Cited: College v. Riddle,* 165 N. C., 218; *Pendleton v. Williams,* 175 N. C., 250; *Dawson v. Wood,* 177 N. C., 166.

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JOHN A. COLLINS v. GEORGE W. PETTITT ET ALS.

(Decided 9 May, 1899.)

*Tax Sale—Assignee of Certificate of Sale Held by County.*

The decision in *Wilcox v. Leach,* 123 N. C., 74, defining the right of an assignee of certificates of sale for taxes held by county to be that of mortgagee, to be enforced by foreclosure, is reaffirmed.

PETITION to rehear this case decided at September Term, 1898 (123 N. C., 79).

*MacRae & Day, E. L. Travis, and Shepherd & Busbee for* (727) *petitioner.*

*Thomas N. Hill and W. A. Dunn contra.*

PER CURIAM: The petition to rehear is dismissed. We see no reason to change the opinion of this Court delivered in the case at the September Term, 1898.

CLARK, J., dissenting: The courts have no public policy to declare or enforce. This lies outside of their province. It is for the Legislature, the lawmaking power, to define and declare the public policy, and when this is clear, whether it may seem a hardship or beneficial, it is equally the duty of the courts to declare the law as written. If of doubtful meaning, it is the duty of the courts to construe it in accord with the settled public policy as deduced from this and similar legislation, or to consider the evil to be remedied, and other like aids, in the endeavor to get at the true meaning of the act.

The taxing power is essential to the existence of government, and justice requires not only that the taxes shall be laid on all "by a uniform rule and *ad valorem*" (Const., Art. V., sec. 3), but that they shall be collected from all; for if any property escapes payment of taxes, the property of others who have already paid their shares must make good the default of those who evade payment. Formerly, the holder of a tax deed had to prove the regularity of the many steps leading up to it, with the result, as a decision of the Supreme Court stated just before the tax reform act of 1887 became law, that no tax deed had till then ever been sustained in this Court. As a consequence, no one scarcely would pur-
chase at a tax sale, and the counties who bought in the lands of
(728) defaulting taxpayers from year to year, in default of other bid-
ders, accumulated large bundles of worthless "tax-sale certificates." Fifty years or so ago, when the average State tax was 9 cents, or less, on $100, the temptation to any landowner to shirk payment of taxes was small, and the default of those who did threw a hardly perceptible increase upon those who paid. But with the addition of the public schools, the insane asylum, institutions for the deaf, dumb, and the blind, the penitentiary, and many other added subjects of expense required by an advancing civilization, the aggregate of State and county taxes has run up often to the full limit of taxation (66⅔ cents), with frequent recurrence of special taxes in excess of that sum. The increased temptation to avoid taxation—a temptation that was encouraged by a knowledge of the futility of tax sales—piled an increasing burden upon good men and swelled the ranks of those who evaded the payment of their just public burdens. The complaint became general; the State Treasurer and the Governor repeatedly recommended a change as imperatively demanded, till finally the Legislature of 1885 (chapter 238) appointed a commission of three eminent citizens to report a bill for an entirely new system of collecting taxes — the first and indispensable requisite being, of course, that the purchaser at a tax sale should get a good title. The commission reported to the Legislature of 1887 their bill, which was in most particulars a copy of the law on the subject obtaining in most other States, and whose constitutionality had been

sustained by many decisions of their courts and by the United States Supreme Court, and the change was suggested as valid if it should be made by the opinion of this Court in *Fox v. Stafford,* 90 N. C., 296, at p. 298 (1884). The report of the Tax Commission was adopted (Laws 1887, ch. 137) and with minor changes in the law today. Its striking feature was a change of the burden of proof. The old law placed upon the purchaser at a tax sale the burden of proving that all (729) the proceedings were regular, which it was almost impossible for him to do. Under the new law, the burden was shifted, and the tax deed was made conclusive evidence of the regularity of matters of routine and presumptive evidence of all other matters. Statutes substantially the same as the new statute had been sustained, as above stated, in numerous decisions in the States adopting the tax reform, and by the United States Supreme Court, many of which are cited in Cooley on Taxation (2d Ed.), 521, note 1, and since reiterated by the United States Supreme Court down as late as *Castillo v. McComico,* 168 U. S., 674, and *King v. Mullens,* 171 U. S., 404. It is needless, however, to discuss the new statute, which has been sustained by this Court in *Basnight v. Smith,* 112 N. C., 229; *Stanley v. Baird (Furches, J.),* 118 N. C., 75; *Peebles v. Taylor (Faircloth, C. J.),* 118 N. C., 165; *Sanders v. Earp (Montgomery, J.),* 118 N. C., 275; *Moore v. Byrd, ib.,* 688; *Powell v. Sikes (Montgomery, J.),* 119 N. C., 231; *Lyman v. Hunter,* 123 N. C., 508, and other cases. The radical difference between the two systems is noted by *Furches, J.,* in *Worth v. Simmons,* 121 N. C., at p. 361, where he says that in 1887, in the matter of tax titles, "the Legislature changed the rule of presumptions. And now it is about as hard to defeat a tax title as it was before to establish one."

The present is a rehearing of this case, decided by a *per curiam* (123 N. C., 769), upon the authority of *Wilcox v. Leach,* 123 N. C., 74, and, therefore, in effect is a rehearing as to the grounds of the opinion in the latter case, which went off upon the point that the word "may," in section 90, chapter 119, Laws 1895, giving to the county commissioners the right to foreclose upon a tax certificate, must be read "shall" or "must." The statute says, when the county purchases, the com- (730) missioners "may proceed by action to foreclose such certificates or liens," etc., making it plainly optional. The opinion held, inadvertently, I think (bottom page 78), the county "must proceed to collect only by foreclosure." I find no warrant for this in the statute, and it is counter to other provisions in the act and to the public policy of the present legislation on the subject.

In view of the very plainly expressed policy in the statutes which have been almost identical since the first enacted chapter 237, Laws 1887, and the repeated decisions of this Court upon it, this seems like

looking back to the "pit from which we have been digged." Not only the word "may" shows that foreclosure was an optional procedure, but the other provisions of the statute confirm that view.

1. The county is authorized to "purchase" just as any one else. Section 85. It is held that, even independent of any expressed provisions of the statute, the government has the same right to purchase as any one else, and if so, of course, it would get exactly the same rights as any other purchaser. *DeTreville v. Smalls,* 98 U. S., 517; *Cooley v. O'Connor,* 12 Wallace, 391; *Douthett v. Kettle,* 104 Ill., 356. In the first of these cases *Mr. Justice Strong,* speaking of the effect of a purchase by the government at a tax sale, says (page 522): "If the United States became the purchaser at the commissioner's sale, it was only to obtain the taxes by a resale; and such a resale, resting, as it must have done, upon the original sale made by the commissioners, needed the encouragement and support of a commissioner's certificate equally with a purchase by a bidder. It is not, therefore, to be admitted that the statute intended to put the United States in any worse condition than that occupied by any other successful bidder," and adds that the argument to the contrary

"is plausible, but unsound." Nor is there the slightest indication (731) in our statute that it was intended to put the county, if it became a purchaser, upon a footing inferior to that "occupied by any other successful bidder." In the same case *Mr. Justice Strong* further says: "We are not unmindful of the numerous decisions of State courts which have construed away the plain meaning of statutes providing for the collection of taxes, disregarding the spirit and often the letter of the enactments, until of late years the astuteness of judicial refinement had rendered almost inoperative all legislative provisions for the sale of land for taxes. The consequence was, that bidders at tax sales, if obtained at all, were mere speculators. The chances were greatly against their obtaining a title. The least error in the conduct of the sale or in the proceedings preliminary thereto was held to vitiate it, though the tax was clearly due and unpaid." It was to remedy that state of things, brought about, as *Mr. Justice Strong* says, by judicial legislation, with the resultant hardship to all honest taxpayers, that the reformed tax system was adopted in this and other States as a sheer necessity for the public treasury, and already astute counsel are besieging the Court to construe away the new statute.

2. Section 85 (chapter 119, Laws 1895) not only gives the county the same right to purchase as any one else, but authorizes it to receive and assign certificates of purchase. It must be that its assignee stands in the same plight as the assignee from any other purchaser, for the certificate issued to the county is identical with that issued to any other purchaser, and its wording is prescribed in section 57, and provides, after

the recital of sale and purchase, the following: "And I further certify that unless redemption is made of said estate in the manner provided by law, the said (here insert name of purchaser), heirs or *assigns,* will be entitled to a deed therefor on and after the.....day of.....,
A. D. 18...., on surrender of this certificate." When the plaintiff (732) saw, in section 85, that the county could buy, receive a certificate, and assign it like any one else, and that the certificate (whose form is prescribed in the statute) provides that on failure of the tax defaulter to redeem in the time prescribed by law, he would be "entitled to a deed," he was justified in relying upon the statute, which did not put the county, when purchasing, "in any worse condition than that occupied by any other successful bidder," to use the language of the highest Court in the land. Though section 90 does give the county the option to foreclose, by section 93 exactly the same privilege is given any other purchaser. Thus, throughout the act there is not the shadow of a shade of an intimation by the lawmaking power of any discrimination or intention to discriminate between the county and any other purchaser. Both are authorized to purchase and to receive and assign the tax certificate; both receive the same tax certificate, drawn in a form prescribed by statute, and which on its face promises that the purchaser or his assignee shall be entitled to a deed if the tax defaulter does not redeem within a year; and to the county and to the other purchaser alike is given the option to foreclose if it is preferred to taking a deed. There is no indication in the statute of any legislative intention to place one who buys the tax certificate of one who purchased at the sale (a speculator) in a better condition than one who buys the certificate from the county who purchases at the tax sale from necessity to save its taxes. A speculator's certificate ought not to be preferred to that of a county, thus making the latter unsalable; for who will buy a lawsuit? The evident purpose of conferring the privilege of foreclosure is, that if there are tax certificates of prior date outstanding, it might be desirable, by a foreclosure, a proceeding *in rem,* to give holders of such other liens opportunity to come in and thus clear the title. (733)

3. It would be a serious discrimination against counties, which are often the only purchasers, to restrict them to a foreclosure. Frequently the taxes range from $1 or less to $20, and to require the county to go to an expense probably of $20 in each such case to foreclose, after waiting a year for the taxes, will result simply in exempting all lands not paying large amounts from taxation, unless the owners volunteer to pay, for they know that the county will not spend $20 to collect any except large amounts.

4. This construction would put the county in a worse condition after the sale than before. It has already before the sale a lien and execu-

tion, and by this construction, after the purchase, it has only a bare right to bring an action of foreclosure. The county starts in with an execution and winds up with a bare right to bring suit.

The law governing tax sales is as liberal as is consistent with the needs of the public treasury and the duty of every citizen to pay his share of the public burdens. Every taxpayer has the same time in which to pay his taxes. If not paid, and after every reasonable indulgence (which is usually liberal) there is public advertisement and public sale. Even after that, twelve months are allowed in which to redeem the land. And even then, since it might still be possible in some cases that the failure to pay is inadvertent and not intentional, the statute requires that the purchaser shall give the defaulting taxpayer a written or printed notice before applying for his deed. This provision was in the original act of 1887, chapter 137, sections 69 and 82, but, having been dropped out for some reason, was reinstated in the statute upon the suggestion of this Court made in *Sanders v. Earp,* 118 N. C., 275.

(734) If the power to foreclose is as plainly optional in the similar statutes of other States as in ours, it is not strange that the question has not been raised in them, except in one case, *Otoe County v. Brown,* 16 Neb., 394, 397, as it was not raised here till last term, though in *Stanley v. Baird,* 118 N. C., 75, this Court decided for the plaintiff in a case "on all fours" with this, he being, like the plaintiff here, the assignee of a tax certificate from the county. In the Nebraska case, the Court held that the county, instead of taking the tax deed, might, if it chose, proceed by foreclosure, and thus cut off all other tax liens accruing before or after the purchase by the county.

A contemporaneous legislative construction is always of value when the object is to ascertain the legislative will. The General Assembly of 1899 has put in section 87 (which is section 85 of the act of 1895) an express provision that the certificate shall issue to the county in the form prescribed in section 57, though that is plainly so under the act of 1895 which prescribed that form for all purchasers, but the express provision now is not only a legislative construction, but was probably intended to cut off future discussion as to the rights of assignees from a county, as the form there provided is (as now) a contract that the holder of the certificate or his assignee "shall be entitled to a deed" if the tax defaulter does not redeem his land within twelve months.

By the express terms of the law the defendant is debarred from contesting the plaintiff's right, for section 66 provides that he cannot do so unless he first shows that " all taxes due upon the property have been paid by them, or the persons under whom they claim title." The defendant has not offered to do this; on the contrary, this land has been sold

several times for successive failures to pay. In *Moore v. Baird,* 118 N. C., 688, this Court said, in construing the above section: "One who has failed to discharge the lien he owes the State for (735) the taxes due and unpaid on his land cannot complain that the State has transferred to another, who has paid off such incumbrance, its prior lien, and that he cannot be heard in the State's courts, when thus in default, to contradict the title conveyed to the purchaser under such lien."

When the certificate of the former opinion of this Court went down, the judgment below was entered in accordance therewith, it being first shown to plaintiff's counsel, and the costs paid by plaintiff as therein decreed. The defendant contends that this estops the plaintiff from this rehearing. But he could not prevent the judgment being entered below, and could only object if not drawn in accordance with the mandate, for which purpose it was submitted to his inspection. The rule of Court, 53, requires as a condition precedent to a rehearing that the judgment "must be performed or secured." Being only for costs, the petitioner performed it by paying the costs instead of giving security. Instead of being estopped he has only done what the rule of Court requires as an indispensable prerequisite to a rehearing.

As the only object of the courts is to ascertain the legislative will and construe the statute to effectuate it, it would seem that this can only be done by adjudging that the plaintiff, assignee of a county certificate, had the same right as an assignee from any other purchaser to take a deed or foreclose at his election; that even if only a mortgagee, he can recover possession from the defendant in that capacity, and that the defendant cannot be heard as he does not aver that he has yet paid the taxes.

But if the above conclusions were incorrect and the plaintiff were only entitled to foreclose, all the parties and all the facts are before the Court, and upon all the principles of The Code it was error to render a judgment against the plaintiff for costs and drive him to a new action for foreclosure, but the foreclosure should be decreed in this action. The plaintiff is "not restricted to his prayer for relief (736) but should be decreed any relief to which the pleadings and facts, proved admitted, show that he is entitled, and even though the plaintiff has misconceived his remedy." *Jones v. Mial,* 79 N. C., 168; *Knight v. Houghtaling,* 85 N. C., 17; *Patrick v. R. R.,* 93 N. C., 422; *Harris v. Sneeden,* 104 N. C., 369; *Barnes v. Barnes, ib.,* 613; *McNeill v. Hodges,* 105 N. C., 52; *Skinner v. Terry,* 107 N. C., 103; *Johnson v. Loftin,* 111 N. C., 319; *Simmons v. Allison,* 118 N. C., 763; *Adams v. Hayes,* 120 N. C., 383, and there are many others, all to same purport.

FURCHES, J., concurring: This is a petition to rehear, and as the opinion in this case is a *per curiam,* based on *Wilcox v. Leach,* 123 N. C., 74, it is in fact a petition to have the opinion in *Wilcox v. Leach* reviewed.

Notwithstanding the severe criticisms made upon the opinion in that case in the arguments at this term, of probably a half dozen cases, it still seems to me that the opinion in that case is based on sound principles; is a just and proper construction of the statute of 1895, and should be sustained. We were told that this Court can have no policy—that its duty is to construe the law as it finds it and leave matters of policy to the Legislature. I agree with these suggestions. But it is somewhat singular that after these suggestions the greater part of the argument of the petitioner was taken up in discussing the policy to be pursued in collecting taxes to meet the demands of the government; how difficult it was to collect them before the statute of 1887; how the payment of taxes was evaded; what a burden this was on the honest taxpayers; that this decision was going back to the old policy, and that the State would not be able, if this opinion stands, to collect its (737) just revenues. And what was equally striking to me was that we were then told that to remove the doubt this opinion had thrown upon this matter, the Legislature of 1899 had passed an act providing against this erroneous construction of the act of 1895. This being so, the matter of public policy contended for is taken out of the case, and it is reduced to the dignity of an ordinary action, involving the title to land where the plaintiff claims title to 200 or 300 acres of land for which the deed shows he paid less than $20. The plaintiff is entitled to the full benefit of the law arising out of the transaction and nothing more. He is entitled to nothing for the good of the public. There have been a number of cases similar to this before us, brought on deeds acquired upon certificates of sales by counties. But not one has come before us in which the county is a party. The counties do not seem to want land; for it would seem that if they are entitled to a deed upon their certificate, as it is contended they are, and this deed gives them the absolute fee simple to the lands, that they would take the lands and sell them for their value, rather than sell their certificates for a pittance.

We are told that *Stanley v. Baird,* 118 N. C., involved the same question that is presented in this case, and it seems that this question was presented by the record in that case; but it was not called to the consideration of the Court, nor was it considered in passing on that case, as every member of this Court well remembers.

But as I have said, to my mind the opinion in *Wilcox v. Leach* rests on sound and correct principles. The county commissioners are not

the owners of the lands nor of the taxes due from the defendant; they are simply the agents and trustees of the counties to whom the taxes are due. To secure the payment of these taxes they have a lien on the lands of the delinquent taxpayer in the nature of a mortgage, with power of sale. At the sale the auctioneer, who cannot buy for (738) the trustees nor for the principal debtor, bids the land in and under the statute certifies that fact to the commissioners. Does this change their relations in the matter? Does it change their trust relations? Are they, by this transaction, the absolute owners of this land in fee simple? According to the clearest principles of law, which it seems to me that no good lawyer will dispute, they are not.

Herein lies the distinction between a third person becoming the purchaser and the commissioners, who simply direct the crier to bid in the land if it does not bring enough to pay the taxes for which it is being sold—that is, if it does not pay the mortgage debt.

When *Wilcox v. Leach* was decided at the last term of this Court it received the approval of every member of this Court, and in my opinion it was correctly decided and should stand.

NOTE.—Changed by Laws 1901, ch. 558, sec. 18, now C. S., 800; *McNair v. Boyd*, 163 N. C., 480.

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JOHN A. COLLINS AND WIFE, MARY W. COLLINS, v. BETTIE J. BRYAN, HUGH B. BRYAN, AND S. G. WHITFIELD.

(Decided 9 May, 1899.)

*Tax Sales—Certificates—Titles—Act 1895, Ch. 119, Sec. 90.*

The assignee of certificate of sale of land for taxes made to the county acquires only rights of a mortgagee, and must foreclose to complete his title. *Wilcox v. Leach*, 123 N. C., 74.

ACTION for recovery of real estate, tried before *Norwood, J.*, at May Term, 1898, of HALIFAX.

*MacRae, Day & Bell and E. L. Travis for plaintiffs.* (739)
*Gilliam & Gilliam for defendants.*

MONTGOMERY, J. This action was brought to recover the possession of the lands described in the complaint. The lands were sold by a tax collector of Halifax County in 1896 for taxes due upon the same. They

were bid off at the sale for the county of Halifax, and certificates of the sale were afterwards issued by the tax collector to the county. The certificates of sale were assigned by the board of commissioners of the county to John A. Collins, and by him assigned to his wife, Mary W. Collins, the plaintiff in this action.

Afterwards, on 11 March, 1897, redemption not having been made by the owners of the lands, the tax collector made a deed in fee simple, conveying the same to the plaintiff, Mary W. Collins. Under (740) this deed the plaintiffs claim title to the land.

The defendants requested the court to instruct the jury "That as purchaser of said lands the county of Halifax was not entitled to a deed therefor, but was only entitled to foreclose the certificates of sale as in case of mortgage; that the plaintiffs, as assignees of the county, acquired no greater rights, and were not entitled to deeds for said lands." His Honor refused to give the instruction, and told the jury to answer the issue "Yes."

The instruction ought to have been given. We will not enter upon a discussion of the matter here, but simply make reference to the case of *Wilcox v. Leach,* 123 N. C., 74, for the reasoning upon which this case is decided.

We are of the opinion, however, that as it does not appear from the pleadings that the defendants have offered to pay to the plaintiffs the amount of the tax, interest and penalty, the defendants should be allowed a reasonable time within which to pay the same; and in default of such payment the plaintiffs should be allowed in this action to proceed to foreclose the lien which they obtained by the purchase of the certificate from the county; and the plaintiffs ought to be allowed their costs of action in the court below, but not their costs of appeal. There was error in the matter pointed out for which there must be a

NEW TRIAL.

CLARK, J., dissented on grounds stated *ante,* 727.

*Cited: McNair v. Boyd,* 163 N. C., 480.

(741)

F. WHITMAN v. HENRY L. DICKEY.

(Decided 9 May, 1899.)

*Tax Sales—Certificates—Titles—Act 1895, Ch. 119, Sec. 90.*

The holder of a certificate of sale of land for taxes, assigned to him by the county, the purchaser, acquires the county's interest, which is that of mortgagee, and must foreclose to complete his title. *Wilcox v. Leach*, 123 N. C., 74.

CONTROVERSY without action, relating to tax title to land, submitted under section 567 of The Code upon statement of fact agreed, to *Starbuck, J.*, at chambers at Hendersonville, 1 December, 1898.

*M. H. Justice, Burwell, Walker & Cansler and Shepherd & Busbee for plaintiff.*

*R. S. Eaves, B. A. Justice and J. C. L. Harris for defendant.*

MONTGOMERY, J. This is a controversy submitted without action under section 567 of The Code. The facts agreed upon are as follows: At the time for listing the taxes for the year 1896 the defendant was the owner of the tract of land described in the complaint and listed the same for taxation. The defendant made default in (742) the payment of taxes, and George Bickerstaff, a tax collector for the county of Rutherford, where the land is situated, sold the same for the taxes due, after proper advertisement, when the commissioners of the county purchased it and received a certificate of sale from the tax collector. Afterwards the county commissioners assigned the certificate to the plaintiff. The tax collector executed to the plaintiff a deed to the land in pursuance of the sale and under the certificate, after the time of redemption had passed.

The plaintiff contends that the tax collector's deed conveys to him a good title. The defendant contends that the plaintiff's deed from the tax collector is of no force. Upon the facts the court was of opinion that the plaintiff's deed to the land from the tax collector was good, and that the plaintiff was entitled to the possession of the land, and gave judgment accordingly.

For the reasons given in *Wilcox v. Leach*, 123 N. C., 74, we are of the opinion that his Honor was in error, and that the plaintiff is not entitled to recover.

But we are of the opinion, however, that as it does not appear from the facts agreed that the defendant has offered to pay to the plaintiff the amount of the tax, interest and penalty, the defendant should be

allowed a reasonable time within which to pay the same; and in default of such payment the plaintiff should be allowed in this action to proceed to foreclose the lien which he obtained by the purchase of the certificate from the county; and the plaintiff ought to be allowed his costs of action in the court below but not his costs of appeal.

REVERSED.

CLARK, J., dissented, see *ante,* 727.

*Cited: McNair v. Boyd,* 163 N. C., 480.

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(743)

C. J. HUSS v. T. L. CRAIG AND T. W. WILSON.

(Decided 9 May, 1899.)

*"Tax Sales"—Certificates—Titles—Act 1895, Ch. 119, Sec. 90.*

Where land is sold for taxes and the county buys and takes the sheriff's certificate, the interest acquired is that of mortgagee, and the assignee of such certificate acquires the same interest, and, although receiving the sheriff's deed, after time of redemption, in order to complete his title, must resort to foreclosure. *Wilcox v. Leach,* 123 N. C., 74.

CONTROVERSY without action, relating to tax title to land, submitted, upon agreed statement of facts, to *Coble, J.,* at chambers, in GASTON County, 15 April, 1899.

The facts agreed are stated in the opinion. His Honor gave judgment that the plaintiff is the owner in fee of the land in controversy and entitled to the possession of the same. Defendants except and appeal.

*Todd & Pell and Argo & Snow for plaintiffs.*
*R. L. Durham for defendants.*

MONTGOMERY, J. This is a controversy submitted without action under section 567 of The Code. The following is the statement of facts agreed: Prior to 1895 the defendants, T. L. Craig and T. W. Wilson, were tenants in common in fee of the tract of land described in the complaint, and on 3 December, 1895, they contracted to convey the same to George Glenn and put him in possession. The land was listed (744) for taxes for the year 1896 in the name of Glenn, and the taxes

assessed thereon amounted to $2.40. Default having been made in the payment of the taxes, the land was sold for the same by the sheriff of Gaston County, and bid in by the commissioners of the county. The sheriff issued a certificate of sale to the commissioners, in which it was recited "that unless redemption was made of said estate in the manner provided by law the said county commissioners of Gaston County, heirs or assigns, will be entitled to a deed therefor on and after the 3d day of May, A. D. 1898, on surrender of this certificate." Afterwards the certificate was assigned to the plaintiff.

After the expiration of the period of redemption, and the owner not having paid the taxes, the plaintiff presented and surrendered the certificate to the sheriff, and demanded and obtained a deed to the land from him, according to the provisions of the statute. Under this deed the plaintiff claims the land in controversy.

The plaintiff contends that his tax deed conveys a good title to the land in fee. The defendants contend that the plaintiff's deed is void. His Honor was of opinion upon the facts that the sheriff's deed conveyed the title to the land and that the plaintiff was entitled to possession thereof, and gave judgment accordingly. For the reasons set out in *Wilcox v. Leach,* 123 N. C., 74, we are of opinion that his Honor was in error and that the plaintiff was not entitled to recover.

But we are of opinion, however, that as it does not appear from the facts agreed that the defendants have offered to pay to the plaintiff the amount of the tax, interest and penalty, the defendants should be allowed a reasonable time within which to pay the same; and in default of such payment the plaintiff should be allowed in this action to proceed to foreclose the lien which he obtained by the purchase of the certificates from the county; and the plaintiff ought to be allowed his costs of action in the court below, but not his costs of appeal. (745)

REVERSED.

CLARK, J., dissented, see *ante,* 727.

*Cited: Merrimon v. Lyman,* 126 N. C., 542; *McNair v. Boyd,* 163 N. C., 480.

JAMES NORWOOD, ADMR., v. HANES PRATT ET AL.

(Decided 9 May, 1899.)

*Certiorari—Rule 5, 121 N. C., 694.*

At the first term of this Court after the trial below, it is the duty of the appellant to file here the transcript on appeal. If at that time the case has not been settled by the judge, and the appellant has not been guilty of laches, he would be entitled to a writ of *certiorari* therefor, upon his filing all of the transcript that was available.

MOTION for a writ of *certiorari* to the Superior Court of ORANGE. The facts are stated in the opinion.

*John W. Graham and P. C. Graham for plaintiff.*
*C. D. Turner for defendant.*

MONTGOMERY, J. At November Term, 1898, of Orange Superior Court this case was heard upon exceptions filed to a referee's report. All of the exceptions made by the defendants were overruled and (746) the report of the referee was confirmed. The defendants excepted, *seriatim,* to the overruling of each exception. By agreement between the counsel of both sides the judgment was signed out of term, and it was filed in the office of the clerk on 29 November, 1898, and notice thereof promptly given to the counsel of the defendants.

Ordinarily, at the first term of this Court after the trial below, it is the duty of the appellant to have filed here the transcript on appeal. Rule 5, 121 N. C., 694. If at that time the case on appeal has not been settled by the judge and the appellant has not been guilty of any *laches,* he would be entitled to a writ of *certiorari* therefor, upon his filing "all of the transcript that was available."

The district from which this case comes was reached on 7 March, 1899, and at that time the appellants had filed here only a copy of the judgment and the docket entries in the case. The judge had not settled the case on appeal. The certificate attached showed the matter to be a "partial transcript of the record, sent at the request of defendants' counsel." The appellants did not attempt to account for the balance of the record proper (although it appears that it had been for weeks in the clerk's office), and made a motion for *certiorari* to procure the case on appeal.

In *Burwell v. Hughes,* 120 N. C., 277, it was said: "In any event, since the appeal should be docketed here at the first term beginning after the trial below, it was the duty of the appellant at such first term

to file all of the transcript that was available, and have asked for a *certiorari* to complete the transcript. His failure to do so is a lack of diligence and forfeits his appeal."

The allegation of the appellants is that the rest of the tran- (747) script was not furnished because the clerk would not make it out, notwithstanding the fact that their counsel tendered to him the fees necessary for that purpose. The clerk's affidavit was to the contrary. We need not, however, pass upon that contradiction. The appellants were not before this Court according to its rules, and, before they could get a standing here, it was incumbent on them to show, to our satisfaction, that they had not been guilty of laches. We cannot say that that has been shown affirmatively, and we must therefore deny the motion for a *certiorari,* and dismiss the appeal.

CLARK, J., concurring: The settled practice upon such applications as this is thus stated in *Burwell v. Hughes,* 120 N. C., 277 (which was an appeal from the same county and in which the same counsel represented the appellant): "It was the duty of the appellant at such first term to file all the transcript that was available, and have asked for a *certiorari* to complete the transcript. His failure to do so is a lack of diligence and forfeits his appeal. *Brown v. House,* 119 N. C., 622; *Haynes v. Coward,* 116 N. C., 840; *Graham v. Edwards,* 114 N. C., 228; *Sanders v. Thompson, ib.,* 282; *S. v. James,* 108 N. C., 792; *Collins v. Faribault,* 92 N. C., 310, and there are still other cases. There are *some* matters at least which should be deemed settled, and this is one of them." This has since been cited and followed in *Morrison v. Craven,* 120 N. C., 327; *Critz v. Sparger,* 121 N. C., 283; *Rothchild v. McNichol, ib.,* 284; *Parker v. R. R., ib.,* 501; *McMillan v. McMillan,* 122 N. C., 410; and in other cases disposed of *per curiam,* because reiteration was unnecessary, among them the case last called immediately preceding this on the docket—*Trollinger v. R. R., post,* 876.

It has been contended that if the *certiorari* were granted no harm would be done. In the first place, the case would go over to the Fall Term, and delay of justice is often a denial of justice, and is one of the evils held so great that a provision against it was inserted (748) in Magna Charta. Besides, there must of necessity be rules of procedure or the administration of justice would be "confusion worse confounded." It is not material whether an appeal should be docketed "at the first term beginning after the trial below," as our rule requires, or at the second term, or at the third term, but whatever the rule, it should apply to all. It is not material whether, on an application for a *certiorari,* the applicant must docket as a basis "a transcript of all the record that is available" (as our uniform decisions require), or only a

copy of the judgment, or nothing, but whatever the requirement, it must be impartially applied to all. An exemption of any litigant would be favoritism or at the least the uncertain "rule of the chancellor's thumb"—varying in thickness.

As far as possible, the courts should give their time to the decision of disputed rights and eliminate as far as they can all mere questions of practice, as to the proper manner of presenting cases in courts. This renders it of the gravest importance to have the practice settled and to adhere to it impartially, letting all needed changes be made by statute or by changing the rules of Court so as to be prospective. If this is not done, and the well-settled practice is not adhered to, the Court would be deluged with questions of mere procedure "to the neglect of the weightier matters of the law."

MOTION DENIED.

*Cited: Worth v. Wilmington,* 131 N. C., 533; *S. v. Telfair,* 139 N. C., 555; *Walsh v. Burleson,* 154 N. C., 175.

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(749)

GEORGE N. HUTTON ET ALS., PARTNERS IN MANUFACTURING LUMBER, v. THOMAS M. WEBB, SHERIFF, AND THE BOARD OF COMMISSIONERS OF BURKE COUNTY.

(Decided 10 May, 1899.)

*Floatable Streams—Catawba and Johns Rivers Assessments Act 1897, Ch. 388—Constitution, Art. VIII, Sec. 4.*

1. The right of taxation or assessment is a grant of sovereign power and can only be exercised for the public good and not for private benefit or for corporate gain, unless such gain be incident to the public benefit.

2. While the Legislature may by proper enactments provide for the improvement of navigable and floatable waterways for the *benefit of navigation,* it cannot impose duties upon the commerce upon such waters for the purposes of building bridges or cleaning out fords, public and private, across such watercourses.

3. The act of 1897 (chapter 388) appointing a board of managers to provide for removing driftwood from the Catawba and Johns rivers, between points named, which may gather at the shoals on said streams at low water, so as to obstruct fords used for public and private crossings, or pond back the water, and empowering the board to ascertain the number of logs floated down said streams, and to impose an assessment upon each log, the fund derived to be apportioned among the counties of Burke, Catawba, and McDowell, and to be used for the purpose of keeping the

fords clear and for building bridges, is manifestly an act passed for the benefit of these counties and not for the public good, and is in contravention of the Constitution, Art. VIII, sec. 4, inhibiting abuse in assessment, and is in conflict with the whole tenor and spirit of the Constitution and of our institutions.

ACTION for injunction relief to restrain the defendants from enforcing an assessment on the property of plaintiffs and from interfering with their floatage of logs down the Catawba and Johns rivers. (750) A temporary order of restraint was granted by *Robinson, J.,* in this cause, pending in BURKE, and came to a hearing, by consent, before *Bryan, J.,* at chambers at Raleigh, on 25 October, 1898, and was heard upon affidavits from both sides by his Honor.

The complaint alleged that the plaintiffs were engaged in the manufacture of lumber in this State, owning planing mills and a sawmill plant in Catawba County, also owning large quantities of standing timber in the Catawba and Johns rivers, and also owning a large quantity of cut logs, and are purchasing large quantities of logs to supply the milling plant, and that their only convenient way of getting the same to said plant is by floating them down said rivers, which are floatable streams.

That the defendant commissioners have caused an assessment of $275.50 to be made upon their logs, and have required the defendant sheriff to collect the same, and that he has levied upon 150,000 feet of their sawed lumber and has advertised it for sale.

