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VOL. 125

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IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1899

RALPH P. BUXTON

REPORTER

ANNOTATED BY

WALTER CLARK

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(Adopted 7 November, 1899.)

RULE 2 shall read as follows:

2. Requirements and Course of Study.

Each applicant must have attained the age of 21 years, and must have studied—

Ewell's Essentials, 3 volumes.
Clark on Corporations.
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Bispham's Equity.
Clark's Code of Civil Procedure.
Volume 1, Code of North Carolina.
Constitution of North Carolina.
Constitution of the United States.
Creasy's English Constitution.

Each applicant must have read law for twelve months, at least, and shall file with the Clerk a certificate of good moral character, signed by two members of the bar who are practicing attorneys of this Court.

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CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SEPTEMBER TERM, 1899

J. W. WRIGHT, JR., v. NORTHAMPTON AND HERTFORD RAILROAD COMPANY.

(Decided 10 October, 1899.)

Damages—Release—Judge's Charge.

1. A release of damages for injury sustained given by the plaintiff to the defendant operates as a satisfaction of plaintiff's claim and precludes a recovery, unless invalidated by fraud alleged and proved.
2. Where fraud is alleged without scintilla of proof, an instruction from the judge, submitting the question of fraud to be passed on by the jury, is erroneous.

CIVIL ACTION to recover damages for personal injury to the plaintiff caused by alleged negligence of the defendant, tried before *Norwood, J.*, at August Term, 1898, of NORTHAMPTON Superior Court. The issues relating to the cause of action were found in favor of the plaintiff.

As a further defense to the action the defendant relied upon a written release signed by the plaintiff, dated December 18, 1894.

To which the plaintiff replied, that if he ever signed such (2) paper there was no consideration, and that his signature to same was obtained by deceit and fraud, and that the same is not valid. An issue relating thereto, was submitted to the jury as follows:

4. Is the paper writing dated December 18, 1894, relied on by defendants as a release or accord and satisfaction, the contract of plaintiff?

The following testimony bearing on the fourth issue was offered:

J. W. Wright, the plaintiff, testified: (Receipt is shown to the witness, marked Exhibit 1.) This is my signature; I did not know what it was when I signed it. (Statement of account, marked Exhibit 2, is shown witness. He says he has seen this paper or one like it.) I never read the receipt until I came back from Arkansas. I never looked over the account. Mr. Missel had been keeping my money and my account with the company, and I considered him honest, and I had great confidence in him, and I signed the paper that he brought. He brought some money and gave it to me, but I did not count it. When I came back from Arkansas, in consequence of a conversation I had with Grant, I went to Missel and asked to see the receipt, Exhibit 1, and he showed it to me. I don't remember what I said to him, except that I told him that I did not know I was signing a release.

Plaintiff rests.

Defendants offered in evidence Exhibit 1, which is in the following words and figures, to-wit:

$62.67. GUMBERRY, N. C., December 18, 1894.

Received of the Northampton and Hertford Railroad Company, through the hands of F. Kell, as per his statement rendered, sixty-two and 67-100 dollars, in full of any and all claims to date, includ-
(3) ing the sustaining of injury received by accident October 26, 1894, by the breakage of leg, they agreeing to pay Dr. A. J. Ellis at their own cost the amount of his medical service rendered.

J. W. WRIGHT, JR.

Defendants then offered in evidence Exhibit 2, which is in the following words and figures, to-wit:

18 December, 1894.

MR. JOHN W. WRIGHT, *In account with* F. KELL.

		DR.	CR.
Nov. 1.	By balance due you per acct., rendered.....		$18.87
10.	To cash paid Eugene Samuels.....	$6.00	
24.	By 8 days checked off McArthur's time.....		6.00
	To mdse. from store.....	1.83	
23.	To cash, Wm. $1; cash, Chesly 10 cents; cash, Geo., $2.50	3.60	
Dec. 4.	To cash, Dr. Green $5; cash, license $3; cash, crutches $2	10.00	
6.	To cash sent you by Friday $1; cash, W. D. Smith $1	2.00	
	To cash, dispatch 75.; cash, pass Brooks 75 cents	1.50	
14.	To ladies' shoes and postage $2.20; 17 tels. and for W. W. W. 50 cents.....	2.70	
17.	To cash, Spivey	.85	

Dec. 18.	To board, Mrs. Joyner of wife 15 days.....	$ 6.00	
	By 25 days in Nov. on acct. N. & H. R. R.		
	By 15 days in December.		
	By 40 days $50.....	76.92	
	By erroneously charged crutch $2; paid Friday $2.50		$ 4.50
	To mdse. from store.....	9.14	
	To cash handed you in full to date of any and all claims, including the sustaining of injury received	62.67	
		$106.29	$106.29