That the defendants are professing to act under color of an act of the Legislature ratified 9 March, 1897 (Laws 1897, ch. 388), which in terms attempts to authorize the board of managers mentioned therein to exact such tolls for the purpose of removing of driftwood "that may gather at the shoals on said streams, when the water is low, so as to obstruct fords used for public and private crossings, or pond back the water at any point" on said rivers, and also for the purpose of building certain public bridges over the said streams; that the plaintiffs are advised that the said act is invalid and void, in that the Legislature has no power to authorize assessments for such purposes on the plaintiffs and others of the public engaged in the exercise of the paramount right of navigation by floating of said streams, and that the duty of (751) building such bridges and clearing-out of such fords from driftwood is imposed upon the public generally to whose benefit it inures, and not upon these plaintiffs alone and those similarly engaged in the floatage of logs in said streams who receive no peculiar benefit from the building of such bridges or the clearing out of such fords, apart from the general public, being in no wise necessary to, or in furtherance of, the floatage of logs during the seasons when said streams are floatable.

The answer sets up Laws 1897, ch. 388, as a full and complete authorization of the acts of the defendants complained of by plaintiffs. His Honor continued the injunction until the final hearing. Defendants excepted and appealed.

*Shepherd & Busbee for plaintiffs.*
*A. C. Avery and J. M. Mull for defendants.*

FURCHES, J. We think the judgment below should be affirmed. To our minds there is too little resemblance in a public turnpike road and a navigable watercourse to afford analogy for argument, from which proper conclusions may be drawn. The turnpike is created by legislation and can be abolished by legislation. But a navigable watercourse is not created by legislation and cannot be abolished by legislation.

It is true that the Legislature may by proper enactment provide for the improvement of such waterways for the *benefit of navigation.* But the Legislature cannot impose duties upon the commerce upon such waters, for the purpose of "building public bridges, and of cleaning out the fords, public and private, across" such watercourses. The right of taxation or "assessment" is a grant of sovereign power and can only be exercised for the public good. This sovereign power cannot be granted for private benefits or for corporate gain, unless such gain be incident to the public benefit, authorizing the exercise of the taxing power of government.

(752)

It is manifest from the provisions of this act that it was passed for the benefit of the counties of Burke, McDowell and Caldwell, and not for the public good—the improvement of the navigation of the streams therein named, as their improvement for such purpose is not mentioned. The duty of this "board is to remove driftwood (that may gather at shoals on said stream when the water is low, so as to obstruct fords used for public and private crossings, or pond back the water) at any point on the Catawba River," etc. And this board is to provide for the ascertainment of the number of logs floated and to *fix the charge thereon;* and "after paying for keeping the shoals as aforesaid and for ascertaining the number of logs floated, any residue of the fund arising from said tolls shall be divided among said counties." This board is to report to the commissioners of each of the counties the respective part of dividends that belong to it, and the commissioners shall "assess the same" and enter up judgment for said amount against the parties assessed, and execution shall issue thereon "as for other tax assessments." This act was passed in the spring of 1897, and under its operation the plaintiff was taxed $275.50 in the spring of 1898, and his property

advertised for sale. But few private business enterprises in this State can stand such an assessment as this. In our opinion, it is in contravention of the provision, Article VIII, section 4, of the Constitution, there being nothing in the act limiting the power or extent of (753) taxation.

But, outside of this provision of the Constitution, we do not believe it can be sustained. It provides for the levy of "taxes or assessments" on private property for private benefit, and not for the public good. It is in conflict with the whole tenor and spirit of the Constitution, and of our institutions. It is an unauthorized exercise of sovereign power in the hands of this new board of commissioners, and we think the judgment of the court appealed from should be affirmed.

MONTGOMERY, J., dissents.

CLARK, J., dissenting: In England the test of navigable rivers is the ebb and flow of the tide. In this country, owing to essential differences in topography, the test of a navigable river (over which class of streams alone Congress has jurisdiction) is that it is wide enough and deep enough to be navigable by sea-going vessels, and below falls or other obstructions so as to be accessible to such vessels. Navigable streams are subject to regulation by State legislation provided it is not repugnant to any regulation thereof by Congress. *Bagg v. R. R.,* 109 N. C., 281; *Morgan v. Louisiana,* 118 U. S., 455; *Smith v. Alabama,* 124 U. S., 465; *R. R. v. Alabama,* 128 U. S., 96; Cooley Const. Lim., 595; 16 A. and E., 264, and this to the extent even of imposing a reasonable toll as compensation for improving the navigation of such streams, if not in conflict with some statute passed by Congress in pursuance of its paramount right. *Thomas Bank v. Lovell,* 46 Am. Dec., 332; *Benjamin v. Manistee,* 42 Mich., 628; *McReynolds v. Smallhouse,* 8 Bush. (Ky.), 447; *Morris v. State,* 62 Texas, 728; Prentice & Eagan Commerce, Clause 113, and cases cited.

Streams not technically navigable in the above sense are exclu- (754) sively within the State jurisdiction and are those non-navigable and those cut off by falls in the river from access by sea-going vessels (*Com. v. King,* 150 Mass., 221; *The Montello,* 11 Wall., 411), and streams strictly non-navigable are divided into floatable and non-floatable.

The distinction between floatable and non-floatable streams is drawn in *Comrs. v. Lumber Co.,* 116 N. C., 731, in which it is held that the Catawba River, at the location now in question, is a floatable stream, and the act of the General Assembly, Acts 1897, ch. 388, recites that

decision and provides for the regulation of the use of said stream for floatage purposes. It is the constitutionality of that statute which is called in question by this action.

In *S. v. Glenn,* 52 N. C., 321, it is said that "When a stream (not navigable) is naturally of sufficient depth for valuable floatage, the public have an *easement* therein for the purpose of transportation and commercial intercourse, and in fact they are *public highways by water,*" this easement being explained to be as to the use of the stream for said purposes, the bed of the stream and with it the right of fishing being capable of grant to the riparian owners. To same effect *Bucki v. Cone,* 25 Fla., 1.

Floatable streams being "public highways by water," as said in *S. v. Glenn, supra,* the State can in the exercise of its powers provide regulations for the unrestricted exercise thereof, and provide for the expense of doing so and of keeping the channel open, either by funds out of the public treasury or by tolls upon the commerce using said streams (*i. e.,* logs and rafts), and this power it can exercise through commissioners appointed directly by the State or confer the control and the power to lay tolls upon the commissioners of the counties through which such "public highway by water" flows.

In many instances the State has devolved the duty of keeping (755) open the use of floatable streams upon private companies, giving in consideration thereof the right to exact tolls (as is also done in the case of turnpikes), and such acts have been sustained as a legitimate exercise of legislative power, and that these do not infringe "the right of free navigation." *Osborne v. Knife Falls Co.,* 32 Minn., 412; *Benjamin v. Manistee,* 42 Mich., 628 (opinion by *Cooley, J.*); *Nelson v. Navigation Co.,* 44 Mich., 7; *Morris v. State,* 62 Tex., 728; *Green v. Palmer,* 83 Ky., 646; *Lumber Co. v. Boone Co.,* 17 Fed., 419; *Huse v. Glover,* 119 U. S., 343; *Sands v. Manistee,* 123 U. S., 22. Nor conflict with the constitutional inhibition against taking private property without compensation. Gould on Waters, sec. 143, and cases cited. *A fortiori* the State can confer the control of a public highway and the right to lay tolls upon the transportation thereon, upon one of its own agencies, the commissioners of the counties through which, or upon whose borders, the stream runs. It is difficult to understand why it is not competent for the Legislature, under its general police power, to permit the organization of a governmental agency to improve the navigation of these streams for logs in the same way and to devote any profit arising from tolls to the special purpose of improving and building such bridges as would not interfere with the passage of logs, instead of putting such profits into the coffers of the county to be used for general county purposes.

This is not a tax or an assessment (as in *Peace v. Raleigh,* cited by plaintiff's counsel), but a toll which is provided for in the act in question. It is a matter of universal knowledge that the Legislature has resorted to the plan of allowing persons or companies to charge toll for the purpose of keeping up certain public roads in the mountain counties in North Carolina. The charging of these tolls has been at times allowed, and at other times discontinued by the Legislature. It (756) was always in contemplation of the State and those in charge of such roads that a profit would be realized and pocketed by those who should keep the highways in good condition. There is no reason why the State should not embark in the same business itself or authorize one of its local agencies to engage in it and to apply its profits for the public good.

Were these charges technically taxes instead of tolls? It has been held that even a tax levied within the constitutional limits for one county purpose may be devoted to another county purpose. *Long v. Comrs.,* 76 N. C., p. 280.

The Legislature has the power to convert an ordinary public highway used as a carriage and wagon road into a turnpike or toll road. The courts hold in such cases that "the change is not in the character of the servitude but in the mode of sustaining the highway, or keeping it in repair, viz.: in substituting tolls instead of taxes or involuntary labor." *Carter v. Clark,* 89 Ind., 238, 239; Elliott on Roads and Streets, p. 55, and authorities there cited. Especially see *Walker v. Caywood,* 31 N. Y., 51; *Wright v. Carter,* 27 N. J., 76; *Douglass v. Boonesborough,* 23 Md., 219; *S. v. Blake,* 36 N. J., 442.

Has the Legislature the power to assume the same control over *navigable* and *non-navigable* streams as *over* the *dirt roads* made *such* by authority of law?

"It is too late to question that the police power of the State (which is part of its general legislative power) extends to providing for every object which may be reasonably considered necessary for the public safety, health, good order or prosperity, and which is not forbidden by some restriction in the State or Federal Constitution, or by some recognized principle of right or justice found in the common law. It is unnecessary to consider at present the limits of this extensive (757) power, *since it clearly includes the right to provide for and compel the clearing out, not only of such watercourses as are naturally navigable, but of all such watercourses and drains as are not and never were navigable,* but which are necessary for carrying off the surplus drain water, thereby promoting the public health, and enabling a considerable portion of territory, otherwise uninhabitable, to be brought into cultivation." *Norfleet v. Cromwell,* 70 N. C., 634; *Brown v. Keener,* 74

N. C., 712, at pp. 716, 717; The Code, secs. 3707, 3710, 3711; *S. v. Moore,* 104 N. C., at pp. 720, 721 and 722; *Sands v. Manistee,* 123 U. S., pp. 294, 295.

The boards of commissioners of two or more counties can be united in such work by legislative authority. *Herring v. Dixon,* 122 N. C., 420.

If a charter were granted to a private company to clean out the channel and, in consideration of keeping it open and of building all necessary bridges over the stream, the company were authorized to levy toll on the logs and other traffic, could there be any doubt of the legality of such charter? If not, then certainly the State can exercise the powers it could grant and can confer them upon the county commissioners of the riparian counties as agencies of the State.

As to the suggestions in the argument of the possible purposes in passing the act in question it has always been held that the courts will not inquire into the motives of legislators of any kind of grade, whether it be the Congress of the United States, the Legislature of the State, or a municipal board, except in so far as they may be disclosed by (758) the language of the act itself, and every intendment of law is in favor of the good faith of a legislative body. *S. v. Moore,* 104 N. C., p. 714; *Soon Hing v. Crowley,* 113 U. S., pp. 703, 704, 710; *Angle v. R. R.,* 151 U. S., 18. Unless an act is plainly unconstitutional upon its face, it is the duty of the courts to sustain and uphold the exercise of the legislative will. *Hoke v. Henderson,* 15 N. C., 1; *Sutton v. Phillips,* 116 N. C., 502; *McDonald v. Morrow,* 119 N. C., 670; *S. v. Moore,* 104 N. C., at page 719.

In granting the restraining order against the defendants' proceeding, as authorized by the terms of said act, I think there was error.

DOUGLAS, J., concurring in judgment: This case presents, either necessarily or by possible implication, many difficult and perplexing questions, rendered more so by their far-reaching and perhaps unforeseen results. What is and is not a floatable stream I am at present utterly unable to define, and my inability is not lessened by reading the authorities from other States. The doctrine may be said to be of common-law origin, and like nearly all such doctrines is the offspring of necessity. It seems to come to us from some of the Northern States where there are large bodies of timber with intersecting streams, but few local railroads and no efficient system of public roads. The present value of such lands is principally in their timber, and its value depends upon the accessibility of market. Under such circumstances the practical use of the smaller streams is confined almost exclusively to floatage, which, being

of paramount importance, came to be regarded as of paramount right. Having such an origin, the doctrine is naturally affected in different States by their different necessities and local statutes.

How small a stream may be floatable I am not prepared to say; and I am glad that at least this much difficulty has been solved by the decision of this Court holding that these streams now under (759) consideration are floatable streams. I suppose this is now the law of the case; but it does not settle the case. The term "floatable stream" implies an easement in some one to use the stream for purposes of transportation. Whether this easement belongs to the general public or is appurtenant to the riparian lands, it is difficult to say. If it exists at all, it must belong to the riparian owner, as a *natural* easement. Whether it vests in him solely, or in common with others, it is needless now to discuss. If it is worth anything to anybody, it is a valuable appurtenance to his land, of which he cannot be deprived without adequate compensation. Whether this compensation must be in money, or may be in the increased conveniences afforded him by valuable improvements upon the stream, need not now be considered, as no compensation whatever appears to have been given to him, and no substantial improvements have been made which would increase the facility of transportation. I speak of the riparian owner as a class, each of whom has the easement, where it exists, as far as the floatability of the stream extends. If he owns the easement, then the State cannot charge him for the simple use of it. In the majority of cases the State has granted to him the bed of the stream, and has nothing left therein to *grant* to any one else. I concede the right of the State to establish a highway on water or land, but it can acquire the bed of the highway in private lands only by sale or dedication by the owner, or by condemnation according to law, with adequate compensation. Whether the State establishes such a highway directly or through the agency of the counties or even by a private corporation, may not be material, as in any event it would be a delegated exercise of the right of eminent domain, which is exclusively vested in the State as an inherent prerogative of sovereignty. The State cannot take private property even for a public use without just compensation, and cannot take private (760) property solely for the private use of another under any circumstances. Of course it cannot authorize any one else to do what it cannot do. I also admit that where the State has made or caused to be made valuable improvements of a local nature, it may charge a reasonable compensation for the use of the increased facilities and benefits afforded by such improvements. But this is in the nature of a toll and not a tax, and presupposes some corresponding benefit to him who pays the toll. Where there is an utter failure of consideration, why should the

toll be paid? But it is said to be in the nature of special tax levied upon the property to be benefited. But on what property is it levied? Not on the logs, for they have not been benefited, nor even assisted in their journey. Moreover, a tax must possess some element of uniformity; and if levied locally for a special purpose, its disbursement must be confined to its creative objects.

While I do not mean to attack the *general* constitutionality of the act, I think it is defective in application, and affords no constitutional warrant for the assessment under consideration, as no improvement whatever has been made upon the stream, and no pretense of condemnation of whatever private property may have vested therein. I do not think the State can, in the utter absence of any general system of taxation, tax directly or indirectly the easement held by the plaintiffs. For the reasons stated above, I think the judgment should be affirmed.

PER CURIAM. AFFIRMED.

*Cited: S. c.,* 126 N. C., 897.

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(761)

STATE ON THE RELATION OF C. C. CHERRY v. J. L. BURNS.

(Decided 13 May, 1899.)

*Keeper of the Capitol—Offices, Constitutional and Legislative.*

1. Constitutional offices must be filled in the mode designated in the Constitution.
2. Under the amended Constitution of 1875, the Legislature may provide for the filling of any office created by statute.
3. The office of Keeper of the Capitol is a legislative office. By the act of 23 February, 1899, amending section 2301 of The Code, the Legislature conferred upon themselves the power to fill that office, and on 6 March, 1899, elected the plaintiff.

QUO WARRANTO brought before *Brown, J.,* at April Term, 1899, of WAKE, to try the title to the office of keeper of the capitol. His Honor, by consent, found the facts, and rendered judgment in favor of plaintiff.

(763) *Shepherd & Busbee for plaintiff.*
*Douglass & Simms for defendant.*

FURCHES, J. On 8 March, 1897, the defendant Burns was duly appointed keeper of the capitol. He complied with the requirements of

the law by filing his bond, was qualified and inducted into office. On 3 January, 1899, he filed another bond, in which it is stated that the defendant had been appointed keeper of the capitol for 1899 and 1900. This bond was approved and filed. On 23 February, 1899, the Legislature passed an act amending section 2301 of The Code, by which they took from the "Board of Public Buildings" the power to appoint a keeper of the public buildings, and conferred this power on the "General Assembly." And on 6 March, 1899, the General Assembly in joint session elected the plaintiff keeper of the public buildings, who, after filing his bond and taking the oath of office, demanded this office of the defendant, which demand was refused, and this action was brought for the possession of said office.

These facts are admitted by the defendant, but he alleges that the plaintiff cannot recover for several reasons: That defendant's term of office has not expired; that it is a constitutional office, and for that reason the appointment belongs to the Governor and his board, and the Legislature cannot take it from them; that the act of 23 February, 1899, amending section 2301 of The Code, taking the power of appointment from the Governor and board, conferred the power on the General Assembly, and that meant the two Houses of the General Assembly and not a joint session of that body; that the vote should have been taken separately in each house, and that the plaintiff could not be elected, under this amendment to section 2301, without receiving a majority of the votes in each house.

These are the defendant's contentions, which we will proceed (764) to examine.

Section 2301 of The Code provides that "The Board of Public Buildings" shall appoint a keeper of the capitol, "who shall hold his office until his successor is appointed and files his bond as required by this chapter." The question as to whether the defendant's office has terminated or not depends upon the fact as to whether his successor has been appointed and filed his bond.

If this office is a constitutional office, we should hold that the Legislature could not fill it or provide for its being filled, otherwise than is provided by the Constitution. Then, is it a constitutional office? If so, why is it so? It is not named in the Constitution, and the only ground for this contention made in the argument was that it was an office existing at the adoption of the Constitution and was thereby recognized by the Constitution, and the fact that *Judge Pearson,* in delivering the opinion of the Court in *Welker v. Bledsoe,* 68 N. C., 457, called "the keeper of the capitol" a constitutional office. It seems to us that it cannot be held to be a constitutional office, because there was a "keeper of the capitol" at the time the Constitution was adopted. If we were

to hold this, it is probable there would be more than one thousand offices in the State that are constitutional offices that have never been so regarded by lawyer or layman.

We have the very greatest respect for anything said by *Chief Justice Pearson,* though it be *obiter.* And the fact that he said in *Welker v. Bledsoe, supra,* that the office of the "keeper of the capitol" was a constitutional office, caused us to hesitate and examine the case with great care. It was not at all necessary for the Court to pass upon the question as to the keeper of the capitol in *Welker's case;* it was in no way involved, and it added nothing to the strength of the argument
(765) in that case. And this is an instance in which a great judge has slipped in giving expression to an *obiter* that cannot be sustained.

The case of *Clark v. Stanley,* 66 N. C., 59, and many other cases establish the fact that this is an office. Indeed, this is not denied by the plaintiff.

*Welker v. Bledsoe, supra,* and that line of cases in the 68 N. C., were all under the Constitution of 1868, and are not of the same authority now as they were under that Constitution. If the present Constitution was the same as that of 1868, there would be no difficulty in deciding this case for the defendant; but not upon the ground that it is a constitutional office, but because the Legislature would be prohibited from filling the office whether it was a constitutional office or not. These cases are to be viewed in the light of the amended Constitution of 1875. The amendments in the Constitution of 1875 made material changes in the Constitution of 1868. The amended Constitution of 1875 leaves out that clause which prohibits the Legislature from filling any office, and also that clause "or which shall be created by law." These were important provisions, and must have been stricken out of the Constitution of 1868 for a purpose. It is said it was done in consequence of the decision in *Welker v. Bledsoe, supra; Nichols v. McKee,* 68 N. C., 429, and that line of decisions. If this is so (and we think it probably is) it affords us some aid in construing the Constitution of 1875, and leads us to the opinion that the Legislature may fill this office. This view seems to be sustained by *University v. McIver,* 72 N. C., 76; *Ewart v. Jones,* 116 N. C., 570; *Wood v. Bellamy,* 120 N. C., 212, and *State Prison v. Day, ante,* 362.

The only remaining question is the election of the plaintiff. If he has not been elected, he cannot succeed in this action, whether the defendant is properly in or not. *Stanford v. Ellington,* 117 N. C.,
(766) 158. And if the plaintiff has been elected and given his bond, the defendant's office has terminated, no matter how he was elected. Code, sec. 2201. We have seen the Legislature has power to elect. Has it done so? It is admitted it passed an act providing that

the "General Assembly" should elect, and it appears by a certificate signed by the president of the Senate and the speaker of the House of Representatives, that the plaintiff was elected in joint session of the General Assembly. This is admitted. But defendant says this was not an election by the General Assembly; that they could not legislate in joint session. We agree that they could not legislate in joint session, but the election of the plaintiff was not legislation. It was the exercise of a delegated power. Suppose the act had provided that the House alone should elect. We think it might have done so, and the two bodies when assembled are styled the General Assembly. Constitution, Art. II, sec. 9. This being so, we are of the opinion that the General Assembly in joint session was the constituted agent to make the election.

The defendant says that the certificate does not show that there was a quorum of either House present at this election; nor does it show who voted. This is so, but as the certificate shows that there was an election, and nothing else appearing, the law presumes a quorum and that the election was regular. *Stanford v. Ellington, supra.*

For these reasons we are of the opinion that the judgment should be AFFIRMED.

*Cited: Cunningham v. Sprinkle, ante,* 641; *Salisbury v. Croom,* 167 N. C., 226.

(767)

CAPITAL PRINTING COMPANY v. CLYDE R. HOEY AND OTHERS, JOINT COMMITTEE ON PRINTING; EDWARDS & BROUGHTON, AND E. M. UZZELL; AND CYRUS THOMPSON, SECRETARY OF STATE.

(Decided 13 May, 1899.)

*Public Printing—Contract—Mandamus—Injunction.*

The acceptance by the joint committee of both houses of the General Assembly on public printing, of a bid by the lowest responsible bidder, does not become a contract for the public printing for the State until the necessary details, along with the prices, are incorporated in a written contract, the act of Assembly requiring that the committee should have the agreement reduced to writing. Until written and executed, the contract is incomplete.

MANDAMUS and injunctive relief, made to *Brown, J.,* at chambers in Raleigh, during April Term, 1899, of WAKE.

The complaint alleged that the plaintiff was the lowest bidder for the public printing; that his bid had been accepted and bond approved by

joint committee of both houses, but that they had refused to put the contract in writing according to the terms of the agreement, and, claiming to act under legislative authority, had transferred the contract for the public printing to Edwards & Broughton and Uzzell, and that the Secretary of State would not recognize the contract made with plaintiff. The mandamus was asked to compel the committee on printing to execute a written contract for the public printing with the plaintiff, and to compel the Secretary of State to turn over to him the laws, journals, and public documents to be printed. The injunction was asked against the other defendants to enjoin them from proceeding with the public printing. The defendants demurred *ore tenus* to the jurisdiction
(768) of the court, and on the ground that the complaint did not state a cause of action.

His Honor sustained the demurrer and dismissed the case. Plaintiff excepted and appealed.

*A. J. Feild and Battle & Mordecai for plaintiff.*
*J. N. Holding for defendant Legislative Committee.*
*Womack & Hayes for defendants Edwards & Broughton.*
*Armistead Jones for defendant E. M. Uzzell.*

MONTGOMERY, J. This is an application, made by the plaintiff company, for writs of mandamus against those of the defendants who are alleged to be members of the joint committee on printing of the General Assembly of 1899, to compel them to execute a written contract with the plaintiff in accordance with an alleged agreement with the plaintiff and that committee, by which the plaintiff was to do the public printing for the State, and against the Secretary of State, who is also a defendant, to compel him to deliver the copies and manuscripts of laws, journals, documents, and other matter to be printed by the State, to the plaintiff as public printer. Injunctive relief was asked against the other defendants, Edwards & Broughton and E. M. Uzzell. All of the defendants answered, and then all, except the Secretary of State, demurred *ore tenus* to the complaint, on the ground that the complaint did not state a cause of action against Edwards & Broughton and Uzzell, and that the court was without jurisdiction as to the other defendants, as the proceeding was against the State of North Carolina and could not be maintained on that account. His Honor sustained the demur-
(769) rer and dismissed the proceeding, and from the judgment the plaintiff appealed.

The facts stated in the complaint are to be taken as true—the effect of the demurrer. From the complaint it appears that by an act ratified on 24 January, 1899, those of the defendants who were appointed a joint

committee on printing were directed on the part of the State to execute and deliver a contract for the public printing and binding. The first, second, third, fourth, and fifth sections of the act are in the following words:

"Section 1. The joint committee on printing are directed, on the part of the State, to make, execute and deliver a contract for the public printing and binding at not more than the following rates: For every one thousand ems of plain composition, 30 cents; for every one thousand ems of rule-and-figure work, 60 cents; for every token of two hundred and forty impressions of presswork, 20 cents; for law sheep binding, 45 cents per volume of 600 pages; for half binding, 20 cents per volume of 600 pages; for every 48 pages over 600, one cent per volume. The contract, however, shall be made with the person whose bid shall require payment from the State of the least amount of money on account thereof. The necessary freight and other expense to be incurred by accepting any proposition for the public printing shall be taken into consideration, so that the work may be done and the printed matter be delivered for distribution in the city of Raleigh at the lowest price obtainable from a responsible bidder. The said committee shall have the right to reject any bid if in its opinion the same is not made by responsible parties; and in awarding the said contract, regard shall be had to the character of the work to be done and of the quality of the material to be used, in passing on the responsibility of the bidder: *Provided,* the contract shall be let to a person or firm in the State of North Caro- (770) lina. And for all job printing and binding ordered by the State departments, and the subdepartments thereof, the usual customary rate charged by printers for such work, to be approved by the Commissioner of Labor and Printing, as hereinafter provided for.

"Sec. 2. The parties to whom the said committee may award the public printing and binding shall give bond, with approved security, payable to the State of North Carolina, in the sum of $5,000, conditioned for the faithful performance of his duties and undertakings under said contract, and under this act the surety or sureties herein required shall justify before some person authorized to administer oaths.

"Sec. 3. Each bill for printing shall be charged by the 'quad em' and 'token,' and the binding per volume; and before being paid for by the State, shall be examined and approved by the Commissioner of Labor and Printing, who shall impartially examine said printing and binding, and determine both the manner of its execution and the correctness of its accounts rendered for the same.

"Sec. 4. The public printer may select such quality and quantity of paper as may be necessary for doing the public printing, which requisition shall be approved by said 'Commissioner of Labor and Printing,'

and upon such requisition it shall be the duty of the Secretary of State to purchase said paper and turn the same over to the public printer, taking his receipt for the same."

Section 6 of the act contains a proviso, as follows: *"Provided,* that when printing the reports of State officers and State institutions, the public printer shall print of said reports the number of copies necessary for binding in the public documents, and for the copies required for public documents said printer shall be paid, in addition to the
(771) presswork, only for changing heads and folios of said reports, such amount as said Commissioner of Labor and Printing shall allow therefor."

Under the act of Assembly, the committee met on the day after the ratification of the act to receive bids on the public printing, when Edwards & Broughton, Nash Bros., E. M. Uzzell, and the plaintiff company appeared and handed in their bids to the committee, and the bids were opened in the presence of the bidders and their respective attorneys. It was conceded then and there by all the bidders that the bid of the plaintiff was the lowest bid, and was as follows: "For plain composition, per 1,000 ems, 20 cents; for rule-and-figure work, per 1,000 ems, 40 cents; for every token of 240 impressions of presswork, 11 cents; for law sheep binding, per volume of 600 pages, 35 cents; for half binding, per volume of 600 pages, 14 cents; for binding every 48 pages over 600, per volume, one-fourth of one cent; for all other work the prices named in the act."

The bid of Edwards & Broughton was at the prices named in the act as maximum.

The particulars of the acceptance of the plaintiff's bid appear in the seventh, eighth, and ninth allegations of the complaint, as follows:

"7. That afterwards, to wit, on 28 February, 1899, said joint committee met for the purpose of passing on the responsibility of plaintiff, and after hearing evidence and examining samples of work done by plaintiff, found as a fact that plaintiff was responsible, and approved its bond for $5,000, with the surety thereon, which was tendered by plaintiff; and said joint committee then and there, by a vote, accepted plaintiff's said bid and awarded to plaintiff the contract for said public printing, pursuant to the terms of said act and in accordance with its said bid.

"8. That thereupon said joint committee appointed M. H.
(772) Justice, Clyde R. Hoey, and S. M. Gattis as a subcommittee to reduce to writing said contract, made as aforesaid, between the State of North Carolina and plaintiff.

"9. That at the time said contract was let to plaintiff, as aforesaid, Edwards & Broughton, who had been theretofore doing the public printing temporarily, had in their hands certain matter to be printed for the

House of Representatives, which they promptly returned without printing; that the same was at once given to plaintiff by the proper officers of the House, and other matter to be printed for both the House and the Senate was sent to plaintiff by the proper officers of those bodies, and plaintiff was instructed by Clyde R. Hoey, chairman of the House branch of said joint committee, to do said printing, and he stated that he wished the bill to be rendered therefor to be in accordance with the terms of plaintiff's said contract with the State, and plaintiff did do said printing accordingly."

An attorney at law was selected by the committee to prepare the contract, and after it was prepared the plaintiff refused to sign it, alleging that it was unjust, unreasonable and not in accordance with the plaintiff's accepted bid and the requirements of the act of Assembly. The contract prepared is as follows:

"This agreement, made and entered into this 7 March, 1899, between the State of North Carolina, through the joint committee on printing of the General Assembly, of the one part, said committee being thereto duly authorized by law, and the Capital Printing Company, a corporation, of the other part:

"Witnesseth, That the said Capital Printing Company hereby undertakes and agrees, upon the terms and conditions named in this contract, and at the prices hereinafter set forth or provided for, accurately, promptly, and in good time, and in a first-class, workmanlike (773) manner, to do all the public printing, binding, job work, and all other similar work required and allowed by law to be done during the said term of one year, ten months and fifteen days from the date of this contract by the said State of North Carolina and for all the departments and subdepartments and the penal and charitable institutions thereof, and to deliver the same in the city of Raleigh, to the proper officers or departments, without cost of freight, expressage, drayage, or charges of any kind to said State, other than those set forth or provided for in this contract:

"And in consideration thereof the said State of North Carolina, through said joint committee on printing, agrees that, upon the conditions named in this contract, and at the prices hereinafter set out or provided for, all printing, binding, job work and all other similar work required and allowed by law to be done during said term of one year, ten months and fifteen days from the date of this contract, for said State and its departments, subdepartments and penal and charitable institutions, shall be done by the said Capital Printing Company, and the same shall be paid for at the prices hereinafter named or provided for, and none other, and in the manner herein named and provided for, which said prices shall constitute the entire compensation of said Capital

Printing Company for doing all printing, binding, job work and all other work necessary to be done by law or by the terms of this contract in connection with the public printing, including all cutting and trimming of paper, wrapping, packing and otherwise handling and distributing any and all of said work before and after the same is done, up to the delivery thereof, as provided for in this contract, to the proper officers or departments.

(774) "It is understood and agreed that all bills against the State for said printing shall be made out and charged by the 'quad em' and 'token,' except those for job work, which shall be made out and charged as hereinafter specially set forth, and those for the binding shall be made out and charged per volume; and said bills, and all other bills for work done under the provisions of this contract, before being audited and paid, shall be approved by the Commissioner of Labor and Printing of said State, who shall, before approval, impartially examine the printing, binding and other work, and determine both the manner of its execution and the correctness of the accounts rendered for the same; and if said Commissioner of Labor and Printing shall ascertain that any of said printing or binding, or other work done under the provisions of this contract, are not done in the manner required by law or called for by this contract, that he may reject the same and decline to approve said bills or accounts, or in lieu of complete rejection he may deduct from said bills or accounts such sum as he shall deem just and proper to be deducted therefrom for such failure.

"Said Capital Printing Company, in printing the reports of the State officers and of the various State departments and penal and charitable institutions, shall print of said reports the number of copies necessary for binding in the public documents, making the necessary changes in the heads and folios of said reports, and for the copies so required for the public documents said Capital Printing Company shall be paid, in addition to the presswork, only for changing the heads and folios aforesaid such amount as said Commissioner of Labor and Printing may allow therefor.

"Said State of North Carolina shall furnish and deliver to said Capital Printing Company, at its place of business in the city of Raleigh, free of cost and expense, all paper of every kind (that for binding excepted) needed for use in doing the public printing and job

(775) work aforesaid.

"Said Capital Printing Company shall furnish, free of cost to the State, except the prices allowed for binding, all material of every kind needed for use in doing all the binding called for by this contract.

"Said Capital Printing Company shall make to said Commissioner of Labor and Printing, each quarter during the term of this contract,

commencing 1 April, 1899, a written report, showing the amount of each quality and kind of paper that has been used during the preceding quarter in doing the public printing, and the amount of each quality and kind that may be on hand at the time of making such report.

"Said Capital Printing Company agrees to receive, store and properly care for, free of cost to said State, and honestly and faithfully use and account for, all paper and material of every kind, valuable manuscripts, books, original copies, and all other articles and things of value that may be delivered to it for use in doing any of the public printing or other work provided for in this contract, and to promptly return such manuscripts, books, original copies, and other articles or things of value to the proper officers or departments of said State or of its penal or charitable institutions, and, at the termination of this contract, to promptly and faithfully account for and turn over to the proper authorities aforesaid all paper, materials of every kind, valuable manuscripts, original copies, books and other articles or things of value that may be on hand and belonging to said State or to any of its said departments or institutions.

"It is understood and agreed that in printing the Supreme Court Reports the said Capital Printing Company shall print, bind and deliver the said reports to the Secretary of State within ninety days from the time the manuscripts or original copies of such reports are turned over to said printing company for printing; and for (776) failure to so deliver there shall be deducted by the Commissioner of Labor and Printing from the bills or accounts of said company rendered for said work the sum of $25 per day for each and every day's delay after said ninety days, which said sum is hereby agreed upon and stipulated and fixed as liquidated damages in lieu of all actual damages, and for all inconveniences and annoyance that may be caused by such delay.

"It is further understood and agreed that said Capital Printing Company shall have all the copies of the laws, documents, and journals printed and bound (which are required to be bound under this contract or by law) and delivered to the Secretary of State within ninety days after the adjournment of the present session of the General Assembly, and for failure to do so there shall be deducted by said Commissioner of Labor and Printing from the bills or accounts rendered by said company for said work the sum of $50 for each and every day's delay thereafter, which said sum is hereby agreed upon and stipulated and fixed as liquidated damages in lieu of all actual damages and for all inconveniences and annoyance caused by such delay.

"The prices agreed upon and fixed or otherwise provided for in this contract for doing said printing and other work are as follows:

"For every one thousand ems of plain composition, 20 cents, for every one thousand ems of rule-and-figure work, 40 cents; for every token of 240 impressions of eight pages of presswork, 11 cents; for law sheep binding, 35 cents per volume of 600 pages; for half binding, 14 cents per volume of 600 pages; for every 48 pages over 600 in said volume, one-fourth of one cent per volume. And it is understood that the foregoing prices apply only to the following classes of work, to wit: to the (777) composition and presswork and binding of the public and private laws, journals, Supreme Court Reports, pamphlets of all kinds, including all copies, for circulation of such laws as are required or allowed by law to be sent out and circulated, and the reports of all officers of the State and of the various departments, and the penal and charitable institutions thereof. All other printing and presswork and other similar work called for by the provisions of this contract are hereby classed and fixed as job work, and shall be charged and paid for as follows: The charges for setting type for each and every job of such work shall be computed at 32 cents per hour for the time taken by the compositor in setting or arranging said job, and the time to be allowed the said compositor in doing said work shall be on the basis of the actual time in which a first-class journeyman printer could do said work in doing honest, faithful and prompt work, which said price of 32 cents shall also pay for the distribution of said work. The presswork on all of said job work shall be charged for at the rate of 44 cents for each 1,000 impressions.

"For doing any other kinds of job work, the prices for which are not herein specified, the amount to be charged and allowed therefor shall be at the usual customary rates charged by printers for such work, to be approved by said Commissioner of Labor and Printing, as required by law.

"It is further understood that whenever one or more duplicates of any job work can and may be printed at the same impression, the charges for the presswork thereon shall be computed at 11 cents per token for each 240 sheets run through the press.

"It is particularly understood and agreed that all printing done under the provisions of this contract is to be done with type of standard size and face to insure first-class work, as may be designated by the head of each department, sub-department, penal and charitable insti- (778) tution, except as herein specifically called for. The Senate and House Journals and documents (except tabular or rule and figure work), are to be set in leaded small pica type, each page to be twenty-three pica ems wide, and forty-two pica ems long, including head and foot lines.

"The text of public and private laws is to be set in leaded brevier type, each page to be twenty-two pica ems wide and forty-three pica ems long, and the sidenotes to be set in nonpareil type, five pica ems wide, and separated from the text by a three-to-pica lead.

"The text of the Supreme Court Reports (not reprint) is to be set in leaded small pica type, and the index and syllabus thereof to be set in leaded brevier, the width and length of the pages to be the same as those of the reports printed during the past two years.

"It is further understood and agreed that, in addition to all the provisions and requirements of this contract, the said Capital Printing Company is to do and perform all acts and things, duties and obligations required by law to be done and performed in connection with said public printing, and in the manner and form required by law, and that the said Commissioner of Labor and Printing shall have not only such power, authority and jurisdiction as are herein provided for, but also such as are given him by law. In witness whereof," etc.

The plaintiff then offered a contract containing what was alleged to be the terms of the contract agreed on with the committee, but they refused to sign it. The plaintiff being desirous of avoiding a controversy offered another contract by way of compromise, and it was rejected by the committee. The contract was as follows:

"This agreement made and entered into this 7 March, 1899, (779) between the State of North Carolina, through the Joint Committee on Printing of the General Assembly, of the one part, said committee being thereunto duly authorized by law, and the Capital Printing Company, a corporation, of the other part, witnesseth:

"That the said Capital Printing Company hereby undertakes and agrees upon the terms and conditions named in this contract, and at the prices hereinafter set forth or provided for, accurately, promptly and in good time, and in a first-class workmanlike manner, to do all of the public printing, binding, job work, and all other similar work required and allowed by law to be done during the term of one year, ten months and fifteen days from the date of this contract by the State of North Carolina, and for the departments and sub-departments, and the penal and charitable institutions thereof; and to deliver the same in the city of Raleigh to the proper offices or departments without cost of freight, expressage, drayage, or charges of any kind, to the said State, other than those set forth or provided for in this contract.

"And in consideration thereof the said State of North Carolina, through said Joint Committee on Printing, agrees that upon the conditions named in this contract, and at the prices hereinafter set out or provided for, all printing, binding, job work, and all other similar work

required and allowed by law to be done during the said term of one year, ten months and fifteen days from the date of this contract for said State, its departments, sub-departments and penal and charitable institutions, shall be done by the said Capital Printing Company, and the same shall be paid for at the prices hereinafter named and provided for, and none other, and in the manner hereinafter named and provided for, which said prices shall constitute the entire compensation of the said Capital Printing Company for doing all printing, binding, job work, and all other work necessary to be done by law, or by the terms of this
(780) contract, in connection with the public printing, including all cutting and trimming of paper used by said Capital Printing Company, wrapping, packing and otherwise handling all of said work from the time of its delivery to said Capital Printing Company up to and including its delivery to the proper officers or department in the city of Raleigh.

"It is understood and agreed that all bills against the State for said printing shall be made out and charged by the 'quad em' and 'token,' except those for the job work, which shall be made out and charged as hereinafter specifically set forth, and those for the binding shall be made out and charged per volume; and said bills, and all other bills for work done under the provisions of this contract, before being audited and paid, shall be approved by the Commissioner of Labor and Printing of said State, who shall, before approval, impartially examine the printing, binding and other work, and determine both the manner of its execution and the correctness of the accounts rendered for the same; and if said Commissioner of Labor and Printing shall ascertain that any of said printing or binding, or other work done under the provisions of this contract, are not done in the manner required by law or called for by this contract, then he may reject the same and decline to approve said bills or accounts; or, in lieu of complete rejection, he may deduct from said bills or accounts such sum or sums as he shall deem just and proper to be deducted therefrom for such failure.

"Said Capital Printing Company, in printing the reports of the State officers and of the various State departments and penal and charitable institutions, shall print of said reports the number of copies necessary for binding in the public documents, making the necessary changes in the heads and folios of said reports, and for the copies so required for the public documents, said Capital Printing Company shall be
(781) paid, in addition to the presswork, only for changing the heads and folios aforesaid, such amount as the said Commissioner of Labor and Printing may allow therefor.

"Said State of North Carolina shall furnish and deliver to said Capital Printing Company at its place of business in the city of Raleigh, free of cost or expense, all paper of every kind (that for binding excepted) needed for use in doing the public printing and job work aforesaid.

"Said Capital Printing Company shall furnish free of cost to the State, except the prices allowed for binding, all material of every kind needed for use in doing all binding called for in this contract..

"Said Capital Printing Company, once a quarter, shall furnish a written report showing the amount of each quality and kind of paper that has been used since the last report in doing the public printing, and the amount of each quality and kind that may be on hand at the time of making such report.

"Said Capital Printing Company agrees to receive, store and properly care for as needed, free of cost to the said State, and to honestly and faithfully use and care for all paper and material of every kind, valuable manuscripts, books, original copies, and all other articles and things of value which may be delivered to it for use in doing any of the public printing, or other work provided for in this contract, and to promptly return such manuscripts, books, original copies, and other articles or things of value, to the proper officers or departments of said State, or the said penal and charitable institutions; and at the termination of this contract to promptly and faithfully account for, and turn over the proper authorities aforesaid, all paper, material of every kind, valuable manuscripts, original copies, books and other articles or things of value, that may be on hand and belonging to said State, or to any of its departments or institutions.

"It is understood and agreed that in printing the Supreme (782) Court Reports, the said Capital Printing Company shall print, bind and deliver the said reports to the Secretary of State within ninety days from the time the manuscripts or original copies of such reports are turned over to said Capital Printing Company for printing; and for failure to deliver, there shall be deducted by the Commissioner of Labor and Printing from the bills or accounts of said company rendered for said work, the sum of $25 per day for each and every day's delay after said ninety days, which said sum is hereby agreed upon and stipulated and fixed as liquidated damages, in lieu of all actual damages, and for all inconvenience and annoyance that may be caused by such delay.

"It is further understood and agreed that said Capital Printing Company shall begin the delivery of the public laws within three months after the final adjournment of the General Assembly, and shall complete the delivery of the public laws, private laws, documents and journals within five months from the final adjournment of the General Assembly, and for failure to do so there shall be deducted by said Com-

missioner of Labor and Printing from the bills or accounts rendered by said company for said work the sum of $50 for each and every day's delay thereafter.

"The prices agreed upon and fixed or otherwise provided for in this contract for doing said printing and other work, are as follows:

"For every one thousand ems of plain composition, 20 cents; for every one thousand ems of rule-and-figure work, 40 cents; for every token of two hundred and forty impressions, of eight book pages of presswork, 11 cents; for law sheep binding, 35 cents per volume of 600 pages; for half binding, 14 cents per volume of 600 pages; for every 48 pages over 600 in said volume, one-fourth of one cent per volume. And it is understood that the foregoing prices apply only to the following (783) classes of work, to wit: To the composition and presswork and binding of the public and private laws, documents, journals, Supreme Court Reports, pamphlets of all kinds, including all copies for circulation of such laws as are required or allowed by law to be sent out and circulated, and the reports of all officers of the State, and of the various departments, and the penal and charitable institutions thereof. All other printing and presswork and other similar work called for by the provisions of this contract is hereby classed and fixed as job work, and shall be charged and paid for as follows: The charges for setting type for each and every job of such work shall be computed at 32 cents per hour for the time taken by the compositor in the setting and arranging said job, and in distributing the type after the job is done, and the time to be allowed said compositor in doing said work shall be on the basis of the actual time in which a first-class journeyman printer could do said work in doing honest, faithful and prompt work.

"The presswork on all of said job work shall be charged for at 11 cents for each token, except that in printing fertilizer tags, which come in gangs of eight, electros being furnished by the department, the charge shall be eight cents per thousand tags each impression.

"For doing any and all kinds of job work, the prices for which are not herein specified, the amount to be charged and allowed therefor shall be at the usual customary rates charged by printers for such work, to be approved by said Commissioner of Labor and Printing as required by law. It is further understood and agreed that in addition to all the provisions and requirements of this contract, the said Capital Printing Company is to do and perform all acts and things, duties and obligations required by law to be done and performed in connection with said public printing, and in the manner and form required by law, and that the said Commissioner of Labor and Printing shall have not only such power, authority and jurisdiction as are herein provided for, but (784) also such as are given him by law.

"In witness whereof the said Capital Printing Company has caused these presents to be signed by its president, and caused its corporate seal to be hereto affixed, duly attested by its secretary, and the members of said Joint Committee have hereto set their several signatures."

And plaintiff agreed further by way of compromise to insert therein the following clause:

"It is particularly understood and agreed that all printing done under the provisions of this contract is to be done with type of standard size and face to insure first-class work, as may be designated by the head of each department, sub-department, penal and charitable institution, except as herein specifically called for. The Senate and House Journals and documents (except tabular or rule-and-figure work) are to be set in leaded small pica type, each page to be twenty-three pica ems wide, and forty-two pica ems long, including head and foot lines.

"The text of the public and private laws is to be set in leaded brevier type, each page to be twenty-two pica ems wide and forty-three pica ems long, and the side notes to be sent in nonpareil type, five pica ems wide, and separated from the text by a three-to-pica lead.

"The text of the Supreme Court Reports (not reprint) is to be set in leaded small pica type, and the index and syllabus thereof to be set in leaded brevier, the width and length of the pages to be the same as those of the reports printed during the past two years."

The committee rejected each and all of the contracts tendered (785) by the plaintiff, and insisted on the execution of the one drawn and prepared by its attorney.

The plaintiff refused to sign that one. The facts set out in the fifteenth and sixteenth sections of the complaint show how the matter was concluded:

"15. That thereafter, to wit, about 1 or 2 o'clock p. m., on 7 March, 1899, said joint committee announced that they would at 4 o'clock p. m., on that day receive new bids for said public printing according to the terms and specifications of the paper-writing set out in paragraph 11 above, but no advertisement of the same was made; that thereupon plaintiff declined to make any new bid, and forbade said joint committee to contract with any other person or firm for said public printing, or to let the same or any part thereof to any other person or firm; and forbade Edwards & Broughton, and E. M. Uzzell, to contract for or to do said public printing or any part thereof, and notified them that any contract which they might assume to make concerning same would be null and void and would be contested in the courts.

"16. That there was no meeting of said joint committee for the reception of bids at the designated hour of 4 o'clock p. m., or at any other

time on said day; but about said hour a resolution was introduced and passed by the House and Senate in words and figures as follows, to wit:

RESOLUTION IN REGARD TO PUBLIC PRINTING

*The House of Representatives, the Senate concurring, do Resolve,* That the printing committee appointed by this General Assembly be authorized to enter into a contract for the public printing in the form following, to wit:

"This agreement, made and entered into this the .... day of March, 1899, between the State of North Carolina, through the joint committee on printing, of the General Assembly, of the one part, said com-
(786) mittee being thereto duly authorized by law, and Edwards & Broughton a firm composed of C. B. Edwards and N. B. Broughton, and doing business in the city of Raleigh, said State, and E. M. Uzzell, also of said city of Raleigh, of the other part.

"Witnesseth: That the said Edwards & Broughton and E. M. Uzzell hereby undertake and agree, upon terms and conditions named in this contract, and at the prices hereinafter set forth, or provided for, accurately, promptly, and in good time and in a first-class, workmanlike manner, to do all the public printing, binding, job work, and all other similar work required and allowed by law to be done during the term of one year, ten months and fifteen days from the date of this contract, by the said State of North Carolina and for all departments and sub-departments, and the penal and charitable institutions thereof, and to deliver the same in the city of Raleigh to the proper officers or departments, without cost of freight, expressage, drayage, or charges of any kind to said State, other than those set forth and provided for in this contract.

"And in consideration thereof, said State of North Carolina, through said joint committee on printing, agrees that, upon the conditions named in this contract, and at the prices hereinafter set out or provided for, all printing, binding, job work and all other similar work required and allowed by law to be done during said term of one year, ten months and fifteen days from the date of this contract, for State and its departments, sub-departments and penal and charitable institutions, shall be done by the said Edwards & Broughton and E. M. Uzzell, and the same shall be paid for at the prices hereinafter named or provided for, and none other, and in the manner herein named and provided for, which said prices shall constitute the entire compensation of said Edwards & Broughton and E. M. Uzzell for doing all printing, binding, job work, and all other work necessary to be done by law or by the
(787) terms of this contract in connection with the public printing,

including all cutting and trimming of paper, wrapping, packing and otherwise handling and distributing any and all of said work before and after the same is done, up to the delivery thereof, as provided for in this contract, to the proper officers or departments.

"It is understood and agreed that all bills against the State for said printing shall be made out and charged by the 'quad em' and 'token,' except those for job work, which shall be made out and charged as hereinafter specially set forth, and those for the binding shall be made out and charged per volume; and said bills, and all other bills for work done under the provisions of this contract, before being audited and paid, shall be approved by the Commissioner of Labor and Printing of said State, who shall, before approval, impartially examine the printing, binding and other work, and determine both the manner of its execution and the correctness of the accounts rendered for the same; and if said Commissioner of Labor and Printing shall ascertain that any of said printing or binding or other work done under the provisions of this contract are not done in the manner required by law or called for by this contract, then he may reject the same and decline to approve said bills or accounts, or in lieu of complete rejection he may deduct from said bills or accounts such sum or sums as he shall deem just and proper to be deducted therefrom for such failure.

"Said Edwards & Broughton and E. M. Uzzell, in printing the reports of the State officers and of the various State departments and penal and charitable institutions, shall print of said reports the number of copies necessary for binding in the public documents, making the necessary changes in the heads and folios of said reports, and for the copies so required for the public documents said Edwards & Broughton (788) and E. M. Uzzell shall be paid, in addition to the presswork, only for changing the heads and folios aforesaid such amounts as said Commissioner of Labor and Printing may allow therefor.

"Said State of North Carolina shall furnish and deliver to said Edwards & Broughton and E. M. Uzzell, at their places of business in the city of Raleigh, free of cost and expense, all paper of every kind, that for binding excepted, needed for use in doing the public printing and job work aforesaid.

"Said Edwards & Broughton and E. M. Uzzell shall furnish, free of cost to the State, except the prices allowed for binding, all material of every kind needed for use in doing all the binding called for by this contract.

"Said Edwards & Broughton and E. M. Uzzell shall make to said Commissioner of Labor and Printing, each quarter during the term of this contract, commencing 1 April, 1899, a written report, showing the amount of each quality and kind of paper that has been used during

the preceding quarter in doing the public printing, and the amount of each quality and kind that may be on hand at the time of making such report.

"Said Edwards & Broughton and E. M. Uzzell agree to receive, store and properly care for, free of cost to said State, and honestly and faithfully use and account for, all paper and material of every kind, valuable manuscripts, books, original copies and all other articles and things of value that may be delivered to them for use in doing any of the public printing or other work provided for in this contract, and to promptly return such manuscripts, books, original copies and other articles or things of value to the proper officers or departments of said State, or of its penal or charitable institutions, and, at the termination of this contract, to promptly and faithfully account for and turn over to the proper authorities aforesaid all paper, material of every kind, valuable manuscripts, original copies, books and other articles or things of value
(789) that may be on hand and belonging to said State or to any of its said departments or institutions.

"It is understood and agreed that in printing the Supreme Court Reports the said Edwards & Broughton and E. M. Uzzell shall print, bind, and deliver the said reports to the Secretary of State within ninety days from the time the manuscripts or original copies of such reports are turned over to said Edwards & Broughton and E. M. Uzzell for printing, and for failure to so deliver there shall be deducted by the Commissioner of Labor and Printing from the bills or accounts rendered by them for said work the sum of $25 per day for each and every day's delay after said ninety days, which said sum is hereby agreed upon and stipulated and fixed as liquidated damages in lieu of all actual damages and for all inconvenience and annoyance that may be caused by such delay.

"It is further understood and agreed that said Edwards & Broughton and E. M. Uzzell shall have all the copies of the laws, documents, and journals printed and bound (which are required to be bound under this contract or by law) and delivered to the Secretary of State within ninety days after the adjournment of the present session of the General Assembly; and for failure to do so, there shall be deducted by said Commissioner of Labor and Printing from the bills or accounts rendered by them for said work the sum of $50 for each and every day's delay thereafter, which said sum is hereby agreed upon and stipulated and fixed as liquidated damages in lieu of all actual damages and for all inconvenience and annoyance caused by such delay.

"The prices agreed upon and fixed or otherwise provided for in this contract for doing said printing and other work are as follows:

"For every 1,000 ems of plain composition, 30 cents; for every (790) 1,000 ems of rule-and-figure work, 60 cents; for every token of 240 impressions of 16 pages of presswork, 20 cents; for law sheep binding, 50 cents per volume of 600 pages; for half binding, 20 cents per volume of 600 pages; for every 48 pages over 600 in said volume, one cent per volume. And it is understood that the foregoing prices apply only to the following classes of work, to wit: to the composition and presswork and binding of the public and private Laws, documents, journals, Supreme Court Reports, pamphlets of all kinds, including all copies, for circulation, of such laws as are required or allowed by law to be sent out and circulated, and the reports of all officers of the State and of the various departments, and the penal and charitable institutions thereof. All other printing and presswork and other similar work called for by the provisions of this contract is hereby classed and fixed as job work, and shall be charged and paid for as follows: The charges for setting type for each and every job of such work shall be computed at 30 cents per hour for the time taken by the compositor in setting or arranging said job, and the time to be allowed the said compositor in doing said work shall be on the basis of the actual time in which a first-class journeyman printer could do said work in doing honest, faithful and prompt work, which said price of 30 cents shall also pay for the distribution of said work. The presswork on all of said job work shall be charged for at the rate of 80 cents for each 1,000 impressions.

"For doing any other kinds of job work, the prices for which are not herein specified, the amount to be charged and allowed therefor shall be at the usual customary rates charged by printers for such work, to be approved by said Commissioner of Labor and Printing, as required by law. It is further understood that whenever one or (791) more duplicates of any job work can and may be printed at the same impression the charges for the presswork thereon shall be computed at 20 cents per token for each 240 sheets run through the press. It is particularly understood and agreed that all printing done under the provisions of this contract is to be done with type of standard size and face to insure first-class work, as may be designated by the head of each department, sub-department, penal and charitable institutions, except as herein specifically called for. The Senate and House Journals and documents (except tabular or rule-and-figure work) are to be set in leaded small pica type, each page to be 23 pica ems wide and 42 pica ems long, including head and foot lines. The text of the Public and Private Laws to be set in leaded brevier type, each page to be 22 pica ems wide and 43 pica ems long, and the sidenotes to be set in nonpareil type, 5 pica ems wide, separated from the text by a 3-to-pica lead. The text of the Supreme Court Reports (not reprinted) is to be set in leaded

small pica type, and the index and syllabus thereof to be set in leaded brevier, the width and length of the pages to be the same as those of the reports printed during the past two years. It is further understood and agreed that, in addition to all the provisions and requirements of this contract, the said Edwards & Broughton and E. M. Uzzell are to do and perform all acts and things, duties and obligations required by law to be done and performed in connection with the said public printing, and in the manner and form required by law, and that the said Commissioner of Labor and Printing shall have not only such power, authority and jurisdiction as are herein provided for, but also (792) such as are given him by law.

"In witness whereof, said C. B. Edwards and N. B. Broughton, the members of said firm of Edwards & Broughton, and said E. M. Uzzell have hereto set their hands and affixed their seals, and the said joint committee have hereto signed their names, the day and year first above written."

It is evident from what appears before us that the policy adopted originally by the General Assembly of 1899, of putting out the public printing to the lowest responsible bidder, was abandoned when the joint resolution was adopted instructing the committee to make the contract with Edwards & Broughton and Uzzell at the prices named therein, the same being the maximum prices named in the original bill. It is apparent upon the face of the record that the contract was not made with the lowest responsible bidder. When the contract, as it was executed, is compared with the bid of the plaintiff company, and the contract which it tendered, no room is left for doubt that the contract as executed was made with the highest bidder. The plaintiff company was a reliable establishment, found to be so after a full investigation by the committee, and the bond tendered was declared by the committee to be sufficient, both in amount and as to security. Its bid was clear and distinct as to prices, and it was unconditionally accepted. The terms of the bid were materially changed to the disadvantage of the plaintiff company by the attorney who was employed to reduce the bid and acceptance to writing in the shape of a contract. That can be seen by a reference to the original act, the bid of the plaintiff company and the contract which was offered to be executed with the plaintiff. Of course, this Court knows nothing of these matters, except what appears in the record; nor are the reasons which caused the change of policy on the part of the General Assembly known to us. While, as we have said, the plaintiff's bid was clear in its terms as to prices—and the lowest bid made— (793) and was accepted by the committee, yet it was not of itself such a contract as the act of Assembly required. The details as to character of type, times of delivery of the work, and other such matters

necessary to be put in a contract for the public printing, were not specified in the plaintiff's bid, and these details were to be incorporated in the contract with the weightier matter of prices, and the plaintiff expected that to be done. In fact, he offered a contract embracing all these matters fully, and it was rejected.

However deeply the managers of the plaintiff company may feel aggrieved at the result, there was no legal contract between the committee and the plaintiff. The committee's action was simply an acceptance of the plaintiff's bid to do the public printing. The act of Assembly required that the committee should have the agreement reduced to writing, and that was a most proper requirement. Both the committee and the plaintiff company knew that the agreement had to be reduced to writing before it could become such a contract as the General Assembly authorized the committee to make. Although the terms of contract may be entirely agreed upon by parties, yet if it is understood that it is to be reduced to writing as a part of the agreement, the contract is not complete until it is written and executed. 7 A. & E., 140, and cases there cited. The act of Assembly made the reduction of the agreement a condition precedent to the completion of the contract. And, besides, the complaint shows that the contract for the public printing was awarded by the committee in due form of law to Edwards & Broughton and Uzzell under a joint resolution of the General Assembly, and that they are doing the work. Our conclusion, then, is, as a matter of law, that the plaintiff has stated no cause of action in the complaint against any of the parties. If the complaint had stated a cause of action against Edwards & Broughton and Uzzell, yet as it appears that (794) a contract about the same matter has been executed and delivered to Edwards & Broughton and Uzzell, a mandamus could not issue against the other defendants, for that would be in effect annulling the contract by mandamus, which cannot be done. Edwards & Broughton and Uzzell, being in the possession of a contract for the public printing, made under the forms of law, would be entitled to a trial of their rights according to the usual course of the law, by trial in open court. *Detroit Free Press Co. v. Auditor,* 47 Mich., 145.

We have not gone into an elaborate discussion of the various law propositions discussed in the argument here, for the reason that the plaintiff, in our opinion, has no contract with the State for the public printing. That the agreement between the plaintiff and the committee was only an acceptance of the bid of the plaintiff, and that the contract required by the act of Assembly was a contract to be reduced to writing, signed by the parties and delivered. Whether the action was one against the State, it is not necessary to decide. The judgment of the court below is affirmed.

CLARK, J., concurring: I concur in the decision, not only for the reason given in the opinion of the Court, that the contract was not reduced to writing, as required by the statute, but because, if it had been, the condition of the plaintiff would have been no better, since in no aspect could the action be maintained, the complaint not stating a cause of action and the court having no jurisdiction. Clearly, the remedy asked, of a mandamus to the defendants to compel them to sign and deliver the contract, could not be entertained, for they had no part in the transaction, and their signatures, if affixed, would have no validity, except as a legislative committee, acting by authority of, and in behalf of, the Legislature, and the Court could issue no man-
(795) damus to compel that body to perform any act or to compel its committee to act after the General Assembly, as in this case, had by statute revoked the committee's authority to sign the contract with the plaintiff, by directing them to sign a contract for the printing with another party. Even if the contract had been signed and delivered, the contract drafted by plaintiff for signature by the committee and that afterwards signed by them and delivered to Edwards & Broughton both recite that it is a contract "between the State of North Carolina, through the joint committee on printing of the General Assembly of the one part" and the printers named of the second part. As the Legislature subsequently, by legislative act, directed the committee to make a contract with Edwards & Broughton, even if a valid contract had been perfected with the plaintiff, no court, State or Federal, could render a judgment compelling the State to perform the contract with the plaintiff. Indeed, such order for specific performance could be entered against no one for breach of such contract, but the remedy is an action for damages, which in the case of the State must be sought by petition in this Court (Const., Art. IV., sec. 9), and in the case of other than the State, in the lower court. Neither in such cases would an injunction lie, as is asked in this case, by the first contractor against the second. There being a remedy at law, equitable relief could not be granted.

A somewhat similar case was *Clements v. The State,* 77 N. C., 143, except that in that case the contract broken by the State had been duly made and perfected. The authorities are referred to in the most recent case in regard to actions against the State. *Garner v. Worth,* 122 N. C., 250.

PER CURIAM. AFFIRMED.

(796)

STATE v. JOHN WHIDBEE.

(Decided 21 February, 1899.)

*False Pretense—The Code, Section 1027.*

An indictment for obtaining goods under a false pretense (The Code, sec. 1027) must be founded on a false representation by the defendant of an existing fact.

INDICTMENT for obtaining goods under a false pretense, before *Hoke, J.*, at Fall Term, 1898, of DARE. The indictment is as follows:

The jurors for the State present on oath, that at and in the above State and county, on or about 12 July, 1897, the defendant, John D. Whidbee, late of the State and county aforesaid, did unlawfully, wilfully and feloniously agree in writing with R. D. Fulcher in the following words and figures, to wit:

HATTERAS, N. C., 12 July, 1897.

This is to certify that I have received of R. D. Fulcher twenty-four dollars in merchandise, the amount of my check for the quarter ending 30 October, 1897, which check I hereby pledge him in payment of same.

Witness: J. E. Whidbee. JOHN D. WHIDBEE.

With intent to defraud said R. D. Fulcher of the value of said merchandise, and the said John D. Whidbee having entered into said agreement as aforesaid, failed to apply said check or any part thereof, or the proceeds of the same in accordance with said agreement, but disposed of same in a manner other than agreed in said paper-writing with intent to defraud said R. D. Fulcher of the value of said (797) merchandise, against the peace and dignity of the State, and contrary to the form of the statute as in such cases made and provided.

WM. J. LEARY, *Solicitor.*

The defendant moved to quash the bill of indictment for the reason that it does not state an indictable offense.

Motion to quash was allowed. The solicitor excepted, and appealed.

*Attorney-General for the State.*
*No counsel contra.*

FAIRCLOTH, C. J. The defendant stands indicted for obtaining goods under a false pretense. On 12 July, 1897, the defendant certified in writing that he had received of Fulcher "twenty-four dollars in mer-

chandise, the amount of my check for the quarter ending 30 October, 1897, which check I hereby pledge in payment of same." He failed to apply said check or the proceeds thereof according to agreement.

The defendant moved to quash the indictment on the ground that it stated no indictable offense, which motion was allowed, and the State Solicitor appealed.

There was no error. The offense charged does not fall within the meaning of The Code, sec. 1027. The fact that the defendant did not have and *could not have* the check for the quarter, beginning 1 August to 30 October, was plain on the face of the writing, and was or ought to have been known to the prosecutor, and whatever the motive was, it was not a fraudulent representation. Suppose the defendant had certified on 12 July that he would represent the firm of A. & Co., (798) of New York, during the same quarter. There would be no false statement of an existing fact, and the prosecutor would see and know it.

AFFIRMED.

*Cited: S. v. Torrence,* 127 N. C., 554; *S. v. Williams,* 154 N. C., 804; *S. v. McFarland,* 180 N. C., 729.

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STATE v. STANLY FULFORD AND JACOB McCLOUD.

(Decided 28 February, 1899.)

*Larceny—Indictment—Judge's Charge.*

1. On the trial of an indictment—*e grege*, for larceny—it is the duty of the judge, while leaving the weight of the evidence to be determined by the jury, to declare and explain the principles of law and the essential constituents of the offense charged. The Code, sec. 413.

2. Where an exception presents only one proposition of law applicable to the whole charge, it is not obnoxious to the ground of being a "broadside" exception.

INDICTMENT for larceny of a sheep, the property of a person to the jury unknown, with a count for receiving, tried before *Hoke, J.,* at Fall Term, 1898, of HYDE. There was no evidence of ownership, and the evidence of asportation was inferential.

The State witness as to the occurrence was Sam Credle, who testified: "I was going home one Friday night in July, 1898, about 9 o'clock, and

saw two men with a sheep near an old house. They started to run. I told them there was no need to run, that I knew who they were. One was Jacob McCloud and the other one I took to be Stanly Fulford; I think it was Stanly Fulford. I don't know what they did with the sheep; and while I am not certain it was Stanly Fulford, it looked like him, and that is my best impression now. I don't (799) know whose sheep it was—it was a white sheep. It was a misty night, and I could not see the parties plainly. The place was on the Lake road, near an old house, where Jacob used to live. Jacob came to me and asked me to say nothing about it, and I told him I would not unless I was forced to. Stanly Fulford came to me afterwards in the cotton field and said, 'I hear you have been talking about my stealing of the sheep,' and asked me for God's sake not to say anything about it for it would ruin him if I did. He saw me twice about it."

His Honor's charge appears in the opinion. The defendants excepted to the instruction of the court as given.

Verdict guilty. Judgment of imprisonment in the penitentiary for the term of one year.

Defendants appealed.

*Attorney-General for the State.*
*No counsel contra.*

DOUGLAS, J. The defendants were convicted of the larceny of a sheep. Upon the close of the evidence they requested the court to instruct the jury that the evidence submitted by the State was not sufficient to justify a verdict of guilty, and that upon the whole evidence they should return a verdict of not guilty. The court refused to charge as requested and instructed the jury that "It was a question of fact for them to consider, and that if, upon considering the whole evidence, both for the State and for the defendants, they were satisfied beyond a reasonable doubt that defendants were guilty of the larceny of the sheep as charged in the bill of indictment, they should convict the defendants; and if they were not so satisfied beyond a reasonable doubt of the guilt of the defendants, they should acquit them."

The defendants excepted to the instruction of the court as (800) given, and to its refusal to instruct the jury as requested.

The latter exception cannot be sustained, as there was some evidence, however slight, yet more than a mere scintilla, *tending* to prove the offense. The weight of that evidence the jury alone can determine; but in its consideration they should be aided and directed by correct principles of law to be laid down by the court. The entire charge seems to have been given, and we presume that the exception of the defendant

"to the instruction of the court as given" refers to the want of instruction, as the charge is unobjectionable as far as it went. This exception is not obnoxious to the ground of being a *"broadside* exception" because it presents only one proposition of law, applicable to the whole charge. *S. v. Webster,* 121 N. C., 587.

We think, however, that the charge of his Honor was insufficient, inasmuch as it failed to explain the nature of the crime with which the defendants were charged. We are not inadvertent to the long line of uniform decisions to the effect that, in the absence of any request for special instructions, no exception can be maintained to the failure of the court to charge as to the particular phases of the case; but this rule does not exclude the duty of the court, at least in criminal cases, to charge the jury as to the nature of the offense and the general principles of law essential to their verdict. For instance, the crime of larceny is never complete without some asportation. *S. v. Butler,* 65 N. C., 309; *S. v. Jones, ib.,* 395; *S. v. Alexander,* 74 N. C., 232; *S. v. Perkins,* 104 N. C., 710.

This question was of particular importance under the circumstances of the case at bar, where there was no direct evidence of asportation and none whatever as to the ownership of the sheep. The jury might have inferred asportation from the evidence, but they must (801) understand its nature before they can infer its existence.

It is needless to review the different decisions upon this subject, as each case necessarily depends upon its own peculiar circumstances. But we think that section 413 of The Code requires the court to give to the jury such instructions as will enable them to understand the nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of the accused.

Where it appears from the record that the failure to give such instructions could not possibly have prejudiced the accused, the omission might be such harmless error as would not vitiate the verdict; but in the case at bar the evident possibility of injury entitles the defendants to a

NEW TRIAL.

STATE v. B. J. ROBINSON.

(Decided 14 March, 1899.)

*Practice—Opening and Conclusion.*

Where there are several defendants, and one of them introduces evidence, that gives the right to begin and conclude the argument to the State, Rule 3 (119 N. C., 958) construed accordingly.

INDICTMENT for assault and battery, tried before *Bryan, J.*, at September Term, 1898, of WAKE.

Defendant and Eliza Ward were indicted for assault and bat- (802) tery on Laura Robinson. Eliza Ward introduced evidence, the defendant Robinson introduced none, and his counsel claimed the right to open and close the argument. His Honor, as a matter of discretion, allowed the State to open and conclude. Defendant excepted.

Verdict of guilty. Judgment and appeal.

*Attorney-General and Douglass & Simms for the State.*
*No counsel contra.*

FAIRCLOTH, C. J. The defendant and Eliza Ward were indicted for an assault on Laura Robinson. At the trial, Ward introduced witnesses, but Robinson introduced no evidence. At the close of the evidence, Robinson's counsel claimed the right to open and close the argument. His Honor, as a matter of discretion, allowed the State to open and close, and Robinson excepted.

It is admitted that his Honor's ruling, except under Rule 3, is final and not reviewable. Rule 6, 119 N. C., 959.

Rule 3 is that in all cases, civil or criminal, where no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel. 89 N. C., 608, Rule 3. This question of practice has not been heretofore presented. It is the recollection of the members of this Court that the practice has been that where one defendant introduces evidence, that gives the right to begin and conclude the argument to the State, and we adopt that view as the better rule. If there were several defendants, the rule claimed by the defendant would be inconvenient.

NO ERROR.

(803)

STATE v. DANIEL G. TAYLOR.

(Decided 21 March, 1899.)

*Carrying Concealed Weapons—The Code, Sec. 1005—Construction—Penal Statute.*

In a penal statute, "*or*" will never be construed "*and*," so as to make it more penal.

INDICTMENT for carrying concealed weapon, tried before *Robinson, J.*, at November Term, 1898, of LENOIR.

The defendant pleaded guilty, and was adjudged to be imprisoned four months and pay a fine of $200 and costs.

The defendant excepted:

1. That the judgment is excessive and contrary to the *spirit* of the court and the *law*.

2. That his Honor erred in imposing both fine and imprisonment.

Defendant appealed.

*Attorney-General for the State.*
*Simmons, Pou & Ward for appellant.*

PER CURIAM. Remanded for proper sentence. *S. v. Walters,* 97 N. C., 489; *S. v. Johnson,* 94 N. C., 863; *S. v. Kearney,* 8 N. C., 53.

REMANDED.

*Cited: S. v. Walker,* 179 N. C., 733.

(804)

STATE v. J. H. LUCAS.

(Decided 21 March, 1899.)

*Church Road—User—The Code, Sec. 2065, Motion in Arrest—Proof.*

An indictment for obstructing a neighborhood road leading to a church, which follows the words of the statute (The Code, sec. 2065), will be sustained; still, to warrant a conviction, it is essential, in the absence of proof of an actual dedication, or of a laying-out by public authority under The Code, sec. 2062, to show a user for twenty years, and it must have been worked and kept in order by public authority.

STATE *v.* LUCAS

CRIMINAL ACTION for obstructing a road leading to a church. Conviction. Motion in arrest of judgment. Judgment and appeal.

Criminal action for obstructing a road, tried before *Robinson, J.*, and a jury, at October Term, 1898, of SAMPSON, upon the following indictment:

"The jurors for the State, upon their oaths, present that J. H. Lucas, late of the county of Sampson, on 20 May, 1898, with force and arms, at and in said county, a certain road leading to and from Bethel Church in Little Coharie Township, Sampson County, known as the 'Old Church Road,' leading from the Wilmington and Raleigh road, known as the 'Negro Head Road,' to said church, did wilfully and unlawfully obstruct by putting his fence in the said road, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The following evidence was not controverted: That the road (805) (the obstruction of which was admitted by the defendant) has been continuously used as an ordinary neighborhood road for many years by the general public before the erection of Bethel Church, which was in 1856, and after the erection of the church many residents of the neighborhood continued to pass over that part of the road, which defendant has now obstructed, in going to and from said church, but the road was never a public charge. No hands were ever assigned to work it, nor had it ever been laid off or kept up by any court, county or township authority, nor was it ever laid off, dedicated, set apart or acquired in any way by any one as a public or church road, except by its use as above stated, and it was not kept open by any one in particular, but was kept open by such residents of the neighborhood as had occasion to use it and saw proper to do so.

The court charged the jury that if they believed the evidence the defendant was guilty, to which the defendant excepted. Verdict of guilty. Defendant moved in arrest of judgment for that the indictment does not charge a criminal offense. Motion denied. Judgment and appeal.

*Attorney-General for the State.*
*F. R. Cooper for defendant.*

CLARK, J., after stating the facts: The motion in arrest of judgment was properly overruled. The indictment follows the language of the statute (The Code, sec. 2065), which makes it a misdemeanor to "wilfully alter, change, or obstruct any highway, cartway, mill-road or

*road leading from or to any church* or other place of public worship, whether the right of way thereto be secured in the manner herein provided for or by purchase, donation or otherwise."

As to the exception to the charge, the law is clearly and suc-
(806) cintly stated thus by *Reade, J.*, in *Boyden v. Achenback*, 79 N. C., 539: "Where the public has used a way as a public road or cart-way, just as if it had been laid off by order of court—as if it had had an overseer and hands and been worked and kept in order—for more than twenty years, it will be presumed that it was so laid off, or that the owner of the land had dedicated it to the public; but the mere user of foot-paths and neighborhood roads without such accompanying circumstances will raise no presumption however long the time. In *S. v. McDaniel*, 53 N. C., 284, the jury found a special verdict that the road had been used by the neighborhood for sixty years in going to church, to mill, and to public highways on foot, or horseback and in vehicles, and yet it was not held to be a public road which it was indictable to obstruct." To like purport, *S. v. Gross*, 119 N. C., 868; *Kennedy v. Williams*, 87 N. C., 6; *S. v. Johnson*, 33 N. C., 647. It is true that in *McDaniel's case, supra*, it was held, as the law then stood, that a road to and from a church, closed up at one end, a *cul de sac* as the court termed it, could not be a public road because not a thoroughfare, and therefore that its obstruction was not indictable, and that chapter 189, Acts 1872-3 (now The Code, sec. 2065) has since made it indictable, but none the less it is still essential in the absence of a laying out by public authority under The Code, sec. 2062, or actual dedication, not only that there must be twenty years user (as there was in this case), but the road must have been worked and kept in order by public authority. *Boyden v. Achenback, supra.* For error in instruction to the jury there must be a

NEW TRIAL.

*Cited: S. v. Truesdale*, 125 N. C., 701; *S. v. Haynie*, 169 N. C., 280.

(807)

STATE AND LUVIDA CANNON v. JASPER WARREN.

(Decided 21 March, 1899.)

*Bastardy Proceeding—Evidence.*

On the trial of an issue of paternity, whatever tends to prove or to disprove the affirmative of the issue is competent evidence for the jury. Where the defendant offers to prove that another man had intercourse with the prosecutrix at the time when, by the course of nature, the child must have been begotten, this evidence bears directly upon the issue and ought to be admitted.

ISSUE OF PATERNITY in a bastardy proceeding, tried before *Robinson, J.*, at October Term, 1898, of SAMPSON.

Verdict of guilty. Judgment and appeal. (808)

*Attorney-General for the State.*
*F. R. Cooper for defendant.*

FURCHES, J. This is a proceeding in bastardy involving the paternity of the child. The mother testified that the defendant was the father, while the defendant testified that he was not. The mother, upon her cross-examination, testified that she never had criminal intercourse with any one but the defendant and one Blackman, who was the father of a former child but not of this one. The defendant then offered to prove by Daggett that he had sexual intercourse with the mother, the prosecuting witness, about the time she says the child was begotten, and about the time when it must have been begotten according to the law of gestation. This evidence, upon the objection of the State, was ruled out, and the defendant excepted.

The only issue presented was as to whether the defendant was the father of the child. This was to be found by the jury, but only upon competent evidence. This question has been before the Court several times, and the opinions do not seem to be in entire harmony, as is said in *S. v. Perkins,* 117 N. C., 698.

In *S. v. Patterson,* 74 N. C., 157, it is held that where the prosecuting witness had testified upon cross-examination (as in this case) that evidence offered to show that she had sexual intercourse with another person, for the purpose of contradicting the prosecutrix, was incompetent and properly excluded. This decision is put upon the (809) ground that her answer was called out by the defendant; was collateral to the issue, and the defendant was bound by it. This opinion is approved by the Court and followed in *S. v. Parrish,* 83 N. C., 613.

In *S. v. Bennett,* 75 N. C., 305, the exact point is presented and the opinion of the Court in that case sustains the ruling of the court below in this case.

In *S. v. Britt,* 78 N. C., 439, the same question was substantially presented that was presented in *S. v. Bennett,* but the Court undertakes to distinguish *Britt's case* from *Bennett's case,* and holds that the evidence was competent. Whether this distinction is very clearly drawn or not, this holding of the Court that the evidence was competent has since been followed in the case of *S. v. Perkins,* 117 N. C., 698. These cases are the latest expressions of the Court upon the question involved, and if they are adhered to, there was error in ruling out this evidence.

It seems to us upon a review of the case and the "reason of the thing," that this evidence was competent and should have been admitted.

It was incompetent for the purpose of contradicting the prosecutrix, as was held in *Patterson's case, supra.* It was incompetent as corroborative evidence of the defendant or of Martin Gainey, as there was no connection between what defendant swore and what Gainey swore, and the fact as to whether Badgett ever had intercourse with the prosecutrix or not. To corroborate is to give strength to the testimony of the witness corroborated. Such evidence as that offered may tend to prove the issue, as we think, but it does not give strength to the testimony of defendant or of Badgett. Corroborative evidence is always secondary and is never primary.

But the issue is the paternity of the child, and whatever tends to prove or disprove the affirmative of this issue is competent. It
(810) would not be competent to show that the prosecutrix, years before the birth of the child, had intercourse with some one else. Nor would it have been competent to prove that the prosecutrix at some other time had such intercourse, when it was apparent from the laws of nature that the child could not be the result of such intercourse. This would be incompetent because it did not tend to prove or disprove the affirmative of the issue. To admit such evidence would only be to allow the defendant to attack the character of the prosecutrix in a way not allowed by law.

But it seems to us that when the defendant offered to prove that another man had intercourse with the prosecutrix at the time when by the course of nature the child must have been begotten, this evidence bears directly upon the issue and is competent. It is true that it may not establish the negative of the issue, but in our opinion it tends to do so, and that the jury ought to have the right to consider it. It is common on the trial of such issues to allow the child to be exhibited to the jury. *S. v. Woodruff,* 67 N. C., 89. This is done by the State when it is thought it favors the defendant, and by the defendant when he

thinks it favors some one else. And if it is competent to offer the baby as evidence to prove that some one else is the father, why is it not competent to offer the father to show that he is the father. Suppose the mother is a white woman and the defendant is a white man, and the defendant offers a colored man to show that he is the father—that is, to show that he had intercourse with the prosecutrix at the time when the child must have been begotten by some one—and the evidence is objected to and ruled out; the defendant then produces the baby and it is a mulatto (*Warlick v. White,* 76 N. C., 175); this is competent, and why not the father? It is true this evidence would differ in its weight—the evidence of a colored child would be stronger (conclusive) while the other might not satisfy the jury, because the (811) evidence might not be true, and if true, yet the defendant be the father. But still it seems to us that it is such evidence as the jury should be allowed to consider.

It seems to us there is an analogy between the cases supposed and this case that tends to sustain the competency of the evidence rejected.

There was a motion in arrest of judgment, but this cannot be sustained.

NEW TRIAL.

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STATE v. HENRY BEARD AND JALIE MILLER.

(Decided 18 April, 1899.)

*Judge's Charge—Evidence.*

1. While the object of the judge's charge is to state the law and to assist the jury in applying the facts, as found by them, to the law, the manner in which this is to be done must be left, to a very great extent, to the good sense and sound judgment of the trial judge. *S. v. Boyle,* 104 N. C., 800, doubted.

2. On the trial of an indictment charging fornication and adultery, committed in Catawba County, evidence tending to show criminal intercourse between the defendants in Caldwell County is admissible, not that they could be convicted for that, but to properly interpret the evidence tending to prove the offense in Catawba County.

FORNICATION AND ADULTERY, tried before *Coble, J.,* at Fall Term, 1898, of CATAWBA.

The evidence introduced by the State was purely circumstantial. Some of the circumstances occurred in Catawba County and some in Caldwell County. The defendants offered no evidence. (812)

His Honor recited the whole evidence and laid down general principles of law applicable to the trial of such cases.

The defendants excepted for that his Honor failed to classify and array the testimony in its proper bearings, citing *S. v. Boyle,* 104 N. C., 800.

The defendants asked the following special instruction:

"The jury will not consider any evidence of the presence or conduct of the defendants in the county of Caldwell, or anything said by the male defendant in that county, as being independent proof going to sustain the present indictment, but will only consider such evidence in so far as the jury may regard it as tending to prove adulterous intercourse between the defendants in the county."

Instruction declined; defendants excepted. Verdict, guilty. Judgment. Appeal by defendants.

*Attorney-General for the State.*
*E. B. Cline and T. M. Hufham for defendants.*

FURCHES, J. This is an indictment for fornication and adultery, and both defendants were on trial. Verdict of guilty, and appeal.

Defendants' first exception is that the court only read the notes of the evidence, and charged the law in general terms. We do not understand from this exception that there is any complaint upon the ground that the charge contained erroneous propositions of law. Nor do we understand that there is any complaint, alleging any error committed by the court in reading the notes of the evidence; but that the court did not sufficiently array and sum up the evidence in its charge (813) to the jury, and the case of *S. v. Boyle,* 104 N. C., 800, is the principal authority relied on for this contention. The case of *S. v. Boyle* has been so often criticized, explained and overruled upon the point for which it is cited that it can no longer be considered as authority. The Court in that case undertook to say how well a judge should succeed in aiding the jury to understand the evidence, and seems to have succeeded better in producing confusion than in establishing the rule of practice intended to be established. We do not wish to fall into this error again. It is true that the object of the charge is to state the law of the case to the jury, and to aid them in applying the facts to the law; but the manner in which this is done must be left, to a very great extent, to the good sense and sound judgment of the judge who tries the case.

There are a few general principles which should be observed by court and counsel on the trial, whether civil or criminal. Prayers for instruction should be hypothetical, not too long and not confused. The charge

should consist in hypothetical propositions, where addressed to the jury; should consist of clear-cut propositions, as far as practicable; should not be too discursive, as it is usually addressed to plain, intelligent jurors, who can comprehend a short, concise statement better than a discussion of the matter. 1 Enc. Pleading and Pr., 151 and 152. But we do not think that the facts or the evidence in this case were complicated, and they must have been fully understood by the jury. This exception is not here well taken, and cannot be sustained.

The interesting question intended to be presented by defendants' seventh prayer, and refusal of the court to give the same, does not arise, as both defendants were on trial and both were convicted. And we do not propose to consider it until it is presented.

The eighth and ninth exceptions, based upon prayers asked (814) and not given, are not sustained.

But it appears from the record that the State was allowed to introduce evidence tending to prove adulterous intercourse between the defendants in Caldwell County. This was competent evidence and could not be excluded on objection of defendants. But it was only competent to be considered in connection with other evidence to prove adultery between the parties in Catawba County, and not to prove the crime of fornication and adultery between the defendants in Caldwell County. It is competent evidence upon the same principle that evidence of facts more than two years before the finding of the bill, or facts that have taken place after the bill is found. The defendants could not be convicted for these acts; but it is competent to prove them, to aid the jury in coming to a correct conclusion, or, in other words, to properly interpret the evidence tending to prove the offense in Catawba County. The court was asked to so instruct the jury and declined to do so. In this there was error. The point is expressly decided in *S. v. Guest,* 100 N. C., 410.

NEW TRIAL.

*Cited: S. v. Edwards,* 126 N. C., 1054; *Turrentine v. Wellington,* 136 N. C., 312; *Simmons v. Davenport,* 140 N. C., 411; *Sears v. R. R.,* 178 N. C., 288.

STATE v. CICERO KNOTT.

(Decided 18 April, 1899.)

*False Pretense—The Code, Sec. 1025.*

Evidence of obtaining money upon a false promise, to be performed in the future, but which does not show a false representation of a subsisting fact, will not support an indictment under The Code, sec. 1025, for obtaining money under a false pretense.

(815) INDICTMENT for obtaining money under a false pretense, tried before *McIver, J.,* at November Term, 1898, of FORSYTH.

The defendant excepted to the sufficiency of the evidence to support the charge, and upon conviction moved for a new trial. Motion refused, and defendant appealed from the judgment. The evidence is stated in the opinion.

*Attorney-General and Brown Shepherd for the State.*
*Moore & Sapp for defendant.*

FAIRCLOTH, C. J. The defendant is indicted for obtaining money under a false pretense. The Code, sec. 1025. The State's witness testified that "he went to the defendant Knott and told him he understood he was an agent for one Franklin, who would furnish good and lawful money to any one at the rate of $10 for each $1 invested, and that he afterwards, on the same day, made a *bargain* with defendant Knott that, upon the payment of $21.50, the said Knott was to procure for him from said Franklin the sum of $150; that defendant Knott told him he had furnished money at these rates for Ogburn, Hill & Co.," and others; further, that said money had not been received by him.

Does this evidence constitute an indictable offense under our Code? It does not. It shows a *promise* to be performed in the future, but does not show a false representation of a subsisting fact. This question was fully explained in *S. v. Phifer,* 65 N. C., 325, which has been followed as a leading case. There, it was held that "There must be a false representation of a subsisting fact, calculated to deceive and which does deceive," but it does not extend to mere tricks of trade. It makes no difference whether the prosecutor was a prudent or imprudent

(816) man, or one easily imposed upon; for, if he was deceived, it was done by a *promise* and not by false representation of an existing fact.

NEW TRIAL.

STATE v. AVERY KALE.

(Decided 25 April, 1899.)

*Indictment for Murder—First and Second Degree—Voluntary Intoxication.*

1. Voluntary drunkenness is never an excuse for the commission of a crime.
2. If one charged with murder has premeditated and deliberately formed the intention to kill, and did kill, the deceased, when drunk, the offense is not reduced to murder in the second degree.
3. Of course, the killing and its manner, the intent, intoxication, how it comes about, and for what purpose drunkenness takes place, and the like, are questions for the jury, under the court's instructions as to the law applicable thereto.

INDICTMENT for murder of George Travis, tried before *Coble, J.*, at Fall Term, 1898, of CATAWBA.

The prisoner and deceased were in the employment of A. S. Alley, who ran a government distillery in Catawba County in 1898. There was evidence that the prisoner entertained bad feelings towards the deceased on account of the deceased having supplanted him in his position at the distillery, and because of his being a witness on an indictment at court against him.

The prisoner was given to bad spells of drinking and had (817) repeatedly uttered threats against the deceased. On 13 August, 1898, the prisoner had been drinking some, and went with his gun to the still-house inquiring for George Travis, and threatening to kill him. Travis was in the still-house, and in about two minutes after prisoner had entered, the report of a gun was heard inside, and prisoner came out, saying he had killed the d—d scoundrel. Travis was found by witness, who immediately entered the still-house, mortally wounded with shot in the head and unconscious. He died the next day. The prisoner left the State and was brought back from Florida by the sheriff.

No evidence was offered on part of the defense.

His Honor gave all the special instructions asked for by the prisoner except the fifth, which was refused. It was as follows:

"5. That if the jury believe from the evidence that the defendant had been drinking to excess during the week in which the homicide occurred; that at the time of committing the homicide he was intoxicated, and by reason of these facts they believe that the homicide was the rash act of a drunken man, rather than the vicious act of a sober man, then the prisoner would not be guilty of murder in the first degree."

To the refusal of his Honor to give this special instruction the prisoner excepted. The charge of his Honor was very elaborate—defined the various grades of homicide, and presented the case in its various phases presented by the evidence to the consideration of the jury, and elicited the *encomium* expressed in the opinion of its faithful compliance with section 413 of The Code relating to the duty of a trial judge.

The jury rendered a verdict of guilty of murder in the first degree. The sentence of death was passed upon the prisoner—and he appealed.

(818) *Attorney-General for the State.*
*Feimster & Yount for prisoner.*

FAIRCLOTH, C. J. The defendant was indicted and convicted of murder in the first degree. The first exception is, that the judge failed "to state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon," as required by section 413 of The Code. This section imposes an important duty on the judge, and one of vital interest to the defendant when on trial under a charge of a capital felony.

We have carefully read the evidence in detail, and the charge. The charge is elaborate, calling attention distinctly to each grade of the offense of murder and manslaughter, with distinct instructions how the jury should find, according to their understanding and belief of the evidence. It is a faithful compliance with section 413, and this put the first exception out of the way.

Second exception: That his Honor erred in refusing to give defendant's fifth prayer for special instructions. That prayer was in these words: "That if the jury believe from the evidence that the defendant had been drinking to excess during the week in which the homicide occurred, and that at the time of committing the homicide was really intoxicated, and if by reason of these facts they believe the homicide was the rash act of a drunken man rather than the vicious act of a sober man, then the prisoner would not be guilty of murder in the first degree." Condensed, this means, if the prisoner was really intoxicated when the rash act was committed, he would not be guilty of mur-
(819) der in the first degree.

As a legal proposition, this prayer could not be given, because it leaves out of view the consideration whether the prisoner had made himself drunk for the purpose of executing a premeditated, wicked intent to kill, or whether he availed himself of a drunken condition to execute a premeditated resolution to do the act.

If one voluntarily becomes drunk and kills, without justification, he is guilty of murder. *S. v. Wilson,* 104 N. C., 868. The test of account-

ability is the ability of the accused to distinguish right from wrong, and that in doing a criminal act he is doing wrong. When killing with a deadly weapon is admitted or proved, the law implies malice, and the burden of showing the absence of malice is upon the defendant. Drunkenness at the time the crime is committed, nothing else appearing, does not repel malice nor lower the grade of the crime. The law recognizes the dethronement of reason, as in insanity, for instance, as an excuse. *S. v. Potts,* 100 N. C., 457. "Voluntary drunkenness is never an excuse for the commission of crime." *S. v. Keath,* 83 N. C., 626. If one charged with murder has premeditated and deliberately formed the intention to kill, and did kill, deceased when drunk, the offense is not reduced to murder in the second degree. *S. v. McDaniel,* 115 N. C., 807. Of course, the killing and its manner, the intent, intoxication, how it comes about, and for what purpose drunkenness takes place, and the like, are questions for the jury, under the court's instructions as to the law applicable thereto.

There was evidence of the prisoner's declared purpose and intent at different times to kill the deceased, tending to show deliberate premeditation. One witness testified that the "prisoner had some bad spells when he got liquor in him. . . . Prisoner had several drams that day and had been drinking all the week. He got one bottle of liquor that day." This was the only evidence offered to show intoxication. No witness said he was drunk when he fired the fatal shot, and there was no evidence of provocation. (820)

His Honor, after charging the jury as before stated, said: "The jury will consider the facts and circumstances connected with the homicide and proved in the case, to determine whether the killing was the outgrowth of premeditation and deliberation. . . . The jury will consider all the evidence, and if the State has shown beyond a reasonable doubt that the prisoner intentionally killed the deceased, and that he did it in pursuance of a fixed purpose and intent to kill him, joined with deliberation and premeditation, then the jury will find the prisoner guilty of murder in the first degree." When the jury were instructed to "consider all the evidence," we must assume that the evidence of drinking or drunkenness relied on by the prisoner passed in review and was considered by the jury—that is, to what extent it existed, if at all, and its bearing upon the alleged premeditated purpose and present purpose of the prisoner, before their verdict was rendered.

We have given the case appearing in the record our best attention, and fail to find anything in the course of the trial prejudicial to the prisoner's rights.

NO ERROR.

*Cited:* *S. v. Peterson,* 129 N. C., 556; *Simmons v. Davenport,* 140 N. C., 411; *S. v. Lance,* 149 N. C., 554; *S. v. Murphy,* 157 N. C., 618; *S. v. English,* 164 N. C., 511; *S. v. Shelton, ib.,* 517; *S. v. Foster,* 172 N. C., 966; *Orvis v. Holt,* 173 N. C., 233.

STATE v. W. W. NICHOLSON.

(Decided 25 April, 1899.)

*Highway Robbery.*

In an indictment for highway robbery, the words, "*at* and *near* a certain highway," etc., are sufficiently descriptive of the locality, and if the robbery was committed at a point 50 or 75 yards from the county road and in plain view of the road running parallel to the railroad, it is sufficiently located.

(821) INDICTMENT for highway robbery, tried before *Coble, J.,* at Spring Term, 1899, of UNION.

(824) *Attorney-General for the State.*
*T. L. Caudle and Iredell Hilliard for defendant.*

FAIRCLOTH, C. J. In *S. v. Bradburn,* 104 N. C., 881, the indictment was robbery, "near the highway." The facts were, that defendant and prosecutor went up the railroad and took a path to a point 20 steps from the railroad and 30 steps from the county road running parallel to the railroad. At that point the jury found that the robbery was committed. This was held to be robbery.

In the present case the indictment was robbery "at and near a certain highway." The facts are, that the defendant and prosecutor walked on the railroad some distance, when defendant stepped off 40 or 50 yards and called prosecutor to him, at a point 50 or 75 yards from the county road and in plain view of the road running parallel to the railroad. At that point the jury find that the robbery was committed. The facts and finding in the two cases are, in substance, the same, and upon that authority we hold that the present is a case of robbery. We can find no error in the charge of the court. We were favored with some discussion as to whether a railroad is a public highway, but that is outside the case, as we have a case of robbery with reference to the county road.

NO ERROR.

(825)

## STATE v. SAMUEL LUCAS.

(Decided 2 May, 1899.)

*Murder—Degrees—State Witnesses—Charge—Verdict—Practice.*

1. The State solicitor will not be required to place all the State witnesses, sworn in the case, upon the witness stand for examination. He will be allowed to manage the case in his own way, so that he observes the law and rules of practice.
2. Where the verdict, as rendered by the foreman, was "Guilty of murder," it was proper for the judge to ask whether they found the prisoner guilty of murder in the first or second degree, and upon the foreman responding, "In the first degree," for the clerk to ask, "So say you all?" and upon their response in the affirmative, to record their verdict accordingly.
3. Where there is no evidence in the case making the killing manslaughter, it is proper for the judge to so instruct the jury, and it would have been useless and out of place to have charged the jury upon a proposition of law that there was no evidence to sustain.
4. Where the killing with a deadly weapon is shown and admitted, and there is no evidence tending to show anything in extenuation or excuse, it is proper for the court to instruct the jury that the only question for them was, whether it was murder in the first or second degree.

INDICTMENT for murder, tried before *Timberlake, J.*, at August Term, 1898, of GUILFORD.

The prisoner was indicted for the murder of Henry Wood, whom he shot and killed at Greensboro, N. C., as was admitted.

The verdict as recorded was, "Guilty of murder in the first degree."

There was sentence of death, and prisoner appealed.

*Attorney-General for the State.*
*No counsel contra.*

FURCHES, J. This is an indictment for murder, and the verdict of the jury is, "Guilty of murder in the first degree." From the evidence in the case, it was a shocking affair, a deliberate and cruel murder. The evidence tends to prove that the prisoner, a short time before he shot the deceased at the Piedmont House, said, "I'll kill the son of a bitch"; that he and one Dunnell came towards the express office, where the deceased was standing in the door, talking to Collins, the express agent; stopped and talked; went past the door, where the deceased was standing; stopped and talked; went towards the center of the street, then turned and came towards the door, where the deceased was (827) standing, with his hand in his hip pocket, and just before reaching the door he pulled his hand out of his pocket, with his pistol in it;

that deceased ran; the prisoner ran after him, and shot once before the deceased got out of the office, which is more than 100 feet in length; that he shot twice more after the deceased got out of the house and while deceased was still running.

The second fire was probably the fatal shot, as the deceased was seen to throw up his hands to his back and hold it at the place of the wound. The deceased died that night, and Dr. Battle testified that he died of that wound. The prisoner said he intended to kill the deceased, but was afraid he had not done so; that he went to get his own pistol, a Smith & Wesson, and had he got it, there would have been no running.

But we will not pursue this line of thought further, as it was admitted on the trial and the argument of the case that the prisoner shot and killed the deceased.

While there are several exceptions, there are none to the evidence, and none to his Honor's charge, applying to the first and second degrees of murder, under the statute of 1893.

The prisoner introduced no evidence, and the State closed without putting all the witnesses it had sworn upon the stand. The prisoner insisted that the State should put them upon the stand, and asked his Honor to so rule. The court declined to do this, saying that the solicitor would be allowed to manage the case in his own way, so that he observed the law and rules of practice. To this the prisoner excepted. This exception cannot be sustained. *S. v. Martin,* 24 N. C., 101; *S. v. Smallwood,* 75 N. C., 104; *S. v. Baxter,* 82 N. C., 602.

When the jury came into court to return their verdict, the foreman being asked by the clerk responded "Guilty of murder." The judge asked whether they found the prisoner guilty of murder in the
(828) first or second degree, when the foreman responded "in the first degree." The clerk then asked, "So say you all?" and they responded in the affirmative, and the verdict was so recorded. This was done in open court in the presence of the prisoner and his counsel, and no objection made at the time. If there was any doubt about the matter, in the minds of the prisoner's counsel, they might have had the jury polled, but this was not asked for.

It seems to us that the action of the court was entirely proper. It was its duty to see that the proper entry should be made of the finding of the jury. This exception cannot be sustained.

Another ground of error assigned by the prisoner is that the court did not charge and explain the law with regard to manslaughter. The court charged that there was no evidence in the case making the killing manslaughter. If he was correct in this, it would have been not only useless, but, as it seems to us, out of place to have charged the jury upon a proposition of law that there was no evidence to sustain. And we

entirely approve of the charge of the court that there was no evidence in the case to authorize a jury in finding a verdict of manslaughter. This exception cannot be sustained.

Another ground assigned as error is that the court instructed the jury that the killing with a deadly weapon being shown and admitted, and the prisoner having failed to show anything in extenuation or excuse by his own or the State's evidence, the only question for them was whether it was murder in the first or second degree. This instruction was correct and in accordance with the decisions of this (829) Court. *S. v. Rhyne, post,* 847.

As this is an issue of life and death, we have carefully examined all the exceptions and assignments of error in the case, and find

NO ERROR.

*Cited: S. v. Truesdale,* 125 N. C., 701; *S. v. Harris,* 166 N. C., 246.

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STATE v. FRANK HICKS.

(Decided 2 May, 1899.)

*Costs—Defendant's Witnesses—State Case—Acquittal.*

1. The Code, secs. 733, 744, 747, and 748, collated and construed together, places it in the discretion of the presiding judge, for reasons satisfactory to him, to refuse to direct the fees of witnesses for the State or for an acquitted defendant, in whole or in part, to be paid by the county, and from his decision no appeal can be taken.

2. The State Constitution, Art. I, sec. 11, exempts an acquitted defendant from payment of necessary witness fees of the defense, but does not require that they shall be paid by the public.

INDICTMENT for murder, tried at Fall Term, 1898, of RUTHERFORD, before *Starbuck, J.,* and a jury.

The defendant, Frank Hicks, was acquitted by the jury. No person was adjudged to pay the costs as prosecutor, nor was any person marked as prosecutor.

After the verdict of acquittal was returned by the jury, counsel for the defendant presented to the court a certificate, that the defendant, Frank Hicks, had witnesses duly subpœnaed, and that said witnesses were in attendance, and was necessary for the defense, and were sworn

(830) and examined, and moved before the presiding judge for an order in the cause, directing that said witnesses be paid by the county in the same manner that the law authorizes the payment of State witnesses in like cases. The court refused to make the order.

The said counsel also moved the court to make the order in behalf of the witnesses, which the court refused to do, and the defendant and said witnesses excepted.

(836) *Attorney-General for the State.*
*M. H. Justice, Matt McBrayer, E. J. Justice for defendants.*

(837) CLARK, J. The court below found that the three witnesses named were necessary and material witnesses for the defendant duly subpœnaed and examined, but that "for reasons satisfactory to the court and in the exercise of the discretion in such cases vested in the presiding judge," he refused to order the witnesses paid by the county. From this order the defendant and the three witnesses named appealed.

The appellants contend that The Code, sec. 747, prescribes that the judge "shall" direct that the county shall pay the witnesses of an acquitted defendant (unless taxed against the prosecutor), but this must be taken in connection with the last two lines of said section (747), "in such manner and to such extent as is authorized by law for the payment of State's witnesses in like cases," and as to State's witnesses, the sections 733, 744, place it in the discretion of the presiding judge, for reasons satisfactory to him, to refuse to direct the fees of the State's witnesses in whole or in part to be paid by the county.

In *S. v. Massey,* 104 N. C., 877, the history of the taxation of witnesses' fees is fully discussed, with statements of the reasons why it is left so largely to the discretion of the presiding judge. It is therein said: "As to the necessary witnesses (of defendants who are acquitted) the constitutional provision (Article I, sec. 11) does not require that they shall be paid by the public, but merely deprives them of their common law right to look to the defendant for payment, and places them, except when there is some legislative enactment, upon the footing all State's witnesses formerly held, and some still hold, of serving without compensation." It is necessary that some one be charged with the duty of protecting the public from the imposition of paying witness fees in excess of what is just and reasonable. The judge who tries the case can discharge that duty better than any one else, and, the statute having
(838) expressly vested it in his discretion upon satisfactory reasons appearing to him (Code, secs. 733, 744, 748), no appeal can be taken. *S. v. Massey, supra,* which has been cited and approved in many cases, among others *in re Smith,* 105 N. C., at p. 170; *Merrimon v. Comrs.,*

106 N. C., at p. 372; *S. v. Horne,* 119 N. C., 853; *Guilford v. Comrs.,* 120 N. C., 23; *Clerk's Office v. Comrs.,* 121 N. C., at p. 30; and by *Faircloth, C. J.,* in *S. v. Ray,* 122 N. C., 1095, in which last the findings of fact are almost identical with those in the present case.

There are many other instances in which the action of the judge below is a matter of discretion and not reviewable, as setting aside or refusing to set aside a verdict because excessive or against the weight of the evidence, granting or refusing amendments, continuances, and in other matters fully as important the questions of allowing witness fees.

AFFIRMED.

DOUGLAS, J., dissents.

*Cited:* *S. v. Wheeler,* 141 N. C., 777; *S. v. Pasley,* 180 N. C., 696.

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(839)

## STATE v. ABE DAVIDSON.

(Decided 2 May, 1899.)

*Indictment—Larceny—Second Offense—Appeal by State.*

1. Where the indictment for larceny charges the value of the property stolen to be less than $20, or the jury should so find, the imprisonment for the first offense cannot exceed one year in the penitentiary or common jail, unless the larceny is from the person, or from the dwelling, by breaking and entering in the daytime. Laws 1895, ch. 285.

2. When a second conviction is punished with other or greater punishment than for a first conviction, the first conviction shall be charged as required in The Code, sec. 1187, so as to be passed on by the jury.

3. Where the sentence imposed is plainly within the discretion of the judge, he may properly have taken into consideration the fact that it was not the first offense.

4. The State's right of appeal is recognized, but limited, by C. S. 4649.

THE defendant was convicted of larceny in Criminal Circuit Court of BUNCOMBE—was sentenced to four years' imprisonment, and appealed to the Superior Court—the case was remanded to the criminal court for proper sentence, for the reason that the bill charged the value of $1, but did not charge it as a second offense. The State appealed.

(843) *Attorney-General for the State.*
*Mark W. Brown for defendant.*

CLARK, J. Laws 1895, ch. 285, sec. 1, provides, "In all cases of larceny where the value of the property stolen does not exceed $20, the punishment shall for the first offense not exceed imprisonment in the penitentiary or common jail for a longer term than one year." Section 2 excepts from the operation of this act larceny from the person or from a dwelling by breaking and entering in the daytime. Section 3 provides that in all cases of doubt the jury shall fix in the verdict the value of the property stolen.

In the present case the defendant was convicted of larceny in the Criminal Circuit Court of Buncombe upon an indictment charging the value of the property at $1. The indictment did not charge that the defendant had been theretofore convicted of any larceny. The court, however, sentenced the defendant to imprisonment for four years upon his admission of a former conviction for larceny. On appeal to the Superior Court that court adjudged the sentence of the Criminal Court illegal and remanded the case that a proper sentence might be entered, from which judgment the solicitor appealed to this Court.

The Code, sec. 1187 (now C. S., 4617), prescribes that when a second conviction is punished with other or greater punishment than for a first conviction the first conviction shall be charged in the manner therein set out, and what proof shall be sufficient evidence thereof. When the property stolen is charged of less value than $20 (or when charged at more than that value, if it is found by the jury to be of less than $20), no punishment greater than one year's imprisonment can be inflicted unless it is charged in the indictment that the defendant has been formerly convicted of larceny, except that should the proof show that the larceny was from the person or by breaking and entering a dwell-
(844) ing-house in the daytime the defendant cannot claim the protection of this statute, and hence it is not necessary to charge in the indictment the manner of the larceny. *S. v. Bynum,* 117 N. C., 749. If the larceny was committed in the manner specified in section 2 of the act (by taking from the person or breaking into a dwelling in the daytime) the case falls under the general statute, and though the goods stolen are of less value than $20, allegation and proof as to former conviction become immaterial. *S. v. Harris,* 119 N. C., 811. In the case before us, the larceny was not committed in either of the modes mentioned in section 2, and the value of the goods being charged at less than $20, and no previous conviction for larceny being alleged in the bill, it was erroneous to pass sentence of imprisonment for more than one year. Whether there was a former conviction or not was for the

jury, not for the court. Had the bill charged that this was not the first offense, then the defendant's admission that he had been formerly convicted of larceny would have been competent to prove the charge, but in the absence of such charge (as provided by C. S. 4617), the admission, if believed, was *probata* without *allegata* and of no effect. This case differs materially from *S. v. Wilson,* 121 N. C., 654, where the judge imposing a sentence plainly within his discretion, recited in his judgment the former convictions of the defendant as a reason for the severity of his sentence.

The defendant further insisted that no appeal lay in behalf of the State, from the decision of the Superior Court. As the appeal to that court and its decision thereon are purely upon questions of law, *S. v. Hinson,* 123 N. C., 755, it would seem that the State should be entitled to an appeal to this Court from the judgment of the Superior Court, but the Legislature by inadvertence has so far failed to (845) so provide in The Code, sec. 1237 (now C. S., 4649), and while, from its public importance, we pass upon the point presented, we feel constrained to dismiss the appeal—the same course which was taken in *Hinson's case, supra.*

APPEAL DISMISSED.

*Cited: S. v. Bost,* 125 N. C., 710; *S. v. Mallett, ib.,* 721; *Mott v. Comrs.,* 126 N. C., 882; *S. v. Savery, ib.,* 1088; *In re Holley,* 154 N. C., 171, 172; *S. v. Dunlap,* 159 N. C., 493; *McLean v. Johnson,* 174 N. C., 347; *S. v. Walker,* 179 N. C., 731.

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## STATE v. SAM HIGHT.

(Decided 5 May, 1899.)

*Indictment—Two Counts—General Verdict.*

1. Where an indictment charges an assault with intent to commit rape, and also a simple assault, a general verdict of guilty applies to the first count as well as to the second.
2. Where there was no evidence applicable to the count for the assault with intent, etc., and the jury were properly so instructed, a general verdict of guilty was wrong, and so was a judgment imposing a longer term of imprisonment than is allowed for a simple assault.

INDICTMENT for an assault with intent to commit rape upon Emma Scott, also for a simple assault upon her.

There was no evidence of an assault with intent to commit rape, and his Honor properly so instructed the jury. There was evidence applicable to the second count. The jury rendered a general verdict of *guilty,* and a sentence of twelve months' imprisonment was rendered by the court. Defendant appealed on the ground that neither the verdict nor the judgment were in accordance with the law.

(846) *Attorney-General for the State.*
*Boone & Bryant and Manning & Foushee for appellant.*

FAIRCLOTH, C. J. The defendant stands indicted, first, for an assault with intent to commit rape; and second, for a simple assault. At the close of the evidence his Honor properly instructed the jury that there was no evidence of an assault with intent to commit rape. The jury rendered a verdict of "guilty." The defendant was sentenced to work on the roads for twelve months.

There must be a new trial. The general verdict "guilty" applies to the first count as well as to the second. The jury should have said on which count he was guilty, in order that the proper punishment might follow. His Honor seems to have understood the verdict to be on the first count as he imposed a longer term of imprisonment than is allowed for a simple assault, *i. e.,* 30 days. Code, secs. 987 and 892 (now C. S. 4215 and 1481); *S. v. Nash,* 109 N. C., 837; *S. v. Johnson,* 94 N. C., 863; *S. v. Albertson,* 113 N. C., 633.

NEW TRIAL.

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(847)

## STATE v. ALPHONSO RHYNE.

(Decided 9 May, 1899.)

*Murder—First and Second Degree—Evidence of Deliberation and Premeditation—Act of 1893, Chap. 85.*

1. At common law, the intentional killing of a human being with a deadly weapon, nothing more appearing, was murder, malice being presumed from the facts.

2. By the act of 1893 (chapter 85) the crime of murder has been divided into two degrees—first and second. The common-law definition and description are still applicable to the crime in the second degree; but it takes more than this to constitute murder in the first degree: the killing must be wilful, deliberate and premeditated, and this must be shown by the State beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree.

3. The law is fixed by the statute that the killing must be wilful, upon premeditation and with deliberation; and where there is no evidence tending to prove this, the jury should be so instructed, and the question of guilt on the charge of murder in the first degree ought not to be submitted to them.

CLARK, J., dissenting.

INDICTMENT for murder, tried before *Coble, J.*, at Spring Term, 1899, of GASTON. The prisoner was indicted for the murder of Thomas G. Falls.

Verdict of guilty of murder in the first degree. Sentence of (848) death. Appeal by prisoner.

*Attorney-General and Jones & Tillett for the State.*
*D. W. Robinson for prisoner.*

FURCHES, J. The prisoner was indicted and convicted of murder in the first degree, and from the judgment of the court he appealed. There are some exceptions taken to the charge, but we have examined them with care and do not think they can be sustained. The charge seems to be a full, clear and correct enunciation of the law of murder in the first and second degrees, as its exists under the statute of 1893. The error, if there be error, is in submitting the question of murder in the first degree to the jury upon the evidence in the case. That Thomas Falls had been killed by the prisoner with a deadly weapon, was clearly shown—indeed, not denied. Under the law as it existed before the act of 1893, malice would have been presumed from these facts, and nothing else appearing, the killing would have been murder. The same rule, as to killing with a deadly weapon and the presumption of malice that existed before the act of 1893, still exists, but is only applicable to murder in the second degree; and the burden is still on the prisoner to show facts in extenuation, mitigation or excuse to reduce the grade of the crime below that of murder in the second degree, or to justify or excuse the killing. As the killing with a deadly weapon was proved (in fact, not denied), and the prisoner having offered no evidence in (849) extenuation, excuse or justification, the court would have been justified in telling the jury that if they believed the evidence the prisoner was guilty of murder in the second degree.

But since Laws 1893, ch. 85, dividing murder into two degrees, these rules of the common law do not apply to murder in the first degree; or, speaking more accurately, it takes more than this to constitute murder in the first degree; that, outside of the specified offense named in the

statute, the killing must be "wilful, deliberate and premeditated"; and this must be shown *by the State* beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree.

As the case depends upon the sufficiency of the evidence to justify a verdict of murder in the first degree, we think it proper to give the evidence upon which it was found: Mr. Grissom, an employee of the deceased, living and boarding with the deceased, went with him from his house to the cotton-gin, and who saw and heard the whole matter, testified "that as he went from the store to his supper, he heard a fuss—a row going on between Frank Parish, an employee of the deceased and the prisoner, who had brought a load of cotton to the gin for a customer. After he got to the house he continued to hear the row going on, when a daughter of the deceased informed her father that a fuss was going on between some person at the cotton-gin; that deceased came out on the piazza where the witness was, stopped a moment and started towards the gin-house." Witness went with him, and further testified: "Witness went with him to the gin-house about twenty-five yards from dwelling. Just across the public road as Falls (the deceased) started up the steps of the platform, prisoner was standing on the platform. Prisoner (850) stepped off the platform into a wagon and from there to the ground. Falls went up the steps and asked Frank Parish what the fuss was about. Frank said that a negro had called him a son of a bitch—said that was more than he could take from any negro. Falls told Frank to shut up and go back to his work—there wasn't any use of that. It was Falls' gin-house. Frank Parish was working for Falls. Falls then turned and went down the steps—went around the wagon where prisoner was standing by a tree. Falls said 'are you the man that has been fussing here with Frank Parish?' and said this a second time. Prisoner made no answer to the first question and he asked him the second time. As he asked him the second time Falls put his left hand on the prisoner's right shoulder or arm and asked him to come to the light, he wanted to find out what all this fuss was about. Just then the prisoner stabbed him and jumped back, and said 'hands off.' Prisoner jumped back about three or four feet. Falls turned to witness and said he has stabbed me and he has ruined me, and he ought not to have done it; and then as soon as Falls spoke to witness, the prisoner ran and Falls turned and went into his house. Witness left him at public road and went to store and 'phoned for a doctor. Witness was in about two feet of deceased at the time he walked up to prisoner. Prisoner didn't open the knife after Falls got there—he didn't put his hands in his pocket—from time prisoner got off the platform till Falls was stabbed, was about five minutes. Falls spoke to prisoner in a kind way

and laid his hands on prisoner just merely to ask him to go round to the light, there was no rudeness about it. Witness saw prisoner no more that night. When Falls was on the platform his manner was gentle—asked Frank what the fuss was about, and Frank said that the negro called him a son of a bitch and this was more than he could take. It occurred on 17 November, 1898, between 6 and 7 o'clock in the (851) afternoon. Falls lived three days after that."

The witness was then cross-examined and testified as follows: "Witness went up on platform with Falls and went back with him, when he went down off the platform, and followed him around to where prisoner was. Witness saw prisoner jump off platform into wagon when Falls started up steps—saw him step out of wagon to the ground—didn't see him while witness was on platform talking to Parish. Witness and Falls both walked up to prisoner. Falls, before he laid his hands on him, asked prisoner 'Are you the fellow who has been fussing around here with Frank?' and asked witness, 'What all this fuss was about?' He laid his hand on him just as he asked him to come around to the light. Falls knew the prisoner. Witness had seen prisoner before this time. Parish said to Falls that the negro, Phonse Rhyne, had called him a son of a bitch, and this was more than he could take from any negro. Prisoner was in hearing distance of this remark from where he was when witness got to him. When witness and Falls went around to prisoner, he was 10 or 12 feet from wagon. When witness last saw prisoner before he found prisoner, he was stepping off the wagon, and he was then in hearing distance of the remarks of Falls—and at the tree he was in hearing distance, unless the machinery prevented him. When witness went around to prisoner he was standing by a tree. As witness and Falls approached from the house, Parish and prisoner were quarreling. The fuss ceased when Falls started up the platform. Falls, with his left hand, caught the prisoner's shoulder—laid his hand on his shoulder—arm rather. Falls weighed 225 pounds or 215 pounds—height about 5 feet 11 inches, probably six feet—he was fleshy—not extra active—he was an energetic man—attended to a great deal of business."

We have quoted the entire evidence of this witness, and while (852) there was some other witnesses examined, there was nothing new elicited. And the evidence of this witness may be said to be the evidence in the case. There was a witness who testified that just after the homicide had taken place, some one ran by him, and he supposed it to be the prisoner (it was dark), saying he would kill him—that he would cut his guts out. And while such evidence might possibly be used to show malice, were that necessary, it is not seen how it can be evidence of premeditation and deliberation, which is the point upon which the case turns.

Probably one of the most difficult things that presents itself to a judge presiding at the trial of an important case—a capital felony—is to say whether there is such evidence of guilt (in some cases) as should be submitted to the jury. And it is with reluctance that this Court, after the court below has submitted the matter to the jury and they have found a verdict of guilty, holds that there was no testimony, or no such testimony of the prisoner's guilt as should have been submitted to the jury. But we find that this Court, in the discharge of its duty, has done so in a number of cases. Of the more recent cases we may name *S. v. Miller,* 112 N. C., 886; *S. v. Thomas,* 118 N. C., 1121; *S. v. Wilcox, ib.,* 1181, and *S. v. Gragg,* 122 N. C., 1082. These were all convictions of murder in which new trials were granted upon the ground that the evidence was not sufficient to justify the verdict of guilty.

The law is fixed by the statute, that the killing must be wilful, and that it must be done upon premeditation and with deliberation. The statute of 1893 making this change in our criminal law is a very important one, and like all new statutes of such great importance, it has given this Court trouble to be always able to determine its mean-
(853) ing and to make a proper application of it to the cases in which it is presented. But since it was passed, it has been presented in quite a number of cases where it has been considered and construed by this Court. It, therefore, becomes our duty to consider it now in the light of these decisions and apply it to this case.

In civil cases, where the issue depends upon the weight of the evidence, there must be more than a scintilla of evidence—"there must be evidence from which the jury might reasonably come to the conclusion that the issue was proved." *Wittkowsky v. Wasson,* 71 N. C., 451. This case has been cited with approval in *Lyne v. Tel. Co.,* 123 N. C., 123; *Thomas v. Shooting Club, ib.,* 288; *Spruill v. Ins. Co.,* 120 N. C., 141, and many other cases. This being the rule in civil cases, it must be at least this strong in State cases, where the issue does not turn upon the weight of evidence, but where it must be proved *beyond a reasonable doubt.*

The killing with a deadly weapon being proved (not denied) the question is, was this killing done upon premeditation and with deliberation? or, to more correctly state the question presented, is there any evidence "from which the jury might reasonably come to the conclusion" beyond a reasonable doubt that this homicide was committed *upon deliberation and with premeditation?*

In *S. v. Fuller,* 114 N. C., 885, where the act of 1893 was first considered by this Court, it is said: "The use of a deadly weapon does not *ipso facto* bring the killing within the definition of murder perpetrated by means of poisoning, lying in wait, imprisonment, starving, torture,

or by any other kind of wilful, deliberate or premeditated killing." "Probably 99 out of every 100 homicides are caused by the use of a deadly weapon, and if every case where its use is provoked by insulting language (not deemed provocation in law) which is resented with fatal result on the spur of the moment, the offense is presumably (854) murder, but little has been accomplished by the legislative attempt to classify cases which before fell within the definition of murder." In this case, there was an assault and battery, deemed in law provocation.

It is next considered by this Court in the case of *S. v. Norwood,* 115 N. C., 789, where the Court uses this language: "In order to convict of murder in the first degree . . . it was necessary that the State should show that the prisoner deliberately determined to take the child's life."

Murder under the act of 1893 is again considered in *S. v. Thomas,* 118 N. C., 1113, where it is said: "In order to constitute deliberation the premeditation, something more must appear than the prior existence of malice, or the presumption of malice which arises from the use of a deadly weapon. Though the mental process may require but a moment of thought, it must be shown, so as to satisfy the jury beyond a reasonable doubt that the prisoner weighed and balanced the subject of killing in his mind long enough to consider the reason or motive which impelled him to the act, and to form a fixed design to kill, in furtherance of such purpose or motive."

In *S. v. McCormac,* 116 N. C., 1033, the act of 1893 is considered and the Court says: "It must have appeared in some aspect of the evidence that the accused deliberately determined to kill the deceased before inflicting the wound, in order to warrant the judge in submitting the question of his guilt, on the charge of murder in the first degree, to the jury." The same doctrine is held in a number of other cases, but these are sufficient to establish the rule.

The evidence in this case is quoted above, and, in our opinion, (855) does not prove or tend to prove that the killing was done upon premeditation and with deliberation, tested by the rule established by this Court.

The prisoner and the deceased knew each other. They were friendly so far as appears from the evidence, until the moment of the homicide. The prisoner was lawfully there—we may say by invitation, as the deceased seems to have been the owner of a public cotton-gin, and the prisoner was the servant of one of his customers, and had brought a load of cotton to the gin of the deceased. The prisoner and Parish, an employee of the deceased, got into a fuss. The deceased went from his dwelling-house to the gin-house. The fuss between Parish and the pris-

oner stopped when the deceased got there. The prisoner left the platform of the gin-house and went ten or twelve feet off on the ground, by a tree. It was dark. The deceased and Grissom, an employee of deceased, went to the prisoner, and the deceased said to prisoner, "Are you the fellow who has been fussing around here with Frank Parish?" (Cross-examination.) The prisoner made no answer, the deceased repeated the question, and as he did so, he placed his hand on the prisoner's shoulder and said, "Come around to the light and tell me what the fuss was about." At this moment the fatal stroke was made. The prisoner jumped back and said, "Hands off."

Where is the evidence of *deliberation* and *premeditation?* It cannot be inferred because it was done with a deadly weapon. He was mad but not with deceased, who had seemed to be his friend until the deceased put his hand upon him and said, "Come around to the light and tell me what this fuss is about." The prisoner being mad, it seems that this assault was the cause of the impulse and the fatal blow. To put any other construction upon this transaction would be unnatural, unreasonable and unwarranted by the evidence in the case.

(856) It was contended by the State that the manner in which the homicide was committed afforded sufficient evidence of deliberation and premeditation to justify the jury in finding a verdict of murder in the first degree, and *S. v. Dowden,* 118 N. C., 1145, is cited to sustain this contention. We do not think so. *S. v. Dowden* is easily distinguished from this case. There, Dowden was unknown to the deceased —had gone upon the deceased's engine without permission—was a trespasser—was ordered off and refused to go—was put off by the deceased, but he did not give the fatal blow at that moment. After the prisoner got on the ground he claimed to have dropped his hat, and asked the deceased to hold his lantern so he could find his hat, which the deceased did, when the prisoner picked up his hat, the deceased turned around, and the prisoner shot him in the back. The simple statement of the facts makes the distinction between that case and this so apparent that we will not discuss it.

After a full consideration of this case we are compelled to order a new trial for the reason that we are of the opinion there is no evidence to support a verdict for murder in the first degree.

NEW TRIAL.

CLARK, J., dissenting: This case was tried by a careful and a painstaking judge and by a jury that was unexceptionable to the prisoner, for no objection was taken by him to any one of them. The charge as to the distinction between murder in the first degree and murder in the second degree, was very clear and explicit, and the jury could not have

misunderstood it, and it is not even alleged that they were misled. Though the judge thought there was sufficient evidence to submit the case to the jury upon the phase of murder in the first degree and the twelve jurors were each of opinion that the prisoner beyond a reasonable doubt was guilty of murder in the first degree as ex- (857) plained by the court, we are asked to overrule both judge and jury. It should be a very plain case that would justify such interference with the province of the jury and with the ordinary course of justice.

The act of 1893 divided murder into the first and second degrees—a very proper step, if it can be admissible for the Court to approve, since it has no right to disapprove, legislative action. There was nothing on the face of the act transferring to murder in the second degree the presumption of malice aforethought, which, by an unbroken line of decisions from the earliest times, arose (*S. v. Rollins,* 113 N. C., 722) upon the killing being shown to have been done with a deadly weapon, but this Court, in *S. v. Fuller,* 114 N. C., 885, held that it was transferred, and, having reiterated it since, we must take it now as settled. These decisions, however, also hold that no particular length of time is necessary to constitute "premeditation." In *S. v. Thomas,* 118 N. C., 1113, it is said that to constitute the "premeditation" necessary to constitute murder in the first degree "the mental process may require but a moment of thought." In *S. v. Dowden,* 118 N. C., 1145, which very nearly resembles this case in the facts, it is said: "The law does not lay down any rule as to the time which must elapse between the moment when the person premeditates, or comes to the determination in his own mind to kill another person, and the moment when he does the killing, as a test. It is not a question of time. . . . In determining the question of deliberation and premeditation, it is competent for the jury to take into their consideration the conduct of the prisoner before and after, as well as at the time of the homicide, and all the circumstances connected with it." (858)

In *S. v. Norwood,* 115 N. C., 879, it is said that the jury may find premeditation, no matter "how soon after resolving to do so," the killing is done. This language is approved in *S. v. McCormac,* 116 N. C., 1033, the Court holding that as evidence of premeditation the jury might consider "the want of provocation, the preparation of a weapon, and that there was no quarreling just before the killing"—the identical evidence that is present in the case at bar; and the Court adds that it is "such attendant circumstances which throw light upon the question (of premeditation) rather than a computation of the time intervening between the formation and execution of the purpose." In *S. v. Covington,* 117 N. C., at p. 862, it is said: "It is immaterial, in deter-

mining the degree of murder, how soon after resolving to kill, the prisoner carried his purpose into execution." If a person goes out into the street and, without provocation, coolly walks up to another and stabs him, and then flees, surely this is murder in the first degree, for the jury is justified in believing, "from the circumstances before and after" (*S. v. Dowden, supra*), that the killing was deliberate. In the case at bar the prisoner had been having a high quarrel with one of the deceased's employees; the deceased came up and reproved his employee; the prisoner went down the steps a few feet and stood in the dark, with his knife open, and the deceased, the owner of the gin, went down the steps and up to the prisoner, and asked him in a mild manner what the trouble was; the prisoner made no response; the deceased then gently, not in a rude manner, laid his hand on the prisoner's arm and asked him to come round to the light and tell him what the fuss was about, whereupon, with his open knife, the prisoner stabbed the deceased in the abdomen, and ran off, crying out loudly, "I'll kill him—I'll cut his guts out." He fled from justice, and, when sought by the sheriff, attempted to escape by a back door, and only stopped after being
(859) shot at. The killing could not justly be ascribed to the kind of speech of the deceased, or his gently laying his hand on prisoner's shoulder. His standing there in the dark, with an open knife; his refusing to answer when first spoken to, his killing without any provocation, and his immediate running off, shouting, "I'll kill him—I'll cut his guts out," and his subsequent flight from justice, were all calculated to satisfy the jury that the "devil was in him," and that while standing there in the dark, brooding over his late quarrel, and with his open knife in his hand, he determined to kill whoever approached him. In accordance with the above precedents, this was ample time to make it premeditation, and justified their verdict.

The declaration of the prisoner was also in evidence that he opened the knife in his pocket. This, if believed by the jury, might well have been considered by them as evidence of deliberation and a determination to slay the deceased, for the knife, in that case, could not have been opened without premeditation and a formed intention to take the deceased at a disadvantage. The stabbing was not on a sudden impulse; at least, there was evidence for the jury tending to prove that it was premeditated.

From the report of the Attorney-General to Congress it appears that in the last dozen years the number of homicides in the United States has suddenly risen from 4,000 to 10,500 per annum, and for the vast slaughter represented by the last figure, in round numbers 100 were convicted of murder by the courts and 240 were executed by lynch law—that growing blot upon our civilization. In this State, from the official

"Criminal Statistics," on an average there are 150 capital offenses per annum, for which on an average two are executed by law and four are lynched, though doubtless all the lynchings are not reported. In 1894 the Attorney-General's report shows eight lynched and two legal executions, and the next year two were lynched, and no execution (860) by law.

Lynch law, evil that it is, is a protest of society against the utter inefficiency of the courts, as above shown, to protect the public against murder. It is in evidence that society, under that first of laws—the right of self-preservation—is endeavoring to protect itself when the costly machinery of courts has failed of the object of its creation, so far as homicide is concerned. The wisest course is not to suppress the facts, but to probe the evil and remove the cause.

This inefficiency of the courts is chiefly due to the failure to adapt legislation, as to murder trials, to their changed surroundings in other respects. When, as at common law, a prisoner on trial for murder was not allowed the benefit of counsel or to have witnesses summoned on his own behalf, or to cross-examine those summoned for the prosecution, the humanity of the judges to "even up" matters invented the disparity of challenges, whereby the State is allowed only four peremptory challenges, while the prisoner has twenty-three without assigning cause, and an unlimited number, of course, if he can show cause. Now that the prisoner has the benefit of counsel, the right to have the compulsory attendance of witnesses on his own behalf, and to cross-examine the State's witnesses, and even to be a witness in his own behalf, if he wishes (and freed from comment if he does not), the retention of the enormous disparity of peremptory challenges (twenty-three) in his favor enables him to "run" for some one man on the venire who is his friend or the friend of his counsel, or opposed to capital punishment. Further, the prisoner must be proved guilty beyond a reasonable doubt, and the doubt of one juror defeats conviction. Besides, the prisoner can except to any ruling or charge of the court, but the solicitor for the State cannot; and there are other discriminations in behalf of the prisoner and against the State. The result is, that the gravest and most fla- (861) grant murder can rarely be punished if the prisoner or his friends have means to engage able and influential counsel who can utilize the overwhelming advantage given the prisoner in trials for murder. Attorney-Generals Davidson, Osborne, and Walser have in their reports called attention to this evil, and recommended a reform, so as to give the State a fair trial in such cases. The practical effect of our present system is, that a murder, however flagrant, if the prisoner or his friends have money, entails merely a sharp fine upon the slayer, imposed for

the benefit of some influential and able lawyer in the way of a fee; it is merely this, and nothing more. The heavy expense of the trial all falls upon the defenseless public, with the increased insecurity of human life resulting from easy acquittals. An ideal trial is one in which the innocent has nothing to fear and the guilty but little to hope. In our murder trials, happily, we fulfill the first condition, but are exceedingly far from the latter.

It is true that this disparity of challenge, and other discriminations which prevent the State having a fair showing, can only be corrected by legislation (and many States are doing it); but the courts, knowing the overwhelming disadvantages under which the State already labors in attempting to protect society against murderers, and the increase of lynchings caused by the inability of the courts to do this, should be slow to increase the inefficiency of the courts with the increase of the evil sure to result therefrom, by taking a case from the jury who, upon the evidence and upon a charge in accordance even with *S. v. Fuller,* has found that, beyond any reasonable doubt in the mind of any juror, the prisoner slew the deceased with premeditation and malice aforethought.

(862) MONTGOMERY, J., concurring: In *S. v. Gadberry,* 117 N. C., p. 811 (in which the statute of 1893, dividing the crime of murder into two degrees, was under consideration), *Judge Avery,* in his concurring opinion, said: "We are not acting as arbitrators nor as citizens, susceptible to the influence of public indignation, naturally aroused by such conduct as is attributed to the prisoner, but as a Court supposed to hold the scales of justice too high to be shaken in our purpose by even our own abhorrence of cruelty." These words of the eminent judge truly characterize the thought and purpose of the ideal judge, and every judicial officer should, in the discharge of his public duties, strive to conform to the ideal. The recital, by the witnesses, of the circumstances connected with the slaying of the deceased by the prisoner, and the excitement naturally produced thereby, I think, led the judge into an error, and, that being so, it is my duty as a member of this Court to say so, regardless of any temporary clamor.

By chapter 85, Laws 1893, murder was divided into two degrees—murder in the first degree, and murder in the second degree. Murder in the first degree, to be punished with death, is described in the first section of the act in the following words: "All murder which shall be perpetrated by means of poison, laying-in-wait, imprisonment, starving, torture, or by any other kind of wilful, deliberate and premeditated killing, or which 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."

The contention of the State is, that the prisoner killed the deceased, not by any of the means or under the circumstances mentioned in section 1 of the act, but that he killed him in a manner and with a purpose wilful, deliberate and premeditated; that the intent of the prisoner was not formed simultaneously with the act of killing, upon (863) the sudden impulse of the moment and at the time when the deceased placed his hand upon the prisoner's shoulder. The following is the evidence recited from the case on appeal: "William Grissom—Was present when Tom Falls was stabbed; saw defendant there. On the way to supper that night I heard two persons fussing; heard defendant tell Frank Parish that he would land him in hell in two minutes if he fooled with him. Witness went on from the store to supper at Falls' home; went in and started to prepare for supper. They got louder. Then witness went out on the steps; was standing, listening to the fuss. By this time Miss Bertha Falls went in and told her father about two persons fussing out there. Her father was Tom Falls; he came out, and as he passed witness he stopped for a moment and walked on. Witness went with him—went to the ginhouse, about 25 yards from the dwelling-house—just across the road. As Falls started up the steps of the platform, defendant was standing on the platform. Defendant stepped off into the wagon and from there to the ground. Falls went up the steps and asked Frank Parish what the fuss was about. Frank said that the negro had called him a son of a bitch; that that was more than he could take from any negro. Mr. Falls told Frank to shut up and go back to his work—there wasn't any use of that. It was Falls' ginhouse, and Parish was working for Falls. Falls then went down the steps, round the wagon to where defendant was. Falls said, 'Are you the man that has been fussing here with Frank Parish?' and said this a second time. Defendant made no answer to first question, nor the second question. As Falls asked him a second time he laid his left hand on defendant's right shoulder or arm and asked him to come round to the light—he wanted to find out what all this fuss was about. Just then the defendant stabbed him and jumped back and said, 'Hands off.' Defendant then jumped back 2 or 3 feet. (864) Mr. Falls turned to me and said, 'He has stabbed me, and he has ruined me, and he ought not to have done it.' As Falls spoke this to witness, defendant ran, and Falls turned and went into his house. Witness left him and phoned for a doctor. Witness was within about 2 feet of deceased when he walked to defendant. Defendant didn't open the knife after Falls got there; he didn't put his hand in his pocket. From the time he got off the platform till Falls was stabbed was about five minutes. Falls spoke to defendant in a kind way. Falls laid his hand on defendant just to ask him to go around to the light; there was no

rudeness about it. Witness saw defendant no more that night. When Mr. Falls went on the platform his manner was gentle; asked Frank what the fuss was about, and Frank said the negro had called him a son of a bitch, and this was more than he could take. It occurred on 17 November, 1898, between 6 and 7 o'clock in the afternoon. Falls lived three days after that."

On cross-examination witness stated that he went on the platform with Falls, and went back with him when he went from the platform to where defendant was. Witness saw defendant jump off the platform into a wagon when Falls started up the steps; saw him step out of the wagon to the ground; didn't see him while witness was on the platform talking to Parish. Witness and Falls both walked up to defendant. Falls, before laying his hand on defendant, asked him, "Are you the fellow who has been fussing around here with Frank?" and he asked, "What is all this fuss about? Come around to the light and tell me what you are fussing about." He laid his hand on him just as he asked him to come round to the light. Falls knew the defendant. Witness has seen defendant before this time. Parish said to Falls that the negro, Rhyne, had called him a son of a bitch, and this was more
(865) than he could take from any negro. Defendant was in hearing distance of this remark from where he was when witness got to him. When witness and Falls went to defendant he was 10 or 12 feet from the wagon. Where witness last saw defendant before he found him was when he was stepping off the wagon, and he was then in hearing distance of the remark of Parish, and at the tree he was in hearing distance, unless the machinery prevented him. When witness went to defendant he was standing by a tree. As witness and Falls approached from the house, Parish and defendant were quarreling. The fuss ceased when Mr. Falls started up the platform. Mr. Falls, with his left hand, caught the defendant's shoulder—laid his hand on his shoulder—*arm,* rather. Falls weighed 225 pounds, or 215; about 5 feet high, 11 inches, probably 6 feet. He was fleshy, not very active; he was an energetic man—attended to a great deal of business.

W. Z. Ferguson testified that, on 17 November, witness was at home ten minutes after 8 o'clock. He was 30 or 40 yards from the platform when the fighting took place; not there when the quarrel started; heard quarreling; sounded like it was in ginhouse, but never saw Falls when he went down. Witness learned that night that Falls was cut. A short time before that, somebody came running by the wagon where witness was, about three minutes before witness heard ladies screaming—not over three minutes and as much as one minute. Witness could not tell who it was running, but thought it was a negro. He was coming from towards the ginhouse; heard him say, "I'll kill him; I'll cut his guts

out, damn him," and a good many other words which witness could not understand. He went on by the wagon, and witness heard him down the road—heard his steps and his voice for 50 or 100 yards.

Cross-examined: Witness knows defendant; never saw him (866) there that evening before the boy or man ran by witness. Witness had been there not over ten minutes. Defendant was working for Boyd. Defendant said, "I'll kill him"—words of that kind witness understood. He was in a trot or run; he moved by witness; he said, "I'll kill him—I'll cut his guts out." Witness heard quarreling; didn't know who was quarreling; only a few minutes before he had heard quarreling. Parish was cursing somebody—witness couldn't tell who; don't think the cursing was as much as five minutes before the running.

Bruce Falls: Was there the night of 17 November with Mr. Ferguson. Witness heard some cursing; was all he heard, and saw a man running; was all he saw; he was going from the gin; he passed in 5 or 6 feet. He said, "I'll cut your guts out—I'll kill him, damn him." Witness couldn't tell who it was; never saw Mr. Falls as he went back to the house. Witness was going home from Gastonia. Before witness got to the ginhouse he heard cursing for two or three minutes. Stopped at the store and got mail.

Cross-examination: Something like 50 yards before witness got to ginhouse. He heard quarreling. Witness thought one of them was Parish; heard cursing and thought two different men were doing it. Witness' wagon was 25 or 30 yards from the gin when the man ran by the wagon. It was about five minutes from the time cursing stopped till the negro came by, but didn't know at the time who it was that passed wagon.

Dr. Sloan: Saw Tom Falls after he was cut—one-half or three-quarters of an hour after he was cut. He was cut in the left side, in the bowels, 3 inches below the navel. Witness examined the wound. He had a stab wound of the large bowels—the descending; had gone through both sides of the bowels; it had not touched the back wall. Deceased was fleshy. The blade was, in my opinion, between 3 and 4 inches in length—possibly not so large. Deceased died on Sunday following. He died of peritonitis, caused by that wound. The wound (867) was a mortal stab.

Cross-examined: The wound could have been made by a smaller or larger knife. Deceased's abdomen was pretty thick—a good deal of fat.

J. L. Falls: Was present when defendant was arrested in Rutherford County. It was the following Tuesday after deceased was cut, on Thursday before. Defendant was in a negro's house; he was in a dwelling-house; defendant ran out the back door and pulled the door after him. Mr. Jones shot twice after him. After he got around the garden fence

he came by witness. Followed him over half a mile before they caught him. Knife shown witness, and he says it looks like knife defendant had. Defendant said that the knife they had was the knife with which he stabbed Mr. Falls. Defendant said he opened the knife in his pocket after Falls put his hand on him. Mr. Jones kept the knife; took that and what money he had. The knife shown witness has a blade 3½ inches long.

It will be seen that not a particle of the evidence tended in the least to show that the prisoner had any feeling of malice or even unkindness toward the deceased until the fatal stab was inflicted. The prisoner had been in a quarrel, it is true, with another man—Mr. Parish, an employee of the deceased—but the deceased had taken no part in it, and surely that is not evidence of malice against the deceased on the part of the prisoner. When the deceased came upon the scene, the prisoner stepped from the platform into the wagon, and from the wagon to the ground. In a short time—a few moments—the deceased walked down the steps of the platform and around the wagon, and, about 10 or 12 feet off, saw the prisoner standing near a tree. He approached him in the darkness, with Grissom and another employee close upon his
(868) heels—2 feet behind. The deceased laid his hand on the shoulder of the prisoner and said, "Are you the fellow that has been fussing around here with Frank?" and, further, "What is all this fuss about? Come round to the light and tell me what you are fussing about." The deceased laid his hand on the prisoner just as he told him to come round to the light. I know that the witness Grissom said the manner of the deceased was kind, but it is plain from the surrounding circumstances that his manner was commanding. The deceased knew the prisoner; he had been told about the quarrel between Parish and the prisoner, and his language at the time of coming up with the prisoner meant nothing, unless it meant a reproach and contempt for him and the determination to compel a submission of the quarrel to his judgment, if not more. The conduct of the deceased was, in law, an assault upon the prisoner. According to the rules which govern human life in our stage of civilization, nothing is, or can be, more offensive to the average person than having the hands of another person laid upon him and being told at the same time to do or not to do a particular thing. And the law is of universal application, and makes no distinction between persons. It is simply idle to attempt to draw any analogy between this case and the case where one person should walk up to another, without a word of warning or threat, and kill that other in a public street or place. In that case the inference would be irresistible that the purpose to kill had been formed before the assailant had met his victim. Here the prisoner was looked for by the deceased and the assault made upon the prisoner.

It is clear, then, that there was no malice by the prisoner toward the deceased at any time except that which arose in law from the killing, and that there was no premeditation to kill, and that the purpose to kill arose simultaneously with the assault made upon the prisoner.

We have now to examine the conduct of the prisoner after the (869) killing. It is enough to remark on the question of the flight of the prisoner that such a course might be evidence of the prisoner's guilt of crime, but it was no evidence of the *degree* of the crime he had committed. If the language of the prisoner as he ran off had been used before he stabbed the deceased, it would of course have been evidence both of malice and of premeditation, but used afterwards it tended to show nothing except that either he did not think he had killed the deceased or that he intended to do so in the future. The evidence concerning the time when the prisoner opened the knife is conflicting. Grissom said, "Defendant did not open the knife after Falls got there; he did not put his hands in his pocket." According to the evidence of one of the witnesses, the prisoner said when he was arrested that he opened the knife in his pocket after Falls put his hand on him. If the prisoner had his knife open in his hands before the deceased came up with him, standing under the tree, it cannot be contended that he had opened it for the purpose of stabbing the deceased, for the reasons already given; and if he opened the knife, as he said he did, after the deceased laid his hands on him, then the opening of the knife and the stabbing of the defendant was simultaneous with the assault on the prisoner, and in neither view was there evidence going to show that the prisoner stabbed the deceased with premeditation and deliberation.

*S. v. Dowden,* 118 N. C., 1145, has been referred to as a case very much resembling this. If that case resembles this in any respect it is very clearly distinguishable. There were method and artifice on the part of the prisoner in that case; there was a motive—anger—because he was required to get off the engine; the time was selected by the prisoner to shoot the deceased—when his back was turned. All such circumstances are lacking in this case. For the reasons set out in (870) this opinion, I think there was no evidence going to show that the prisoner was guilty of murder in the first degree, and I must concur in the opinion of the Court.

DOUGLAS, J., concurring: I am unwilling to rest under the charge that the increase of lynchings is caused by the inability of the courts to protect society from murderers. In the first place, I do not think there has been any increase of lynching in this State, where it has always been extremely rare; and even if our courts were inefficient, which I emphatically deny, I do not see how our alleged laxity should increase

lynchings in other States without having any effect in our own. Such suggestions do great injustice to our State and may do great harm by encouraging the very outrages they profess to denounce. In any event, they tend to weaken, especially when coming from such a source, the respect of the people for the administration of justice, which is the foundation of social order. I feel safe in saying that the courts of this State are fully competent to protect our citizens, and able to do so without denying to any one the equal protection of the law. The temple of justice contains no altar of sacrifice, nor do the people of North Carolina demand a scapegoat for the sins of the ten thousand murderers throughout the country.

We are told that wealthy men who have money enough to retain able counsel are rarely convicted of murder. Are they ever lynched? If they are never lynched, then lynch law can in no sense be regarded as a protest against their acquittal.

It is always a matter of regret that a judge should ever feel it his duty to go outside the record in defending the opinion of the Court; but when his action is questioned in a manner that he cannot ignore, his silence may be construed into an apparent acquiescence that
(871) may tend to bring into disrepute the tribunals of justice and the laws of the land.

Feeling as I do, more I do not wish to say; less I could not say. I concur in the opinion of the Court.

*Cited:* *S. v. Lucas, ante,* 828; *S. v. Truesdale,* 125 N. C., 698, 700; *S. v. Foster,* 130 N. C., 669; *S. v. Bishop,* 131 N. C., 735; *S. v. Cole,* 132 N. C., 1075, 1092; *S. v. Lipscomb,* 134 N. C., 694; *S. v. Cameron,* 166 N. C., 386.

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STATE v. JOHN A. DICKSON, R. K. PRESNELL, JOHN GARRISON, T. J. GILLIAM, SAM HUFFMAN, AND N. L. BEACH, COMRS. OF THE TOWN OF MORGANTON.

(Decided 10 May, 1899.)

*Indictment—Town Commissioners—Repair of Streets.*

1. One of the principal duties of a municipal corporation is the proper maintenance of its streets, and for a neglect of this duty the corporation is liable in damages.

2. It is a general rule that all public officers with some few well recognized exceptions, are liable to indictment for neglect of duty.

STATE *v.* DICKSON

INDICTMENT against the town commissioners of Morganton for failing to keep a public street of the town in proper repair, tried before *L. L. Greene, J.*, at Fall Term, 1898, of BURKE.

The indictment was as follows:

THE STATE OF NORTH CAROLINA—BURKE COUNTY.

Superior Court, Fall Term, 1898.

The jurors for the State, upon their oaths, present: That John A. Dickson, R. K. Presnell, John Garrison, T. J. Gilliam, Sam Huffman, and N. L. Beach, commissioners of the town of Morganton, late of the county of Burke, on 1 May, 1897, with force and arms, at and in the county aforesaid, unlawfully and wilfully did fail, refuse (872) and neglect to have the road leading from the depot to Hunting Creek worked out and kept in proper repair, the same being a public road, or street, and within the corporate limits of the town of Morganton, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

I. F. SPAINHOUR, *Solicitor.*

The defendants moved to quash the bill, which motion was allowed by the Court, and the solicitor appealed.

*Attorney-General for the State.*
*S. J. Ervin for defendants.*

DOUGLAS, J. This is a criminal action, founded upon a bill of indictment charging that the defendants, commissioners of the town of Morganton, on 1 May, 1897, "unlawfully and wilfully did fail, refuse and neglect to have the road leading from the depot to Hunting Creek worked out and kept in proper repair, the same being a public road, or street, and within the corporate limits of the town of Morganton."

The defendants moved to quash the bill, which motion was granted, and the State appealed.

The ground of the motion does not appear in the record, but is thus stated in the brief of defendants' counsel: "The indictment does not charge any criminal offense. It was not the duty of the defendants to work the streets of the town of which they were commis- (873) sioners, nor does any statute provide that they shall have the same worked. Their duty is discharged when they provide for keeping in proper repair the streets of the town."

We are aware that there are many cases holding, in substance, that it is not the duty of the town commissioners, personally, to work the streets, and that an indictment, to be valid, must distinctly state the

neglect or violation of some public duty; but we do not understand these cases to hold that there is no duty whatever imposed upon such officers of keeping the public streets in such reasonable repair as is demanded by the public safety and convenience. Section 3803 of The Code provides that "They shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best."

Surely this section imposes some duty in relation of the repair of streets; and while it allows a wide discretion, we do not think that such discretion extends to the entire neglect of the duty imposed. We know that one of the principal duties of a municipal corporation is the proper maintenance of its streets, and for a neglect of this duty the corporation is liable in damages. This is well settled law, and was reaffirmed in *Dillon v. Raleigh, ante,* 184. Large sums of money are annually collected in taxes and appropriated to the maintenance and improvement of the public streets. Can it be possible that men, holding responsible municipal offices and disbursing large sums of public money, have no legal duties whatsoever imposed upon them by virtue of their office, or if, having such duties, that they are in no way responsible for their faithful performance? It is a general rule that all public officers, with some few well recognized exceptions, are liable to indictment for neglect of duty. Bishop's Criminal Law, sec. 459, says: "Any act or (874) omission in disobedience of official duty by one who has accepted public office is, when of public concern, in general, punishable as a crime." Mecham Pub. Off., secs. 1022, 1025; Throop Pub. Off., secs. 855, 856; 19 A. & E., 502; *S. v. Hatch,* 116 N. C., 1003.

As we are of the opinion that it is the duty of municipal officers to cause the public streets to be kept in proper repair, we see no reason why they should not be held criminally liable for its neglect as for the neglect of any other public duty.

We think the indictment sufficiently describes the offense as neglecting to keep a public street in proper repair. What is proper repair would depend largely upon circumstances, such as the size of the town and its available funds, the character and location of the street, and the amount of travel thereon; but that question is not now before us.

As we see no reason why town commissioners should be exempt from the general responsibility of public officers, the judgment of the court below quashing the indictment must be

REVERSED.

*Cited: Williams v. Greenville,* 130 N. C., 99; *Waynesville v. Satterthwaite,* 136 N. C., 239; *Turner v. McKee,* 137 N. C., 254.

## CASES DISPOSED OF WITHOUT WRITTEN OPINIONS

CUTLER *v.* CUTLER, from Beaufort. Warren for plaintiff; Small and Nicholson for defendant. Motion for new trial, for newly discovered evidence, allowed.

COLLINS *v.* PETTITT, from Halifax. Travis for plaintiff; Hill and Dunn for defendant. Petition to rehear dismissed.

BARBER *v.* BUFFALOE, from Northampton. Dunn for plaintiff; Peebles for defendant. Judgment below affirmed, by consent.

WILLIAMS *v.* SCOTT, from Warren. Pittman & Kerr for plaintiff; Cook & Green for defendant. Affirmed.

BUFFALOE *v.* BURGWYN, from Northampton. MacRae & Day for plaintiff; Peebles for defendant. Appeal dismissed.

WHITFORD *v.* R. R., from Craven. Simmons, Pou & Ward for plaintiff; Clarke for defendant. Affirmed.

JONES *v.* DIXON, from Craven. A. D. Ward for plaintiff. Dismissed for failure to print record.

SHELBURN *v.* JOYNER, from Pitt. Jarvis for plaintiff; Moore for defendant. Affirmed.

STATE *v.* ORRELL, from Guilford. Attorney-General for State; Staples for defendant. Dismissed for failure to print record.

BANKING CO. *v.* BURLINGTON. Winston & Fuller for plaintiff; Bynum and McLean for defendant. Affirmed.

TAYLOR *v.* ROGERS, from Granville. Graham for plaintiff; Edwards & Royster for defendant. Affirmed.

TROLLINGER *v.* R. R., from Alamance. C. M. Busbee for plaintiff; A. B. Andrews, Jr., for defendant. Motion of plaintiff to reinstate appeal denied.

*Cited: Norwood v. Pratt,* 124 N. C., 747.

MCGHEE *v.* BREEDLOVE, from Granville. Batchelor and Edwards & Royster for defendant. Motion to docket and dismiss plaintiff's appeal allowed.

STATE *v.* PUGH, from Sampson. Attorney-General for State; Kerr for defendant. New trial.

MACHINE CO. *v.* BOGGAN, from Anson. Bennett for plaintiff; Lockhart for defendant. Affirmed.

SLOCOMB *v.* WILLIAMS, from Cumberland. Cook for plaintiff; Ray for defendant. Defendant's appeal dismissed.

DOUGLAS *v.* CAGLE, from Montgomery. Douglas for plaintiff; Rush for defendant. Dismissed for failure to print record.

DULA *v.* TUGMAN, from Wilkes. No counsel appearing, dismissed for failure to prosecute appeal.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS

COWLES *v.* COUNCILL, from Watauga. Barber and Lovill & Fletcher for plaintiff; Councill for defendant. Affirmed.

WINEBARGER *v.* LANEY, from Caldwell. Wakefield for defendant. Affirmed.

FERGUSON *v.* ROBINSON, from Union. Jerome for plaintiff; Redwine for defendant. Dismissed for failure to print record.

WILSON *v.* WILSON, from Rutherford. Eaver, McBrayer, and Gallert for plaintiff; M. H. Justice for defendant. Consent judgment awarding new trial.

DAVIS *v.* LONG, from Swain. Ferguson for plaintiff. Affirmed.

# APPENDIX

## ALFRED MOORE AND JAMES IREDELL

REVOLUTIONARY PATRIOTS, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

### AN ADDRESS DELIVERED IN PRESENTING THEIR PORTRAITS TO THE SUPREME COURT OF NORTH CAROLINA ON BEHALF OF THE NORTH CAROLINA SOCIETY OF THE SONS OF THE REVOLUTION, 29 APRIL, 1899

BY JUNIUS DAVIS, ESQ.
A MEMBER OF THE SOCIETY

At the annual meeting of the North Carolina Society of the Sons of the Revolution, held in the city of Raleigh on 15 November, 1898, the following preamble and resolutions were adopted:

"WHEREAS, Alfred Moore and James Iredell, of North Carolina, were prominent patriots during the War of the Revolution—Moore in military, and Iredell in civil stations; and

"WHEREAS, after the return of peace, the talents and patriotism of these distinguished jurists were recognized by appointment to the bench of the Supreme Court of the United States, in which high tribunal they did honor to North Carolina and the country at large:

"*Therefore, be it resolved by the North Carolina Society of the Sons of the Revolution,* That oil portraits of the said Moore and Iredell be painted, at the expense of this society, for presentation to the Supreme Court of North Carolina.

"*Be it further resolved,* That Junius Davis, Esq., of this society, be invited to formally present the said portraits to the North Carolina Supreme Court on behalf of the society at such time as the committee hereafter named shall designate.

"*And be it further resolved,* That the board of managers of this society shall forthwith appoint a committee to carry into effect these resolutions, the said committee having full power to act for the society."

### IN THE SUPREME COURT

### 29 APRIL, 1899

The speaker was introduced by MR. THOMAS S. KENAN, vice-president of the society.

*May it please you, the Chief Justice and Justices of the Supreme Court:* At the request of the North Carolina Society of the Sons of the Revolution, of which I am a member, I have the pleasure and honor of presenting to you portraits of two of the ablest and most distinguished jurists of North Carolina—

Alfred Moore and James Iredell. It is a brilliant and goodly assembly which has gathered here, and into which they are introduced: Ruffin, the great expounder of the law, whether common, commercial, equity, or constitutional; the illustrious and talented Gaston; the scholarly Murphey; Taylor, Daniel, Hall; Pearson, preëminent in the common law; and others—all great lawyers; but even into such company may they enter as peers, with proud front, with lofty dignity, and a serene confidence in their own splendid abilities. As we recall the names and fame of the mighty giants of the law whose shadows now look down upon us from these walls, an involuntary feeling of wonder is excited in us that no one of them whose words have reached throughout this broad land, and, echoing across the wide ocean in the courts of England, have commanded respect there, should have been called to sit in that august tribunal which administers the laws of this great republic. And yet so it is, that only at the birth of that Court, a century ago, has a son of North Carolina been honored with a seat upon the Supreme Bench of the United States. Looking back over that one hundred years, what a retrospect is before us! In every department of art, science and industry, in the art of war and in the arts of peace, what vast progress, what rapid strides have been made! And in no science has there been greater or broader progress than in the science of the law. When Moore and Iredell came to the bar the law was in its infancy—a vast unexplored field, with but few well-known landmarks to guide the toiling student on his way. Now that field is covered with a multitude of roads, ever branching out and crossing and intersecting and bisecting and overlapping each other, until the whole is one tangled maze, through which the brethren wander with dizzy brain and uncertain step. Whether the benefit to the world at large has been equal to the progress, is a question some cynics have asked, but which I will not attempt to answer. In that day a copy of Coke, Bacon, Hawkins, a few stray volumes of reports, perhaps the ancient Plowden, or Dyer, or Coke, a strong, luminous intellect, hard, common sense, and what my Lord Kenyon called "the reason of the thing," were all the weapons of the well-equipped lawyer. There were no encyclopedias, no codes, no State reports, but precious little home-made statute law, and no "case lawyers." Only strong men could succeed, and as a rule only strong men came to the bar. The lawyers of that day were not only laborious students, zealous and diligent in the pursuit of knowledge, but they were also the leaders of the people. More than all others, they moulded and directed public sentiment into that current which finally swept on to the creation of these United States. The prominent part which they were to take in the Revolution was foreseen by Burke, who, in a speech before Parliament in 1775, referring to the colonies, declared: "In no country perhaps in the world is law so general a study. The greater number of the deputies sent to the Congress were lawyers. . . . I have been told by an eminent bookseller that in no branch of his business, after tracts of public devotion, were so many books as those on the law exported to the colonies. . . . I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. . . . This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources." However, there were some things in which the judges and lawyers of that day in no wise differed from those of the present time, notably in that antagonism which always prevails when opinions differ. For, in 1783, we find Iredell writing to his wife in regard to one of his cases: "I think the proceedings are irregular and may be set aside, but there is no risking the plainest things with our judges."

But before Moore and Iredell, even as they came to the bar, was already looming up the black shadow of the coming Revolution. In the dark and weary days of gloom, of trouble, misery and woe, through which our people

passed in their first struggle for liberty and independence, they did their duty well as men and patriots, the one in the field and the other in the halls of council.

It is impossible for us of this generation to realize to the full the conditions which confronted our ancestors. They had been taught to look up to England as a child to its mother, to love and reverence, to fear and obey her. She was the most powerful nation in the world, with a strong army, a mighty navy, and vast resources. The colonies were without money, without arms, without soldiers, without ships, and without friends. There was no quarter of the globe to which they could look with any hope for aid or assistance. But there was no looking backward, no shrinking from the edge of peril, no fear or hesitation to "awake the sleeping sword of war" with the men of that day, but a stern, high, steady resolve to achieve that independence to which they had pledged "their lives, their fortunes, and their sacred honor." And, among those who carried themselves as true men in that great conflict, history tells us that Alfred Moore and James Iredell were prominent.

ALFRED MOORE

Alfred Moore was born in the county of Brunswick on 21 May, 1775. He was the son of Judge Maurice Moore, whose wife was Annie Grange. He came from a line of men who had written their names upon the history of the Old World and of the New. He was a lineal descendant of that Roger Moore who was one of the leaders of the Irish rebellion of 1641, and who, Hume says, "first formed the project of expelling the English and asserting the independence of his native country." James Moore, by some accounts the son and by others the grandson of Roger Moore, had emigrated to the Barbadoes prior to the accession of Charles II. to the throne, and from there he came to South Carolina with Sir John Yeamans, whose daughter he married, and settled near Charleston, in the famous Goose Creek settlement in Berkeley Precinct.

It was a singular destiny which brought about this alliance and mingled in its offspring the blood of the Irish rebel with that of the English cavalier. Sir John Yeamans was the son of Robert Yeamans, who was high sheriff of Bristol in 1643, when that city was besieged by the army of the Parliament under Lord Fairfax. So devoted to the cause of Charles was Robert Yeamans, and so sturdily and bravely did he bear himself in the defense of that city, that upon its capture, Fairfax, in his wrath, hanged him offhand in the street, opposite his dwelling.

The Barbadoes had been an asylum for both Cavaliers and Roundheads, who, wearied of the strife and persecution of the Civil War, sought peace and rest in a distant land, and here came John Yeamans. He was one of the thirteen gentlemen of that colony who were knighted by Charles, when he came to his own again, for their sufferings and sacrifices in the Royal cause. He was also, in January, 1665, made Governor by the Lords Proprietors of the "County of Clarendon," afterwards the Province of South Carolina, stretching west from the Atlantic to those unknown waters called the Southern Seas, and south to the Spanish possessions in Florida, and was also a lieutenant-general. In May, 1671, he was created a landgrave and given 12,000 acres of land, and in the same year, for a second time, was made Governor. He carried with him to the Ashley his negro slaves, and, according to Bancroft, was the first to introduce negro slavery into the colonies.

James Moore was a bold, adventurous man, of high spirit, unflinching courage and strong mind, and he soon became a leader of men. He was Governor of South Carolina in 1700, and when succeeded in that office by Sir Nathaniel Johnson, in 1703, he was appointed Attorney-General of the Province. His

eldest son, James Moore, was also Governor of South Carolina in 1720. He was one of the ablest soldiers of the province, and had greatly distinguished himself in the wars with the Spanish and Indians. When the Tuscaroras, having recovered from their defeat by Barnwell, were again carrying the torch and tomahawk through the unprotected settlements of North Carolina, in 1712, and Governor Pollock called upon South Carolina for aid, James Moore, the second, was selected to lead the men from South Carolina. With him, as an officer, went his younger brother, Maurice, to whom we owe the first permanent settlement of the Cape Fear country. Traversing this region on his toilsome march to the Neuse, and seeing the beauty of the land, the fertility of the soil, and the commercial advantages of the river and harbor, it is reasonable to presume that he then and there conceived the project which he afterwards successfully carried out. Lingering in North Carolina, a few years after the return of his brother to Charleston, long enough to marry one of her fair daughters, he returned to Charleston, and gathering about him the families of all of his brothers and sisters (except his elder brother, James) and many of his friends, about the year 1723, for history leaves the exact time uncertain, he again struck into the wilderness, and settled them at and around Old Brunswick, on the west side of the Cape Fear River, about 13 miles below Wilmington. And this was the first permanent settlement of the Cape Fear region.

His two sons, Maurice and James, were eminent and distinguished men and ardent patriots. Maurice was one of the three judges of the province at the breaking-out of the Revolution, and was "a learned jurist, an astute advocate, and a keen-sighted statesman." James was a soldier and "considered the first military genius of the province." He was colonel of the First North Carolina Continental Regiment in September, 1775, and brigadier general in March, 1776. Upon the departure of Lee for the North, in the summer of 1776, he was appointed by Congress Commander-in-Chief of the Southern Department. But, a few months after, however, his health failed, and he died in Wilmington on 15 January, 1777; and, on the same day, in the same house, died his brother Maurice, both "in the prime of life and in the meridian of their fame and usefulness."

In 1764, while yet a youth, Alfred Moore was sent to Boston to complete his education. Judge Taylor says that, "On the arrival of the British troops there, in 1768, he attracted the notice of a Captain Fordyce, a man of fine taste and acquirements, who became much attached to the youth, and offered to procure him an ensigncy in the army. This he declined, but, under the instructions of his friend, he learned the elements of military science, and furnished himself with a variety of knowledge, which highly qualified him for that stormy period in which he was destined to live."

On 1 September, 1775, while not yet of age, he was appointed a captain in the First North Carolina Regiment, commanded by his uncle, James Moore. After participating in the short but brilliant campaign which resulted in the total defeat and destruction of McDonald's Royalist Highlanders at Moore's Creek, in February, 1776, his regiment, then commanded by his brother-in-law, Col. Francis Nash (Col. James Moore having been appointed brigadier general in the Continental line), was ordered to Charleston to assist in the defense of that city against the threatened attack of the British under Sir Henry Clinton and Lord Cornwallis. With his company he bore his part in that memorable attack on Fort Moultrie in June, 1776, when the North Carolinians behaved with such gallantry as to draw from Charles Lee the eulogium: "I know not which corps I have the greatest reason to be pleased with, Muhlenburg's Virginians or the North Carolina troops—they are both equally alert, zealous, and spirited." And what higher testimony to the valor of the

North Carolinians could we have than this, when a Virginian reckons them as equal to the best regiment Virginia had sent to the field! After the repulse of the British at Charleston, Moore's regiment was camped at Wilmington, where it was put through a rigid system of drill and discipline, which gave it the efficiency that distinguished it in the later northern campaigns.

In March, 1777, the regiment was ordered north to join Washington, who was then retreating through New Jersey and in great straits. Captain Moore did not accompany his regiment, for he had been compelled by the misfortunes and necessities of his family to resign his commission on 8 March, 1777. His brother Maurice, a lieutenant in his regiment, had but recently been killed, his father had died, and the utterly disordered and defenseless condition of the country around Wilmington commanded his presence at home. But, though no longer in the Continental line, he still kept the field, and, enrolling himself in the militia, became an active and zealous partisan. With a few raw but restless spirits he made himself such a thorn in the side of the British at Wilmington that Major Craig, in command there, sent a detachment to his plantation, which plundered his house, burned all the buildings on the place, carried away all his stock, and left him utterly penniless and destitute. But his lofty courage and ardent patriotism were unshaken by these trials, and he continued to lose no opportunity to harass his enemy whenever an opportunity afforded. Judge Taylor tells us that Major Craig made every effort to kill or capture him, and, failing in both, sent him an offer to restore his property and give him amnesty if he would only return to his plantation and take no further active part in war. But this offer was spurned by him, and his efforts in the cause of freedom and independence were never relaxed until the final triumph.

The close of the war found him ruined in fortune and estate. His plantation was a waste, his slaves scattered and stolen, he himself without resources or money, his family almost destitute of food and clothing. His condition was, indeed, deplorable. He had, prior to the breaking-out of the war, studied law under his illustrious father. I have seen it stated that he was appointed Attorney-General of the State before he had obtained a license to practice law, but this is a mistake, for in the minutes of the County Court of New Hanover, April Term, 1775, I have seen the record of his producing a license to practice law in the inferior courts of the State and taking the usual oath required. It is certain, however, that if he had any practice at the bar it was but very limited and of very short duration.

At the June Term, 1782, of the Court for the Hillsboro District, in the absence of the Attorney-General, "The court," to use the words of Judge Williams, "got the favor of Col. Alfred Moore to officiate as attorney for the State, and without whose assistance, which the court experienced in a very essential manner, they could not have carried on the business of the court." There were many important criminal cases at this term, and seven capital convictions, for burglary, high treason, etc.

In 1782, the General Assembly of North Carolina, in grateful remembrance of his distinguished services, and in some part to compensate him for his losses and unselfish patriotism, recognizing his eminent abilities, appointed him Attorney-General of the State to succeed Iredell, who had just resigned. We are told that the salary of the first two years of his office was paid in homespun and provisions. Think upon it a moment, your Honors—what would be the consternation, the utter misery of the present Attorney-General if such legal tender were proffered to him for his salary! To a weak man, the high position to which Alfred Moore had been called at the very outset of his career as a lawyer would have been but a quicksand and a pitfall. But he was anything but weak. Judge Taylor tells us that he had a mind of uncom-

mon strength and a quickness of intellectual digestion that enabled him to master any science he strove to acquire. He was small in stature, scarce 5 feet 4 inches in height, neat in dress, graceful in manner, but frail in body. He had a dark, singularly piercing eye, a clear, sonorous voice, and those rare gifts of oratory that are born with a man and not acquired. Swift was his model, and his language was always plain, concise and pointed. A keen sense of humor, a brilliant wit, a biting tongue, a masterful logic, made him an adversary at the bar to be feared. Judge Murphey, in his address before the societies of the University, says: "Two individuals who received their education during the war were destined to keep alive the remnant of our literature and prepare the public mind for the establishment of this University. They were William R. Davie and Alfred Moore. Each of them had endeared himself to his country by taking an active part in the latter scenes of the war; and when public order was restored and the courts of justice were opened, they appeared at the bar, where they quickly rose to eminence, and for many years shone like meteors in North Carolina. . . . Davie took Bolingbroke for his model; and Moore, Dean Swift. . . . Public opinion was divided upon the question as to whether Moore or Davie excelled at the bar. . . . Davie is certainly to be ranked among the first orators, and his rival, Moore, among the first advocates which the American nation has produced."

In 1790, indignant at what he considered an unconstitutional infringement upon his rights by the creation of the office of solicitor-general, and being worn and exhausted by the constant and arduous toil and labor entailed upon him by a large practice, he resigned his office, and, virtually abandoning his practice, retired to his plantation. He was a Federalist in politics, and in 1795 was defeated for the Senate of the United States by one vote. In 1798 he was elected one of the judges of the State and took his seat upon the bench. In delivering the opinion in *S. v. Barna Jernigan*, 7 N. C., 12, Chief Justice Taylor pays high tribute to his character and ability: "The very question, however, before us, has been decided in the case of *S. v. Hall*, in 1799, by a judge whose opinions on every subject, but particularly on this, merit the highest respect. Judge Moore was appointed Attorney-General a very short time after this act of Assembly was passed, and discharged for a series of years the arduous duties of that office in a manner which commanded the admiration and gratitude of his contemporaries. . . . His profound knowledge of the criminal law was kept in continual exercise by a most varied and extensive practice at a period when the passions of men had not yet subsided from the ferment of a civil war, and every grade of crime incident to an unsettled society made continual demands upon his acuteness. No one ever doubted his learning and penetration, or that, while he enforced the law with an enlightened vigilance and untiring zeal, his energy was seasoned with humanity, leaving the innocent nothing to fear and the guilty but little to hope. The opinion of such a man, delivered on an occasion the most solemn on which a judge could act—when doubt in him would have been life to the prisoner—assumes the authority of a cotemporary exposition of the statute, and cannot but confirm me in the sentiments I have expressed."

In this connection I am reminded of a tradition that I heard from some of the seniors of the bar when I was first admitted to it. About the year 1816 there was a band of robbers and outlaws operating chiefly in Duplin, Sampson, Wayne and the nearby territory, whose chief purpose was enticing slaves from their masters, under the promise of freedom, and spiriting them away to the far Southern States and selling them. Chief among these were the Jernigans, and chief among them was the Barna Jernigan above mentioned. He had been indicted and convicted for enticing away the slave of one John Coor Pender, then sheriff of Wayne County. The story runs, that as Coor Pender

was on his way to court to give evidence against Barna Jernigan he was waylaid, shot and killed by one of the band. His eldest son, then a lad of 19 years of age, vowed to devote his life to the pursuit and punishment of the murderer of his father. Alone he tracked him through North Carolina into South Carolina, through South Carolina into Georgia, through Georgia into Florida, where at last he found him—secure, as his coward's heart believed—refuged among the Seminole Indians. Nothing daunted, young Coor Pender boldly made his way into the Seminole country and, addressing their chief, demanded the assassin with that plea so sacred and dear to the heart of the Indian, that blood alone can atone for blood. Bowing to the justice of the demand, the Seminoles surrendered the man, whose name, I think, was also Jernigan, to young Coor Pender. Binding his prisoner, unaided he brought him back through the long and wild journey and delivered him into the hands of justice in Wayne, where he was soon afterwards tried, convicted and hanged.

No brilliant feat of the days of chivalry can, to my mind, surpass this courageous and devoted act of this plain and simple young North Carolinian.

In December, 1799, Mr. Moore was called to the seat upon the Supreme Bench of the United States made vacant by the death of James Iredell. He first sat at the August Term, 1800, when, in *Bas v. Tingy*, 4 Dallas, 37, on the admiralty side of the docket, he delivered the only opinion emanating from him during the four years of his judicial life on that bench. This seems strange, and forces us to inquire the reason for this singular silence of so able a lawyer. The answer is found in the pages of Dallas and Cranch, and is given by Mr. Carson in his "History of the Supreme Court of the United States," who tells us that it was owing to the practice which obtained after Marshall came upon the bench, of making the Chief Justice the organ of the Court. So strictly was this rule adhered to, that during Justice Moore's term of office the opinion of the Court was always delivered through the Chief Justice, except in one or two instances, when he expressly declined to do so, and then that duty fell upon the senior Justice. We must remember that the Court was then but an infant, its docket exceedingly light, and it was no great labor for one judge to write all the opinions. There can be no doubt, however, that in the solemn deliberations of the conference chamber Moore's opinion upon every question under discussion was given in clear, concise and logical argument, was listened to with deference, and carried the weight of his great talents with it. He remained upon the bench about six years, when his failing health compelled his retirement and he resigned in 1804. He died 15 October, 1810, in the fifty-fifth year of his age, "a loyal, just and upright gentleman," carrying with him to the grave the blessed comfort of a well-spent life, the affection of his friends, the sincere respect and reverence of all men, and the grateful appreciation of his native State.

JAMES IREDELL

James Iredell was born in the quaint and historic old town of Lewes, Sussex County, England, on 5 October, 1751. He was the oldest child of Francis Iredell, a merchant, of Bristol, who had married Margaret McCulloh. Through his mother he was nearly related to Henry McCulloh and his son, Henry Eustace McCulloh, who owned immense bodies of land in North Carolina in the last century, and this relationship was destined to have an important influence upon his after-life. When he was about 16 years of age, his father, through misfortune and ill health, became so reduced in estate that his relatives came with loving care to his aid. It was but natural that they should seek to advance the elder son and secure for him a position in which, in time,

he could be a help and prop to his parents in their declining years. Through the influence of his relative, Sir George McCartney, on 29 February, 1768, Iredell was appointed comptroller of the customs at Edenton, to which place he came in the latter part of 1768. And, as an incidental duty, the McCullohs put upon his shoulders the supervision of their interests in Carolina, without any suggestion or thought on their part of recompense to him for the labor.

It seems that in the effort to secure this appointment for him, his youth was studiously concealed in the very reasonable fear that knowledge of it would be death to the hope. The very suggestion of a lad of 16 to be comptroller of his Majesty's customs would have seemed ridiculous even to the careless Charles. But how shall we speak our admiration of the high spirit, the stout heart, the self-reliant courage of this boy, who, tenderly reared and carefully nurtured, in obedience to the call of duty, leaving all that were near and dear to him, crossed 3,500 miles and more of ocean to assume the unknown duties of a responsible office in a wild and new country, where the red man yet boasted himself the master, and the white man barely clung to the shore by the tips of his fingers! But it was duty that called him, and duty and filial love that impelled him to promise to send to his parents all the salary he should receive from his office. And it is pleasing to know that this promise was religiously kept and that he faithfully remitted all his salary to England, only reserving the scanty fees of the office for his maintenance. And so was the boy the father to the man.

Edenton was then but a village of a few hundred inhabitants, but in and around it dwelt many gentlemen of means, of culture and of learning, who were among the first in the province and destined to be leaders in the coming movement which lost Great Britain her great plantations. Here he met Harvey, Hewes, Jones, Charlton, Dawson, the Johnstons and others, and soon became their friend and constant companion. Among them was Samuel Johnston, of the family of "the gentle Johnstones of Annandale," whose sister, Hannah, Iredell afterwards married, and whose example and influence, more than all else, shaped his future career.

Soon after he had become familiar with the duties of his office, Iredell commenced the study of law under Samuel Johnston. Alternating his devotions between his law books and his lady love, and equally diligent in his application to both, in two years after his arrival, and while in his nineteenth year, on 14 December, 1770, he received a license from Governor Tryon, with the approbation and recommendation of Chief Justice Howard—that "eminent vagrant," as Jones styles him—to practice law in the inferior courts of the State.

On 26 November, 1771, he obtained a license from Governor Martin to practice in the superior courts, and became a full-fledged lawyer. McRee tells us that when he first appeared at the bar "he had a difficulty to encounter which but few experience and fewer surmount as he did. He had a natural impediment in his speech which would have abashed and discouraged weaker minds if possessed of but half of his delicate sensibility." But even this impediment was conquered by the stout courage of his heart, and he soon stood among his seniors as their equal.

In 1771, the restless tide of discontent, stimulated by the arbitrary measures of the crown, and swelling with the news of the Boston massacre, was steadily rolling and spreading as it went through the colonies, and nowhere with more resistless force than in North Carolina.

Iredell, though scarcely aware of it himself, was already in the current and drifting toward the day when he was to stand boldly forth for the cause of liberty.

# APPENDIX

In 1773, the dispute in this State over the Court Acts, which had been rife for some time, culminated. The Assembly insisted upon the right of attachment against foreign nonresidents, and the crown was equally insistent against granting it. The terms of the judges and the life of the courts had expired by limitation. The Assembly passed new laws for the creation and organization of the courts and tacked the attachment law to it. The Governor refused his assent and dissolved the Assembly, leaving the province without courts and without laws. For some time there were only five provincial laws in force, and the only courts were those held by single justices of the peace. In fact, the courts and the supreme majesty of the law were not fully reëstablished in North Carolina until November, 1777. Crime went unpunished, wrongs were unredressed, and person and property alike were without the security and protection of law. This condition of affairs was but the forerunner of the coming storm whose mutterings were already growing near and clearer, presaging "the lean famine, quartering steel and climbing fire," that were so soon to desolate the land. On 18 July, 1773, Iredell married Hannah Johnston. Their union was a most happy one in every respect. She was a loving wife, a prudent and faithful administrator of the domestic economies of their household, and a wise and able friend and counsellor, to whom he ever brought the full story of his joys and triumphs, his sorrows and reverses. The charming letters which passed between them are the highest evidence of their loving devotion to each other, their mutual trust, confidence and respect.

In 1774, the Revolution was well on in North Carolina. Harvey, Johnston, Harnett, Hooper and others were in active correspondence, zealously engaged in preparing and shaping public sentiment to meet with ready courage the approaching crisis. Iredell was an active but silent participator and adviser in all their counsels. Although scarce 23 years of age, he was already in full maturity of mind, of judgment, and of action. Springing at a bound from youth into the full panoply of manhood, he stood and moved among the foremost men of his time as their peer, and his advice and opinions on all questions of public moment were eagerly sought and referred to by them. William Hooper, then some 32 years of age, was easily one of the ablest and most prominent men in North Carolina, as a scholar, a lawyer, a statesman, and a patriot. On 26 April, 1774, we find him writing to Iredell: "I am happy, my dear sir, that my conduct in public life has met your approbation. It is a suffrage which makes me vain, as it flows from a man who has wisdom to distinguish and too much virtue to flatter. . . . *Whilst I was active in contest you forged the weapons which were to give success to the cause I supported.* . . . With you I anticipate the important share which the colonies must soon have in regulating the political balance. *They are striding fast to independence*, and ere long will build an empire on the ruins of Great Britain."

In this short extract we are forcibly impressed with three things: Hooper's deferential appreciation of the approbation of Iredell, his graceful recognition of the great assistance which Iredell was even then rendering to the patriotic cause, and his bold and early declaration for the independence of the colonies. And yet Hooper was the man whom that great apostle of the people, Thomas Jefferson, a few years later, in the bitterness of envy and jealousy, declared to have been the greatest Tory in Congress. The falsity of this accusation is plainly apparent to any person who has ever followed Hooper's course during these troubled times. Fortunately for him, and fortunately for his State, his unwavering devotion and loyalty to the cause of freedom, and his unfaltering determination to achieve independence at any and every cost, has been faithfully recorded by the brilliant and erratic Jones in his celebrated "Defense of North Carolina." It is evident that Hooper was alluding in this letter to

the project of a Provincial Congress, the first of which met in New Bern on 25 August, 1774, with John Harvey as moderator. John Harvey, William Hooper, Samuel Johnston, James Iredell, and Willie Jones were the five men who projected and, more than all others, accomplished this assembly of the people.

The second Provincial Congress in North Carolina assembled at New Bern on 3 April, 1775, and, although he was not a member, so fully was he in sympathy with the movement that Iredell went there to assist with his counsel and advice, so welcome to all.

The events that followed are matters of common knowledge: Martin's frothy proclamation, the grim defiance of Congress, his flight to Wilmington and final refuge on the sloop-of-war, *Cruiser*. In November, 1776, Iredell was appointed by the Congress one of the commissioners to revise the laws of the State, and it is said that the celebrated Court Law of 1777 was the work of his pen. In November, 1777, the law courts were reëstablished; and on 20 December, Samuel Ashe, Samuel Spencer, and James Iredell were elected the first judges of the free and independent State of North Carolina. Iredell was then barely 26 years of age. He had been warmly urged by his friends for the office of Attorney-General, which, it seems, he would have preferred, but was defeated in that by Waightstill Avery, whom he was soon to succeed. In June, 1778, he tendered his resignation to Governor Caswell, who received it with great reluctance, saying he well knew the place could not be supplied "by a gentleman of equal abilities and inclination to serve the State in the important duties of that office."

In January, 1779, when the Assembly was about to appoint delegates to Congress, it expressed through the speaker to Iredell, who happened to be present, its desire to appoint him, but what he called his poverty compelled him to decline with reluctance.

On 8 July, 1779, Iredell was appointed, by Governor Caswell, Attorney-General in place of Avery, who had resigned. We have all reflected with sympathetic pity upon the weary and toilsome life of that poor and patient servant of the Lord whom the irreverent were accustomed to call the "circuit rider," and yet his travels were but a summer day's journey compared to those of the leading lawyers of Iredell's time. When the courts opened, they followed the judges, from Edenton to Hillsboro, from Hillsboro to Halifax, from Halifax to Salisbury, from Salisbury to Wilmington, and from Wilmington to New Bern. Their way lay through the wilderness, over swollen rivers, through pestilential swamps, through rain and snow, hailstorm and sunshine, their usual conveyance a one-seated gig, and their lodging place as chance and the fortunes of the road might determine. The duties of his office entailed upon Iredell so much arduous labor and brought with it such small compensation that, in 1782, when peace was assured by the surrender of Cornwallis, he resigned to become again what he called "a private lawyer." Cases and clients came to him rapidly, and in July, 1783, he writes his brother that he had a share of practice "very near equal to any lawyer in the country."

In 1786, following the passage of the Confiscation Acts, the question of the power of the court to declare void an act of the Legislature because in conflict with the Constitution, was raised in this State by some of the bar and vigorously supported by Iredell in an exceedingly strong and able pamphlet. In this pamphlet, which was published in the New Bern paper of 17 August, 1786, Iredell says: "It will not be denied, I suppose, that the Constitution is a *law of the State*, as well as an act of the Assembly, with this difference only, that it is the fundamental law and unalterable by the Legislature, which

derives all its power from it. . . . An act of Assembly inconsistent with the Constitution is void and cannot be obeyed without disobeying the superior law, to which we were previously and irrevocably bound."

In the celebrated case of *Bayard v. Singleton*, 1 N. C., 5, at May Term, 1787, in which Iredell, Johnston, and Davie were counsel for plaintiff, and Moore and Nash for defendant, that question was first discussed and decided in the courts of this State. In reading the report of this case, one is struck with the great and proper reluctance of the judges to approach the decision of the point so novel and strange. They suggested to the litigants first one and then another method of compromise and settlement, but, driven to it at last, they faced the issue as true men. Mr. Haywood, in his argument in *Moore v. Bradley*, 3 N. C., 140, attributes the merit of that opinion to Judge Ashe, and says that he illustrated his opinion by this forcible language: "As God said to the waters, 'So far shall ye go, and no farther,' so said the people to the Legislature." Afterwards, when upon the Supreme Bench of the United States, in *Calder v. Bull*, 3 Dallas, 386, and again in *Chisholm v. Georgia*, Iredell took occasion to declare in emphatic language his opinion to be, "If any act of Congress or of the Legislature of a State violates those constitutional provisions, it is unquestionably void; though I admit that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority but in a clear and urgent case." This doctrine, so clearly and admirably stated in these few and concise words, is now the law in every State of this Union, and is universally taken to have been so settled by the opinion of Marshall in *Marbury v. Madison*, 1 Cranch, 137. I cannot but think it singular that, in his opinion in this case, Marshall makes no reference whatever to either of the three cases above mentioned or to the earlier cases in Rhode Island and Virginia. The language of Iredell, in *Calder v. Bull*, is so clear-cut and logical that it could not have escaped the notice of the Chief Justice. In our busy life we seldom pause to reflect upon the far-reaching results, the inestimable blessings of these decisions. How often in our history has Congress and Legislature, in the mad lust of power and the wild riot of party hate, striving to accomplish unholy and unwholesome legislation, been halted by the stern mandate, "So far shall ye go, and no farther." England's greatest statesman once said, "The poorest man may in his cottage bid defiance to all the force of the crown; it may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement." But this vaunted liberty of the British subject can bear no comparison to that of the American citizen, who, dwelling under the shadow of the mighty Constitution, is secured by it in the fullest enjoyment of his life, his property, and his liberty.

In the famous State trials at Warrenton, in January, 1787, Alfred Moore prosecuted for the State, and Iredell and Davie defended.

In November, 1787, Mr. Iredell was appointed by the General Assembly a member of the council and sole commissioner to revise and compile the acts of the General Assemblies of the late province and present State of North Carolina. This task was faithfully and ably executed by him, and the work, printed in 1789, afterwards became widely known and celebrated as "Iredell's Revisal."

In 1787, the question of the adoption of the new Federal Constitution was agitating the people. Iredell was one of its ablest and most energetic advocates, and by his labor and eloquence, more than any one else, contributed to its final ratification and adoption in November, 1789. In January, 1788, he published a long and most admirable pamphlet in its support, in reply to the objections of George Mason. He was a member of the convention which met

at Hillsboro on 21 July, 1788, to consider its adoption. Alfred Moore and William Hooper were both candidates for this convention. In instance of the strong ties of friendship which bound these two men together we read that Moore, certain of his election in Brunswick, and fearing Iredell's defeat in Chowan, urged Iredell to become a candidate from Brunswick. Preferring to represent his own people, however, he fortunately declined and was elected, while Moore and Hooper were both defeated. In this convention Iredell was the leader of the Federalists, and the burden of the argument for his party was thrown upon his shoulders. McRee tells us: "He defended, he removed objection, he persuaded, he appealed to interest, and awakened into life the spark of national pride. His vigor, and the extent and variety of his attainments excited the admiration of his adversaries. His words were neither too few nor too many, but such as were in common use, and conveyed his ideas clearly and distinctly to the simplest understanding; his style was terse and condensed; his arguments, direct and solid, struck the mark with the force of cannon balls."

Though not successful, he was not defeated, for the convention would neither reject nor adopt. His fame had now reached far beyond the limits of his State, and Washington, led to a conviction of his great abilities by his debates in the convention, and his answer to Mason's objections, appointed him to the Supreme Bench of the United States in place of R. H. Harrison, who had declined.

On 10 February, 1790, Pierce Butler, of the Senate, writes him: "You have this day been nominated by the President, and *unanimously* appointed by the Senate, to the Supreme Federal Bench. I congratulate the States on the appointment, and you on this mark of their well-merited opinion of you." That he had won the respect and confidence of Washington is well known to us. In a letter of 1 February, 1790, his distinguished brother-in-law, Samuel Johnston, then a member of the lower house of Congress, tells him: "I have just returned from dining at the President's with a very respectable company. . . . The President inquired particularly after you, and spoke of you in a manner that gave me great pleasure." His commission was dated 10 February, 1790, and his first services were on the circuit, where, with Rutledge, he rode the Southern Circuit, then composed of South Carolina and Georgia, North Carolina not having adopted the Constitution when the Judiciary Act of 1789 was passed. He first took his seat on the Supreme Bench at the August Term, 1790, when, after the reading of his commission and the admission of a few counsel, the Court adjourned from the lack of business.

Let us pause here for a brief moment and think upon the work which was carved out for the members of that Court. The questions that were to arise before them were in the highest degree grave and important. An entirely new field of jurisprudence was opened out, in which they were to find no precedents. The unique questions of the amenability of the States to the process of the Court, their relations to the Federal Government, the limitations and definitions of the powers of the Federal courts, the interpretation of the Constitution, the independence of the Federal judiciary as a coördinate branch of government, the obligations of the Treaty of Peace, the extent of the power of Congress to levy taxes and duties, questions of prize, the Confiscation Acts, patent rights, violations of the embargo, land laws, ownership of slaves, citizenship, and many others of like importance and first impression were to be raised, argued, and decided. And when we reflect upon the magnitude of their task and of their successful elucidation of the intricate judicial problems brought before them, we cannot withhold our wonder, our admiration and our reverent respect for the first judges of the Federal Supreme Court. Speaking of its first meeting, Mr. Carson has eloquently said: "Not one of the specta-

tors of that hour, though gifted with the eagle eye of prophecy, could have foreseen that out of that modest assembly of gentlemen, unheard of and unthought of among the tribunals of the earth, a Court without a docket, without a record, without a writ, of unknown and untried powers, and of undetermined jurisdiction, there would be developed in the space of a single century a Court of which the ancient world could present no model and the modern boast no parallel—a Court whose decrees, woven like threads of gold into the priceless and imperishable fabric of our constitutional jurisprudence, would bind in the bonds of love, liberty and law the members of our great republic."

At the February Term, 1793, the celebrated case of *Chisholm v. Georgia*, an action of *assumpsit*, came up before the Court. This case was instituted at the August Term, 1792, of the Supreme Court, which, under the Judiciary Act, had original jurisdiction in such cases, in virtue of Article III., section 2, of the Federal Constitution. At that term the Attorney-General moved that notice issue to the State of Georgia to enter an appearance, or show cause why judgment should not be entered and a writ of inquiry awarded. The Court, "in order to give the State time for deliberation" and, I apprehend, themselves opportunity for study and careful thought, postponed the consideration of the motion to the next term, when it was argued by Randolph, the Attorney-General, alone, counsel for Georgia filing a written protest against the jurisdiction and declining to argue the question.

The point in the case was, whether a State was amenable to the jurisdiction of the Court at the suit of a citizen of another State. The first case, I believe, in which one of the States was sued in the courts of another State by a citizen was instituted at the September Term, 1781, of the Court of Common Pleas at Philadelphia, by one Nathan against the State of Virginia, and in it an attachment was issued and levied on a lot of clothing belonging to the State. The Virginia delegates in Congress, indignant at this affront, and protesting it to be *a violation of the law of nations*, appealed to the Supreme Executive Council of Pennsylvania, which arbitrarily ordered the sheriff to release the goods.

In *Chisholm's case*, the Court upheld the jurisdiction; Jay, Blair, Wilson, and Cushing delivering opinions. Iredell dissented in quite a long argument, in which, voicing the sentiment of the Federalists, and true not only to the tenets of that party, but to the profound convictions of his mind, he denied the jurisdiction. His opinion is a memorable one, and, in my humble judgment, for clear and lucid reasoning, cold logic, strong argument, and high statesmanship, was far superior to that of any of his colleagues. In it he virtually enunciated the doctrine that later on became so famous and prominent in the disputes and differences between the North and South under the name of "States Rights," or the "Sovereignty of the States." Marshall, the great expounder of the Constitution and the greatest jurist America ever produced, had boldly declared it in the Virginia Convention of June, 1788. The decision of the Court created a storm of excitement and discussion throughout the States. Two days after it was promulgated, the Eleventh Amendment to the Constitution, which declared that the jurisdiction of the Supreme Court should not extend to suits against a State by citizens of another State or subjects of a foreign State, was proposed in Congress, and afterwards passed by it, and adopted and ratified by all the States.

It was the custom at that time for all of the judges to deliver opinions in the important cases, and we find the volumes of Dallas enriched by the profound and exhaustive arguments of Iredell, notably in *Calder v. Bull*, *Penhallow v. Doane*, *Hylton v. United States*, *Ware v. Hylton*, and *Talbot v. Johnson*.

Always independent in thought and action, he never failed to dissent when the reasonings of his mind led him to differ with the majority of his brothers

on the bench, or to express his views when agreeing with them upon the general result, he arrived at the same conclusions by a different road. But in all cases, so strong, clear and logical were his opinions that they always compelled attention and respect, even when they failed to persuade. Unquestionably, he was the ablest constitutional lawyer upon that bench until the advent of Marshall, and in all other respects the equal of Justice Wilson. While his labors upon the Supreme Bench were but light, those of the circuit were arduous and exhausting, his circuit at one time compelling him to travel 1,800 miles. He was a laborious and indefatigable student and writer, and while upon the Supreme Bench occupied his leisure moments in writing treatises, the publication of which were probably prevented by his untimely death. Among his manuscripts were found "A Treatise on Evidence," an "Essay on Pleading," and a paper on "The Doctrine of the Laws of England Concerning Real Property in Use or in Force in North Carolina," the two latter of which were unfinished.

I cannot pass on without some slight mention of the correspondence of Iredell and the vast wealth of history bequeathed to us by it. To us the great wonder is, how the chief men of that day found the time to devote to social correspondence; but men then, like men now, were always eager and striving for the news; and, in the lack of newspapers, it was disseminated and carried from one to another, and passed on and on through the colonies by means of letters. The man of that day who was no letter writer lived outside of the history of the times and heard no news. Iredell's letters were models, and numbering, as he did, among his correspondents the chiefest men of the day, hand down to us living pictures of the leading characters and stirring events of his life.

In the summer of 1799, his honorable life was nearly spent. The severe labors of the circuit, and the climatic influences of the sickly region in which he lived and traveled, had undermined his constitution, and his health gave way. He was unable to attend August Term of the Court, and, slowly failing, at last died at Edenton on 20 October, 1799, in the noon of life and the zenith of his glory.

The daily walk and life of Iredell, from the boy of 17 to the statesman and jurist of 48, so vividly pictured to us by McRee, reads like an epic poem. The immature lad of 17, torn by stress of fortune from a gentle home and transplanted in a strange and wild land, springing in a day into the maturity of manhood, rising abruptly into the full radiance of public life, called in rapid succession from one high office to another, until he had exhausted all, and filling all with equal roundness until at the last, weary and worn, he sinks into rest, followed by the love and respect of all.

In reviewing his life, I am at a loss which most to admire—his gentle dignity, his amiable disposition, his independence of thought and action, his sturdy self-reliance, his equipoise of mind, his high character, or his splendid abilities. Throughout the whole period of the Revolution, when North Carolina was in her most perilous strait, there is scarce a page of her history upon which the name of Iredell is not written.

I cannot close this sketch without acknowledging in some slight way my obligation for all there may be of interest in it to the biographer of Iredell. I knew Mr. McRee well when I was a youth, and when I came to the bar enjoyed the privilege of his friendship—a landmark upon my way in life upon which I shall ever look back with pleasant recollections. He brought to his work the loving devotion and reverence of a kinsman, a brilliant and discriminating intellect, an untiring zeal and interest and the facile pen of a polished scholar. Disdaining the arts of rhetoric, his style is clear and concise, ever striving for facts and preserving truth at the expense of sentiment

and popular opinion. Happy was Iredell in his biographer, and fortunate the State of North Carolina in such a son. His book is the greatest and most valuable contribution to the social history of the State that has been or ever will be written, and also to its political history, unless we except the recent Colonial and State Records. By his work let him be remembered, and his name handed down from one generation to another as one who did his State great service. No more enduring monument, no more glorious epitaph could he have than the grateful and affectionate remembrance of his countrymen, which he deserves in the most eminent degree.

There is a close and striking parallel between the lives of Moore and Iredell. Their way through life was ever upward. Together they trod with equal step the lofty paths of fame, and, attaining the highest offices in the State, in the line of their profession, at last reached the most exalted station which the aspiring lawyer can hope to touch. Both were judges and attorney-generals of the State, and both were Justices of the Supreme Court of the United States.

When Iredell resigned the office of Attorney-General, Moore succeeded him, and later on was appointed to the seat upon the Supreme Bench of the United States made vacant by his death. North Carolina, in grateful and affectionate remembrance of her two sons, named one of her counties Moore and another Iredell. Federalists in politics and alike in thought upon the great issues of the day, attracted to each other by the same high and noble traits of mind and character which both possessed in an eminent degree, they became warm friends early in their acquaintance, and so remained during life. At the bar they ever disdained the small arts of the pettifogger, and upon the bench, blindfolded, they ever held the scales of justice with an even hand, treating with equal impartiality the rich and the poor, the guilty and the innocent.

May the example of their useful lives, their spotless integrity, and their distinguished services inspire coming generations to emulate them and follow in the lofty paths they walked through life.

"And History shall cherish them
Among those choicest spirits who, holding their
consciences unmixed with blame,
Have been in all conjectures true to themselves,
Their Country, and their God."

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## ACCEPTANCE BY CHIEF JUSTICE FAIRCLOTH

Replying on behalf of the Court, CHIEF JUSTICE FAIRCLOTH said: "This Court accepts the portraits of Judges Iredell and Moore, and tenders its thanks to the donors. Their lives and characters have been so well portrayed by Mr. Davis that the Court will not attempt to add anything thereto. They not only rendered service to their own State, but their services are recorded in the records of the Supreme Court of the United States, and will remain a monument to their credit through the coming ages.

"We appreciate and commend the laudable work of the Society of Sons of the Revolution, which has presented these portraits. We receive them with pleasure, and the Clerk of this Court will cause them to be suspended in an appropriate place in this hall."

# ANALYTICAL INDEX


ACTS OF GENERAL ASSEMBLY.

Registration Act of 1885, ch. 147, 426.

Nonpreference Act of 1895, ch. 466, 397.

Fellow-servant Act of 1897, ch. 56 (Private Acts), 222.

AGENCY, facts being undisputed, is matter of law. *Dowdy v. Telegraph Co.*, 522.

AGRICULTURE, Board of, subject to legislative appointment. *Cunningham v. Sprinkle*, 638.

AMBIGUITY, latent, as to trustee or *cestui que trust*, explainable by evidence. *Keith v. Scales*, 497.

AMENDMENT, power of, inherent and by statute in the courts. *Swain v. Burden*, 16.

APPEAL is docketed in Supreme Court where transcript is received by the clerk. *Brafford v. Reed*, 345.

By State, limited by The Code, sec. 1237. *S. v. Davidson*, 839.

ASSAULT—criminal—simple.

Indictment containing two counts, one for criminal and the other for simple assault. A general verdict of guilty applies to both.

But where there is no evidence to sustain the first count, a general verdict of guilty is improper, and a judgment in excess of the punishment for simple assault will not be sustained. *S. v. Hight*, 845.

ASSIGNMENT—intent—badges of fraud—honest preference permissible. *Royster v. Stallings*, 55.

Schedule supported by valid preferences, invalid preferences eliminated. *Hall v. Cottingham*, 402.

Failure to duly file schedule invalidates. *Brown v. Nimocks*, 417.

Essential requisites of preferences stated. *Ib.*

Preferences insufficiently stated to be eliminated (act of 1893, ch. 453). *Ib.*

ATTACHMENT under nonpreference (act of 1895). True issue. *Slingluff v. Hall*, 397.

Will not lie for property in hands of officer under process—claimants may resort to claim and delivery. *Mitchell v. Sims*, 411.

*Situs* of debt is where debtor resides. *Balk v. Harris*, 467.

In garnishment, there must be jurisdiction of thing garnisheed. *Ib.*

ATTORNEY, agent of client. Ratification of his act. *Christian v. Yarborough*, 72.

Civility of, to a juror, not ground of exception. *Mitchell v. Corpening*, 472.

Representing two parties, to settle with both fairly. *Markham v. McCown*, 163.

Of administrator, is his attorney, not that of the estate—no debt of the *estate* can be created after death of owner. *Lindsay v. Darden*, 307.

BANK being in liquidation, supposed *pro rata* share in its assets not available as a set-off, legal or equitable, to a note due the bank by a stockholder. *Bank v. Williams*, 534.

Stock pledged as collateral must be released before being entitled to participate in its assets. *Ib.*

May apply general deposits to payment of debt due in same right. *Hodgen v. Bank*, 540.

Rule applicable to deposits of firm, or surviving partner; but not where the debt is individual and the deposits belong to the firm, or where the deposits are individual and the debt is of the firm. *Ib.*

BANK CASHIER should require actual payment of notes due. *Bank v. Wilson*, 561.

BASTARDY—On trial of an issue of paternity, whatever tends to prove or disprove the affirmative of the issue is competent evidence. *S. v. Warren*, 807.

BOARD OF AGRICULTURE—Legislature may add additional members to the old board. *Cunningham v. Sprinkle*, 638.

BOARD OF INTERNAL IMPROVEMENT—Legislature may not displace the members of the old board. *Bryan v. Patrick*, 651.

BOUNDARY—Proceeding to establish — Title not in issue. *Williams v. Hughes*, 3.

Under act of 1893, ch. 22. Injunction inapplicable in a special proceeding to establish lines. *Wilson v. Alleghany Co.*, 7.

BURDEN OF PROOF rests upon the party who has peculiar knowledge of the fact to be proved. *Mitchell v. R. R.*, 236.

CHARITABLE uses upheld in devise if sufficiently definite and not forbidden by public policy. *Keith v. Scales*, 497.

CLAIM AND DELIVERY—Restrictions on plaintiff. Code, sec. 322. *Mitchell v. Sims*, 411.

Defendant may not obstruct execution. *Ib.*

Third parties may resort to this remedy, but not to attachment against goods under process. *Ib.*

CODE commended. It is not necessary to recur to the fine-spun distinctions of special pleading, happily swept away, in order to discern a wrong or to apply the remedy—the common-sense system, now in use, will suffice for both. *Pierce v. R. R.*, 83.

CODE, THE

Sec. 62 ..... 311
" 104 (3) ..... 264
" 138 ..... 117
" 146 ..... 47
" 148 ..... 617
" 158 ..... 296
" 163 ..... 617
" 185 ..... 268
" 214 ..... 589
" 218 (2) (3) ..... 269
" 233 (2) ..... 98
" 244 ..... 538, 570
" 255 ..... 114
" 256 ..... 114
" 264 ..... 224
" 272 ..... 235, 337
" 273 ..... 269
" 274 ..... 235
" 322 ..... 413, 415
" 413 ..... 801, 818
" 422 ..... 584
" 423 ..... 584, 585
" 424 ..... 186
" 424 (1) ..... 268
" 527 ..... 236
" 550 ..... 99
" 567 ..... 553, 741, 743
" 589 ..... 82, 645
" 590 ..... 82, 644, 649
" 603 ..... 363
" 607 (1) ..... 668
" 621 ..... 363
" 623 ..... 207
" 733 ..... 837, 838
" 744 ..... 837, 838
" 747 ..... 837
" 748 ..... 838
" 892 ..... 846
" 965 ..... 725
" 987 ..... 846
" 1025 ..... 815
" 1027 ..... 797
" 1187 ..... 843, 844

CODE, THE

Sec. 1237 ..... 845
" 1245 ..... 432
" 1246 (5) ..... 616
" 1246 (1) ..... 264
" 1256 ..... 616
" 1271 ..... 77
" 1327 ..... 425
" 1370 ..... 113, 115
" 1446 ..... 449
" 1545 ..... 64
" 1688 ..... 652, 658, 668, 669, 670, 678
" 1781 ..... 344
" 1782 ..... 344
" 1783 ..... 344
" 1796 ..... 344
" 1814 ..... 30
" 1816 ..... 30
" 1826 ..... 612, 613, 614, 615
" 1900 ..... 41
" 2062 ..... 806
" 2065 ..... 805, 806
" 2079 ..... 17, 18
" 2147 ..... 82
" 2149 ..... 45
" 2156 ..... 44
" 2180 ..... 514
" 2201 ..... 766
" 2301 ..... 763, 764
" 2342 ..... 500, 514
" 2551 ..... 207
" 2554 ..... 208
" 2555 ..... 208
" 2761 ..... 429
" 2779 ..... 433
" 3062 ..... 118
" 3308 ..... 560
" 3707 ..... 757
" 3710 ..... 757
" 3711 ..... 757
" 3749 ..... 559, 560
" 3802 ..... 187, 311
" 3803 ..... 186, 311, 873

CONDUCTOR is required on railroad soliciting passenger custom. *Means v. R. R.*, 574.

CONSTITUTION.

Art. I, sec. 7 ..... 225, 226, 661
" I, " 8 ..... 705, 719
" I, " 11 ..... 837
" I, " 17 ..... 365, 369
" I, " 27 ..... 212
" II, " 1 ..... 719

CONSTITUTION.

Art. II, sec. 9 ..... 766
" III, " 1 ..... 719
" III, " 2 ..... 718
" III, " 10 ..... 366, 367
" III, " 17 ..... 641
" IV, " 8 ..... 719

CONSTITUTION—*Continued.*

Art. IV, sec. 9..... 675, 795
" IV, " 10..... 705
" IV, " 12..... 690
" IV, " 23..... 691
" IV, " 27..... 689
" V, " 3..... 727
" VII, " 7.....206, 210, 211, 212, 213
" VIII, " 4..... 753
" VIII, " 1..... 673, 677

CONSTITUTION—*Continued.*

Art. IX, sec. 2..... 213
" IX, " 4..... 212
" IX, " 15..... 213
" X, " 6..... 615, 620
" X, " 8..... 441
" XI, " 3..... 367
" XIV, " 1..... 365
" XIV, " 4..... 344
" XXI, " —..... 718

CONTINUANCE, a matter of sound discretion. *Slingluff v. Hall*, 397.

CONTRACT—Right of suit by beneficiary for water supply. *Gorrell v. Water Supply Co.*, 328.

Of insurance made through resident broker of foreign corporation subject to State law. *Ins. Co. v. Edwards*, 116.

Prices control catalogue prices in matter of school tuition. *Horner School v. Wescott*, 518.

COMMON CARRIERS cannot contract for exemption from consequence of their own negligence. *Mitchell v. R. R.*, 236.

Where liability is limited, must bring themselves within excepted causes by proof, and disprove negligence. *Ib.*

On connecting lines, which presumed responsible. *Ib.*

COMMON CARRIER, duty threefold—receive, carry, and deliver safely. *Cogdell v. R. R.*, 302.

COSTS of issue in partition proceedings—Where, at the instance of some of the parties, without opposition from the rest, an issue as to the value of the respective shares was submitted to the jury, who sustained the report and the decisions of the clerk upon the exceptions thereto, it was properly adjudged that the exceptants should pay the costs of the trial of the issue. *Beckwith, ex parte*, 111.

Of witnesses, where there is multiplicity of facts—two allowed for each fact under The Code, sec. 1370. *Ib.*

Of unnecessary matter in record, how taxable. 3 of 222. The cost of sending up unnecessary matter in the record will be paid by the party occasioning it to be done. *Hancock v. R. R.*, 222.

COSTS in State case.

The Code, secs. 733, 744, 747, and 748, collated and construed together, places it in the discretion of the presiding judge, for reasons satisfactory to him, to refuse to direct the fees of witnesses for the State or for an acquitted defendant, in whole or in part, to be paid by the county, and from his decision no appeal can be taken. *S. v. Hicks*, 829.

COSTS—*Continued.*

The State Constitution, Art. I, sec. 11, exempts an acquitted defendant from payment of necessary witness fees of the defense, but does not require that they shall be paid by the public. *Ib.*

CORPORATION, liability—civil and criminal.

A corporation is now held liable to civil and criminal actions under the same conditions and circumstances as natural persons are. *Redditt v. Mfg. Co.*, 100.

A corporation is liable for the misconduct of its agents, in the line of their duty, if they act under the express or implied authority of the company, or their tortious acts are ratified, as by taking the benefit of such misconduct. *Ib.*

When liability is established and the circumstances are aggravating or malicious, the company is subject to punitive damages, on the same principles that natural persons are. *Ib.*

Foreign, sue by comity and must comply with State laws—must take out license. The Code, sec. 3062. *Ins. Co. v. Edwards*, 116.

COUPONS on bonds are specialties and partake of their nature, being subject to same statutes of limitations—ten years. *Broadfoot v. Fayetteville*, 478.

COUNTERCLAIM consisting of a judgment and admitted note is fully established, and not subject to rule of preponderance of proof. *Lehman v. Tise*, 443.

COUNTERCLAIM is creature of The Code, sec. 244, and must conform thereto. *Bank v. Wilson*, 562.

COVERTURE, although not pleaded, if it appears in the case, will be regarded by the Court. *Weathers v. Borders*, 610.

CRIMINAL COURTS—The various acts, establishing, amending and repealing, relating to the criminal courts, considered together *in pari materia*, do not have the effect of abolishing the Criminal Court of Buncombe County, or of ousting the clerk thereof. *Wilson v. Jordan*, 683.

DAMAGES, permanent to the land, go to heirs. Permanent damages to land go to the heir. When the answer demands to have all permanent damages, if there be any, assessed in this action, the defendant cannot object if it is done, nor if the heir is subsequently made party upon defendant's own motion. *Hocutt v. R. R.*, 214.

Permanent, committed by railroad. *Ridley v. R. R.*, 34, 37.

By diverting or flooding water, when actionable. Neither a corporation nor an individual can divert water from its natural course, so as to damage another, neither may they cut ditches through a watershed and conduct water to a watercourse insufficient to carry it off, whereby the water is flooded upon the land of another. *Hocutt v. R. R.*, 214.

DEED with repugnant clauses—first prevails, *aliter* in wills. *Blackwell v. Blackwell*, 269.

DEED—*Continued.*

Probate of, and private examination valid, though taken before an officer relative of the parties. *McAllister v. Purcell*, 262.

DEMURRER—motion to dismiss under Acts 1897, ch. 109, substantially demurrer to the evidence. *Roscoe v. Lumber Co.*, 42.

DEVISE, Construction of, 51.

For life, with remainder over—when sale permissible, when not.

Where there is a devise for life with remainder over to persons not *in esse*, the life tenant still living, the court cannot order a sale, because there can be no one before the court to represent the interest or the remaindermen. *Yancey's case*, 151.

It is otherwise when all the remaindermen living are before the court—they represent a class, and when the gift is general, with no element of survivorship in it, those afterwards born are concluded by the action of the court upon those of the same class then before it, and the purchaser gets a good title. *Irvin v. Clark*, 93 N. C., 437. *Ib.*

For charitable uses, when upheld. The Code, sec. 2342. *Keith v. Scales*, 497.

DOWER—possession by heir or assignee of husband not adverse to widow.

In a proceeding for dower, when the defendant claims under the husband as heir or assignee, the estate passes, subject to the incumbrance of dower right—inchoate during coverture, and consummate at its close. The possession is not adverse to the widow, and the statute does not run against her. *Brown v. Morisey*, 292.

This doctrine does not obtain when the defendant does not claim under the husband, but adversely to him by paramount title. The husband's title may be barred, and the right of dower being but a continuation of the husband's estate, may become barred also.

DRUNKENNESS, voluntary, no excuse for crime.

Voluntary drunkenness is never an excuse for the commission of a crime. *S. v. Kale*, 816.

If one charged with murder has premeditated and deliberately formed the intention to kill, and did kill, the deceased, when drunk, the offense is not reduced to murder in the second degree. *Ib.*

Of course, the killing and its manner, the intent, intoxication, how it comes about, and for what purpose drunkenness takes place, and the like, are questions for the jury, under the court's instructions as to the law applicable thereto. *Ib.*

EMPLOYER AND EMPLOYEE—reasonable care, that of the prudent man, required of both. *Leak v. R. R.*, 455.

EQUITY, notice of, subjects to the equity, which follows the law in transfers, in order of date. *Wittkowsky v. Gidney*, 437.

Will reform and correct errors of fact, but not of law, usually. *Banking Co. v. Morehead*, 622.

EQUITY—*Continued.*

Rules governing equitable interference same now as formerly, when courts were separate. *Ib.*

ESTOPPEL to be pleaded, to be available. *Bear v. Comrs.*, 204.

EVIDENCE, Demurrer to, under Acts 1897, ch. 109. *Roscoe v. Lumber Co.*, 42.

As to wills. The Code, sec. 590, not applicable—governed by section 2147.

Section 590 would not seem to apply to wills, which are governed by section 2147 of The Code, affecting the interest of devisees and legatees when attesting witnesses thereto. *Cox v. Lumber Co.*, 78.

Of executor competent. *Ib.*

Of declaration accompanying an act competent. *Means v. R. R.*, 574.

Of what a person would have done if requested, incompetent. *Ib.*

EVIDENCE, parol, competent to supply lost record.

Independent of the statute relating to burnt and lost records (The Code, ch. 8, passed in aid of the common law), it is competent to prove by parol evidence the existence of a destroyed record. *Mobley v. Watts*, 98 N. C., 284. *Cox v. Lumber Co.*, 78.

The existence of a will, its probate and registration, where destroyed by fire, and also the contents of the will and qualification of the executor, may all be established by parol evidence. *Ib.*

How construed by the court, when the question is whether there is sufficient evidence of negligence to go to the jury. *Dunn v. R. R.*, 252.

Conflicting evidence, for the jury. *Bank v. Nimocks*, 352.

EVIDENCE of husband's declaration, while in possession of personal property, as to wife's right thereto, competent against one claiming under him. *Mitchell v. Sims*, 411.

Is established when admitted by parties or proved by the record. *Lehman v. Tise*, 443.

Conflict of evidence occurring, business methods and usages are admissible as corroborative testimony. *Harrison v. Hall*, 626.

Of one interested in result of suit, though not a party, incompetent under section 590 of The Code. *Fertilizer Co. v. Rippy*, 643.

In bastardy case, 807.

In f. and a. case, 811.

In false pretense case, 814.

EXCEPTION, "*broadside*," defined and disapproved. A "broadside" exception, one which fails to specify alleged errors in a judge's charge, cannot be considered; it is against the established practice of the court and the enactment of The Code, sec. 550. *Pierce v. R. R.*, 83.

What is not a "broadside" exception. Where an exception presents only one proposition of law applicable to the whole charge, it is not obnoxious to the ground of being a "broadside" exception. *S. v. Webster*, 121 N. C., 587. *S. v. Fulford*, 798.

EXCLUSIVE privileges inhibited by the Constitution, Art. I, sec. 7. *Motley v. Finishing Co.*, 232.

FAYETTEVILLE, city of, is the successor of the town of Fayetteville and liable for its debts. *Broadfoot v. Fayetteville*, 478.

FALSE PRETENSE, indictment for, under The Code, sec. 1027, must be founded on a false representation of an existing fact. *S. v. Whidbee*, 796.

A false promise, to be performed *in future*, will not sustain an indictment under The Code, sec. 1025. *S. v. Knott*, 814.

FALSE warranty and deceit, when pleadable as counterclaim. *Hobbs v. Bland*, 284.

*Scienter* not necessary in false warranty. *Aliter*, in deceit. *Ib.*

Damages, not speculative in either, but actual, to be deducted from agreed price and judgment rendered for the balance. *Ib.*

"FELLOW-SERVANT ACT" of 1897 is a public constitutional law, improperly published among the Private Acts, and need not be pleaded, and does not cut off defense of contributory negligence. *Hancock v. R. R.*, 222.

FRAUDULENT conveyance of land to wife or children may be subjected as assets, under The Code, sec. 1446. *Webb v. Atkinson*, 447.

Land bought by debtor and title made to his wife may be reached in equity by the administrator, who represents creditors of an insolvent debtor. *Ib.*

Land encumbered, conveyed to children upon their promise to remove the encumbrance, is without consideration. *Ib.*

General reputation of insolvency is competent evidence. *Ib.*

A trial demanding heroic treatment should receive it. *Ib.*

GENERAL reputation of insolvency competent evidence. *Webb v. Atkinson*, 447.

GOVERNOR does not nominate to the Senate to fill vacancy; simply appoints. *Day's Case*, 362.

GRANTS—to be preceded by entry and followed by survey. *Wyman v. Taylor*, 426.

"Cherokee lands" open to entry and grant. *Ib.*

Reservation void and voidable. *Ib.*

Excessive in *acreage*. *Ib.*

Proceeding to vacate, to be direct. *Ib.*

Registration Act not applicable to their registration, which is regulated by The Code, sec. 2779. *Ib.*

When new counties, or changes in county lines, are made, regulation of The Code, sec. 2784, extended by Acts of 1897, ch. 37. *Ib.*

HACK drivers, negligence of, owner responsible for injury to passenger. *Crampton v. Ivie*, 291.

HEROIC treatment in trial of cause to be administered when necessary. *Webb v. Atkinson*, 447.

HEIRS take at once in case of intestacy—the title cannot stand in abeyance and vest in future, like an executory devise. *Harris v. Russell*, 547.

HIGHWAY ROBBERY. In an indictment for highway robbery, the words, "*at* and *near* a certain highway," etc., are sufficiently descriptive of the locality, and if the robbery was committed at a point 50 or 75 yards from the county road and in plain view of the road running parallel to the railroad, it is sufficiently located. *S. v. Nicholson*, 820.

HOMESTEADER to be joined by his wife in conveyance—Constitution, Art. X, sec. 8. *Wittkowsky v. Gidney*, 437.

HUSBAND AND WIFE—wife may be agent of husband, expressly or implied. Where credit was extended to the husband, as appeared from the dealings, although charge made to wife, he remains responsible. *Sibley v. Gilmer*, 631.

INJUNCTION, not applicable to simple trespass, capable of money compensation. *Sharpe v. Loane*, 1.

Inapplicable to processional proceeding. *Wilson v. Alleghany County*, 7.

Not permissible, where no irreparable damage is threatened. *Puryear v. Sanford*, 276.

INSOLVENCY, general reputation of, competent evidence. *Webb v. Atkinson*, 447.

INSURANCE—premium drafts to be presented and entitled to grace, if on sight. *Burrus v. Ins. Co.*, 9.

Premium recoverable, when. *Ib.*

Premium returnable, when. *Ib.*

Knowledge of the fraud by the agent in such case is not constructive notice to the principal, nor does the receipt of the premium amount to a waiver in the absence of actual notice. The premium, however, should be returned. *Sprinkle v. Indemnity Co.*, 405.

Contract for, not complete until terms are settled and agreed on. *Ross v. Ins. Co.*, 395.

INSURANCE AGENTS—fidelity required.

False representation knowingly inserted in a policy by the agent and signed by the insured, vitiates policy. *Sprinkle v. Life Indemnity Co.*, 405.

Knowledge by agent of his own fraud is not constructive notice, nor waiver by principal, without actual notice. *Ib.*

INSURANCE COMPANY, foreign—must obtain license—sues by comity—and so does its receiver when it is insolvent.

INSURANCE COMPANY—*Continued.*

A foreign fire insurance company must take out license and comply with the requirements of section 3062 of The Code before doing business in this State; otherwise, it cannot maintain an action for any assessment or other liability arising under the policy. Such action is demurrable. *Ins. Co. v. Edwards*, 116.

When such foreign corporation has complied with our laws, our courts are open to it for the enforcement of its rights, and should it become insolvent and pass into the hands of a receiver, he, by comity, will be allowed to sue here to enforce the liability of a policyholder. *Ib.*

INSURANCE POLICY—Possession of policy, at death, presumptive of ownership. *Kendrick v. Ins. Co.*, 315.

Receipt of premium estops, when. *Ib.*

Construction favorable to insured. *Ib.*

Instructions to agents evidence against company. *Ib.*

Issues covering the case sufficient. *Ib.*

INSTRUCTIONS, special, need not be given literally, if given fully and fairly. *Mitchell v. Corpening*, 472.

ISSUES—no evidence, no issue. *Royster v. Stallings*, 55.

Conflicting findings, remedy for, is to set aside the verdict. *Temple v. Ins. Co.*, 66.

INTERNAL IMPROVEMENT BOARD. The act, 10 February, 1899, repealing The Code, sec. 38, did not validate the removal of the old board during the continuance of their term, nor vacate appointments made under their authority. *Bryan v. Patrick*, 651.

JUDICIAL SALE—a purchaser who gets a good title is not concerned in the disposition of the funds, to be made by the courts, but must comply with his bid. *Wilkinson v. Brinn*, 723.

JUDGE'S CHARGE—correctly given, but expressions afterwards used calculated to mislead, is subject to exception. *Bragaw v. Supreme Lodge*, 154.

While the object of the judge's charge is to state the law and to assist the jury in applying the facts, as found by them, to the law, the manner in which this is to be done must be left, to a very great extent, to the good sense and sound judgment of the trial judge. *S. v. Boyle*, 104 N. C., 800, doubted. *S. v. Beard*, 811.

JUDGE, duty of—province of the jury in the trial of an indictment. Code, sec. 413. *S. v. Fulford*, 798.

JUDGE not required to lay down a proposition of law when there is no evidence to sustain it. *S. v. Lucas*, 825.

JUDGMENT, motion for, *non obstante veredicto*, must proceed from plaintiff. *Christian v. Yarborough*, 72.

Notice and motion to set aside must be based on merits, and before rights of innocent third parties intervene. *LeDuc v. Slocomb*, 347.

JUDGMENT—*Continued.*

Parties, when brought in, must take notice. *Ib.*

Within the control of the court during the term. *Culbreth v. Smith*, 289.

Must not contravene the case stated in complaint. *Ib.*

JURISDICTION of justice to enforce payment of money equitably due. *Markham v. McCown*, 163.

Of Superior Court, where the contention is *bona fide*, in matter of contract, for more than $200, although the verdict is for less. *Horner School v. Wescott*, 518.

JURY to determine where there is conflict of evidence. *Bank v. Nimocks*, 352.

KEEPER of the capitol is a legislative officer, subject to legislative appointment. *Cherry v. Burns*, 761.

LABORER'S LIEN—at common law, continued possession necessary.

By statute, the labor bestowed must be for the betterment of the property. *Tedder v. R. R.*, 342.

LANDLORD AND TENANT—summary ejectment, justice's jurisdiction.

The jurisdiction of a justice of the peace in actions for possession of land is statutory, and is limited to landlord and tenant; where title, legal or equitable, is involved, the jurisdiction is ousted. *McDonald v. Ingram*, 272.

The mere plea of ownership will not oust the jurisdiction; the trial will proceed until it is apparent from the evidence that the question of title is involved. *Ib.*

The only question in this proceeding for trial is: Was the defendant the tenant of plaintiff, and does she hold over after the expiration of the tenancy? *Ib.*

A mere offer to sell back at cost—one-third cash and balance on time, not accepted—does not constitute an equitable relation between the parties. *Ib.*

LARCENY—indictment and trial—duty of the judge—province of the jury.

On the trial of an indictment—*e grege*, for larceny—it is the duty of the judge, while leaving the weight of the evidence to be determined by the jury, to declare and explain the principles of law and the essential constituents of the offense charged. The Code, sec. 413. *S. v. Fulford*, 798.

Second offense—

Where the indictment for larceny charges the value of the property stolen to be less than $20, or the jury should so find, the imprisonment for the first offense cannot exceed one year in the penitentiary or common jail, unless the larceny is from the person, or from a dwelling by breaking and entering in the daytime. Laws 1895, ch. 285. *S. v. Davidson*, 839.

LARCENY—*Continued.*

When a second conviction is punished with other or greater punishment than for a first conviction, the first conviction shall be charged as required in The Code, sec. 1187, so as to be passed on by the jury. *Ib.*

Where the sentence imposed is plainly within the discretion of the judge, he may properly have taken into consideration the fact that it was not the first offense. *Ib.*

LATENT AMBIGUITY as to *cestui que trust* or as trustee may be explained by evidence. *Keith v. Scales*, 497.

LIEN, statutory, requires a debt to rest on. There can be no statutory lien without a debt for the lien to rest upon. *Weathers v. Borders*, 610.

MANDAMUS, twofold in its nature—partaking of the character of an action and of an execution. *Bear v. Comrs.*, 204.

When against county commissioners, its requisite. *Ib.*

School orders not enforceable thus, although in judgment against the county. *Ib.*

MARRIAGE LICENSE—duty of register under section 1816 of The Code. *Agent v. Willis*, 29.

MARRIAGE SETTLEMENT—life estate—remainder, when and where to invest. *Harris v. Russell*, 547.

MARRIED WOMEN, capacity of, to make contracts, affected by The Code, sec. 1826, unless free traders. *Weathers v. Borders*, 610.

MENTAL ANGUISH, doctrine of, 459, 522, 528.

MORTGAGE, demand before suit not necessary in case of chattel mortgage, unless stipulated for, nor where it would be obviously futile. *Moore v. Hurtt*, 27.

MORTGAGE—where condition is broken, judgment for foreclosure may be demanded. *Gore v. Davis*, 234.

Judgment should ascertain the debt. *Ib.*

Note secured by mortgage, with forfeiture upon nonpayment of principal or interest, becomes wholly due upon default in payment of either. *Ib.*

MUNICIPAL AUTHORITIES—powers of—restraints on. *Stratford v. Greensboro*, 127.

Liability of, in regard to public streets.

The duty and power of the municipal authorities, under sections 3802 and 3803 of The Code, to prevent and abate nuisances and obstructions in the public streets, are ample and complete, and they may be held liable to the party injured in consequence of their dereliction. *Dillon v. Raleigh*, 184.

Corporation—debts due from, survive the repeal of their charter and revive upon renewal. *Broadfoot v. Fayetteville*, 478.

MUNICIPAL AUTHORITIES—*Continued.*

Of city of Fayetteville liable for debts of town of Fayetteville, and subject to mandamus for the enforcement, legislation to the contrary invalid. *Ib.*

MURDER in first degree not reduced to second degree by voluntary drunkenness. The killing, with all attendant circumstances, to be considered by the jury, under instruction from the court. *S. v. Kale*, 816.

Indictment, conduct of the trial, examination of witness, province of the judge—verdict, first or second degree—right of the solicitor—duty of the clerk. *S. v. Lucas*, 825.

At common law and under the statute of 1893, chapter 85. *S. v. Rhyne*, 847.

NEGLIGENCE and contributory negligence questions for the jury, when evidence is conflicting, under proper instructions. *Parks v. R. R.*, 136.

NEGLIGENCE, CONTRIBUTORY—not to be considered on motion to nonsuit, being in nature of, in confession and avoidance.

Evidence to be considered in light most favorable for plaintiff. *Cogdell v. R. R.*, 302.

NONSUIT, judgment of, how reviewed. *Howell v. R. R.*, 24.

NOTARIES PUBLIC, their fees. *Cider and Vinegar Co. v. Carroll*, 555.

NOTE, with accommodation endorser and collateral security. Surrender of collateral discharges the endorser *pro tanto*. *Bank v. Nimocks*, 352.

Of administrator or executor binds personally. *Banking Co. v. Morehead*, 622.

NOTICE—service of, by mail, when allowable, will be presumed, when enclosed in a letter, properly addressed, with postage paid and deposited in postoffice. *Bragaw v. Supreme Lodge*, 154.

Of equity subjects to the equity, which follows the law in transfers, in order of date. *Wittkowsky v. Gidney*, 437.

Anything calculated to excite attention and stimulate inquiry will affect a party with notice of what the inquiry followed up would have disclosed. *Ib.*

OFFICES—Constitution offices must be filled in the mode designated in the Constitution. *Cherry v. Burns*, 761.

Legislative offices may be filled by legislative appointment. *Ib.*

Keeper of the capitol is a legislative office, subject to legislative appointment. *Ib.*

OWELTY due from infant parties, in partition proceedings, not collectible by sale until they are of age. *Powell v. Weatherington*, 40.

PARENTS, right of, to advise their children in matrimonial disagreements, in good faith and without malice. *Brown v. Brown*, 19.

PARTIES—the assured a necessary party in action on policy. *Proctor v. Ins. Co.*, 265.

Amendment making necessary parties discretionary with the court, on return of the case from Supreme Court. *Ib.*

Misjoinder to be demurred to, else waived. *Hocutt v. R. R.*, 214.

To notice, orders and judgments in the cause. *LeDuc v. Slocomb*, 347.

PENAL STATUTE—"*or*" not to be construed "*and*," so as to make it more penal. *S. v. Lucas*, 825.

PARTIAL intestacy not presumed, where there is a will. *Cox v. Lumber Co.*, 78.

PARTITION of land. Owelty is a charge *in rem* not collectible by sale of infant's share during minority. *Powell v. Weatherington*, 40.

PARTNER not competent, under The Code, sec. 590, to prove the deceased was a member of the firm, in an action against the firm, upon a firm note. *Fertilizer Co. v. Rippy*, 643.

PARTNERSHIP not liable for individual debts of its members. *Hodgin v. Bank*, 540.

PASSENGER in hack not responsible for negligence of driver. *Crampton v. Ivie*, 591.

PEDDLER—what not, 167.

PENITENTIARY, superintendent of, a public office. *Day's case*, 362.

PETITION to rehear—cautiously considered—*stare decisis*. *Capehart v. Burrus*, 48.

New facts and new phases of the law to be stated. *Kornegay v. Morris*, 424.

Requisite of, 610.

POSSESSION of one tenant in common is that of all, unless exclusive for twenty years—and the rule applies to assignee of one tenant in common of the entire interest. *Roscoe v. Lumber Co.*, 42.

PRACTICE—Question of fact, on appeal for clerk, triable by the judge. *Beckwith, ex parte*, 111.

Demurrer overruled, answer due same term, unless time is extended. *Gore v. Davis*, 234.

When appellate court is equally divided, the judgment stands as a decision, not as a precedent. *Bank v. Burlington*, 251.

In case of reference, the court retains the cause and may set aside the report and try the case under The Code, secs. 422, 423. *Cummings v. Swepson*, 579.

An appellant to Supreme Court, who is not guilty of laches, will be entitled to a *certiorari* upon his filing all the transcript available. *Norwood v. Pratt*, 745.

PRACTICE—*Continued.*

Opening and conclusion. One of several defendants, having introduced testimony, give the opening and conclusion to the State. *S. v. Robinson*, 801.

Solicitors examine the State witnesses at their discretion. *S. v. Lucas*, 825.

PROBATE and private examination valid, though taken before an officer relative of parties. *McAllister v. Purcell*, 261.

PROCESSIONING proceedings under The Code, ch. 48, Vol. I. Superseded by act 1893, chapter 22. *Williams v. Hughes*, 3.

Injunction inapplicable to. *Wilson v. Alleghany County*, 7.

PROHIBITED obstructions permitted to remain in public streets subject the public authorities to liability. *Dillon v. Raleigh*, 184.

PROMISSORY NOTE—Sureties bound. *Bank v. Hunt*, 171.

Surety released. *Bank v. Nimocks*, 352.

Execution being admitted, payment is matter of proof by the maker. *Bank v. Wilson*, 561.

PROOF—Burden of, on party with peculiar knowledge. *Mitchell v. R. R.*, 236.

PROXIMATE cause, definition of; when attended by natural and probable consequences. *Dillon v. Raleigh*, 184.

PUBLIC streets—plaintiff to show defects and dangers causing injury; also notice thereof, express or implied. *Jones v. Greensboro*, 310.

Town commissioners responsible for condition of, 871.

PUBLIC OFFICE, an agency of the State.

May be abolished if a legislative office.

Incumbent in, may not be ousted by a mere transfer of his duties.

Superintendent of State Prison is a public officer. *Day's case*, 362.

Act 26 January, 1899, ch. 24, conflicts with Constitution, Art. I, sec. 17. *Ib.*

The Governor *appoints*, not merely *nominates*, to fill vacancies. *Ib.*

PUBLIC OFFICE—Definition, term, duties and rights of legal incumbent. *Bryan v. Patrick*, 651.

Where a public office is not abolished, the legal incumbent may not be legislated out of it. *Wilson v. Jordan*, 683.

PUBLIC OFFICERS, as a general rule, are indictable for neglect of duty—such is the responsibility of town commissioners in reference to condition of public streets. *S. v. Dickson*, 871.

PUBLIC PRINTING—Contract for the public printing incomplete until reduced to writing and executed, under act 24 January, 1899.

RAILROADS—Only permanent damages occasioned by construction recoverable since act 1895, ch. 224—limitation five years. *Ridley v. R. R.*, 34.

RAILROADS—*Continued.*

Company liable for lessee's negligence; also for injury occasioned by employee while on duty, whether through negligence or malice, although party injured is a trespasser. *Pierce v. R. R.*, 83.

What constitutes relation of carrier and passenger; their waiting-rooms not lodging places; may make responsible regulations as to passengers. *Phillips v. R. R.*, 123.

RAILROADS to furnish safe, modern appliances, such as automatic couplers, for use of employees; it is negligence *per se* not to do so. *Troxler v. R. R.*, 189.

Injury by fire—spark-arresters required. *Moore v. R. R.*, 338.

Responsible for defects in "a *foreign car*" used by them; reasonable care to be exercised by employer and employee. *Leak v. R. R.*, 455.

When required to have conductor, the want of one when necessary is negligence. *Means v. R. R.*, 574.

RECORDS, burned or lost, may be supplied by parol evidence—independently of statute. The Code, ch. 8. *Cox v. Lumber Co.*, 78.

REFERENCE—Judge may set aside a reference and report and try the case himself. *Cummings v. Swepson*, 579.

His jurisdiction, discretion and power of the case still continues. The Code, secs. 422 and 423. *Ib.*

ROADS—Obstructing neighborhood road to church, when indictable. *S. v. Lucas*, 804.

SET-OFF, when allowable, 540.

SCHOOL ORDERS, how payable, 204.

SCHOOL RATES—Special contract controls catalogue prices. *Horner School v. Wescott*, 518.

STATE PRISON superintendent a public officer. The place of superintendent of the State Prison, with its attendant duties is a public office, not created by the Constitution, but by a statute. *Day's case*, 362.

STATUTE of limitations—Five years under act 1895, ch. 224, for permanent damages to land by railroad. *Ridley v. R. R.*, 34.

STATUTE of limitations inapplicable to mutual accounts. *Stancell v. Burgwyn*, 69.

To be pleaded, but not in possessory title. *Ins. Co. v. Edwards*, 116.

Starts with cause of action, and not before. *Hocutt v. R. R.*, 214.

Does not run against the widow in favor of heir or assignee of husband. *Brown v. Morisey*, 292.

On coupons, same as on the bonds, both specialties. *Broadfoot v. Fayetteville*, 478.

STATUTES passed *in pari materia* are to be construed together and considered as one act, and as explanatory of each other. *Wilson v. Jordan*, 683.

SUMMONS, service of, how made, how waived, how returned—questions for the court—defendant, after service, bound to know its purport. *Williamson v. Cocke*, 585.

TAX SALE—Assignee of certificate of sale for taxes held by the county is in effect a mortgage with right of foreclosure. *Wilcox v. Leach*, 123 N. C., 74. *Collins v. Pettitt*, 726.

Affirmed, 738. Reaffirmed, 741. Reiterated, 743.

TAXATION, right of, to be exercised for public good, and not for private or corporate gain merely. *Hutton v. Webb*, 749.

May be exercised for benefit of navigation, but duties cannot be imposed upon the commerce of such waters as the Catawba and Johns rivers for local purposes. *Ib.*

TAX valuation of land incompetent evidence—*aliter* as to personal property, which is rated by the owner himself. *Ridley v. R. R.*, 37.

TAXES require no preference in assignment. *Hall v. Cottingham*, 402.

TAX title, purchased after redemption by owner, invalid. *Merrimon v. Lyman*, 434.

TELEGRAM need not disclose relationship of parties in a case of "mental anguish." *Cashion v. Telegraph Co.*, 459.

Failure to deliver, a breach of public duty as well as of a private contract. *Ib.*

TENANCY in common—possession of one, possession of all.

Ouster by one not presumed under twenty years exclusive possession.

Conveyance of entire interest by one not effective to destroy the tenancy in common. *Roscoe v. Lumber Co.*, 42.

Not constituted by joint occupancy where title is only in one of the family. *Straughan v. Tysor*, 229.

TELEGRAPH companies responsible for negligence of operator in charge, day or night. *Dowdy v. Telegraph Co.*, 522.

Bound, whether name of transmitter is disclosed or not. *Laudie v. Telegraph Co.*, 528.

TESTATOR not presumed to die intestate of any part of his estate. *Cox v. Lumber Co.*, 78.

TITLE of land of intestate vests immediately in his heirs. *Harris v. Russell*, 547.

TORT-FEASOR selling personal property, true owner may waive the tort, ratify the sale, and sue for the price. *White v. Boyd*, 177.

TOBACCO warehouseman—who is not one. *Ib.*

TRESPASS—Capable of compensation in damages, will not be enjoined. *Sharpe v. Loane*, 1.

TRESPASSERS, and all who participate, sanction and take benefit knowingly, are responsible for injury to real estate. *Stevens v. Smathers*, 571.

TRUST estate usually governed by same rules and limitations applicable to legal estates. *Equitas sequitur legem. Johnson v. Blake*, 106.

TRUSTEES may be supplied by the court, but *cestui que trust* must be identified by evidence. Latent ambiguity as to either explainable by evidence. *Keith v. Scales*, 497.

WARRANTY—When property present. *Mfg. Co. v. Gray*, 322.

When not present. *Ib.*

Breach—remedy—measure of damages. *Ib.*

WAREHOUSEMAN answerable to the general law for negligence. *Motley v. Furnishing Co.*, 232.

WATERCOURSES not to be diverted to another's injury by individuals or corporations. *Hocutt v. R. R.*, 214.

WILLS of nonresidents, how probated. *Roscoe v. Lumber Co.*, 42.

Devise during life or widowhood, with remainder over after death, how construed. *Beddard v. Harrington*, 51.

Containing devise, with words merely recommendatory, imposed no trust or charge upon the land. *Perdue v. Perdue*, 161.

Devising land to children, will include posthumous children, if so intended. *Clark v. Benton*, 197.

Posthumous children affected by contingency applicable to those *in esse*. *Clark v. Benton*, 200.

Partial intestacy not presumed to be intended. *Cox v. Lumber Co.*, 78.

In an issue of *devisavit vel non*, weakness of mind from protracted illness not identical with insanity. *Mitchell v. Corpening*, 472.

WITNESSES. Two allowable for each fact, where issue is complex. *Beckwith, ex parte*, 111.

2