F. KELL,
P. M. JR.

Phil Missel, Jr., a witness for defendants, testifies: On the (4) day that Wright went to Arkansas, about two months after the accident, I went in his room. He asked me what the railroad company was going to do about paying him. I told him that I did not know. He said that he ought to have pay for his time and have his doctor's bill paid. I told him I thought so too, and that I would see Mr. Kell for him, and see what he would do. I went and saw Kell, and he said that he would pay him from the time that he got hurt until he got well, if he would stay there, in order that his physician might attend him, but if he would not do so, that he would pay him up to the present time and pay Dr. Ellis, and leave the rest to Messrs. Clark and Shephard (the president of the defendant companies). I went back to see Wright, and finding company in his room, called him out and told him what Kell offered to do, and Wright agreed to accept Kell's offer. I then went back to my office and made out Wright's account, and then went back to Wright's room and paid him the money due him, and gave him a statement of his account, of which this (Exhibit 2) is a copy, and read the receipt (Exhibit 1) to him, and he signed the receipt and gave it back to me. He kept the money and statement of account. He said that he was going to Arkansas to see his mother. He had walked around on crutches before this time. I next saw Wright when he returned from Arkansas. He asked to see the receipt, and I showed it to him. He said that he did not know that it read that way. I made no reply. He afterwards asked me about the propriety of his staying with Kell, if he would look like an object of charity? I told him no, that I thought it was due him from Kell. I told him that I would have to swear, if I was put on the witness stand, that I read the receipt to him, and that he had said nothing. I was Kell's bookkeeper and secretary, and bookkeeper for the G. and J. R. R. and L. Co., and secretary and treasurer of N. and H. R. R. Co. The two companies had no connection in a sense except a money transaction. I (5)

am now in the lumber company business. I am secretary of a lumber company not connected with the defendants. I live in Richmond, Va., and came here to testify. Kell paid Wright's board and doctor's bill.

Defendants close.

Mrs. Wright, wife of plaintiff, testifies: I am a niece of Mrs. Kell's. Missel came twice on the day that Wright signed the receipt. Wright was on the bed. Neither paper was read to Wright. Missel told Wright there was an itemized statement of your account and a receipt, and gave him the money and statement of the account, and I put them away without counting the money. Missel had in the evening called Wright out, and talked to him about a sleeper, and I went and settled the matter about the sleeper. Receipt was not read to Wright.

Dr. A. J. Ellis testified: Kell paid Wright's doctor's bill.

At the close of the evidence, the defendants moved the court to dismiss the action upon the ground that there was no evidence to go to the jury showing fraud in the execution of the receipt (Exhibit 1).

Motion overruled, and defendants excepted.

His Honor charged the jury on the 4th issue as follows: "If the jury find that the plaintiff signed the receipt (Exhibit 1) for the purposes therein set forth without any fraud or misrepresentation on the part of the defendants, or their agent, Missel, then they should answer the fourth issue, Yes."

Defendant excepted.

(6) His Honor further charged the jury on the 4th issue: "If the jury should find that the plaintiff was induced to sign the paper by the fraud of the defendant's agent, Missel, and the plaintiff did not know the contents of the paper when he signed it, and he had no opportunity to ascertain its contents, and could not by reasonable diligence have learned what the paper was, then the jury should answer the first issue, No."

Defendants excepted.

At request of plaintiff, his Honor further charged the jury: "If the jury find from the evidence that plaintiff had great confidence in the witness, Missel, and had trusted him to keep his money and his accounts with the defendant company, and further that said Missel told him that the paper dated December 18, 1894, was a receipt for his wages up to date, and that he signed said receipt without reading it, trusting in what Missel had told him, then the plaintiff would not be estopped thereby, and the fourth issue should be answered, No."

Defendants excepted.

The jury responded to the 4th issue, No, and assessed the plaintiff's damages at $1,000, less $142.92, leaving $857.08, and his Honor ren-

dered judgment in favor of plaintiff for $857.08, from which judgment the defendant appealed to Supreme Court.

W. H. Day and S. H. MacRae for defendant (appellant).
R. B. Peebles for plaintiff.

MONTGOMERY, J. This action was commenced for the recovery of damages for an injury to the person of the plaintiff caused by the alleged negligence of the defendant company; and the jury found all the issues favorably to the plaintiff. (7)

One of the defenses set up in the answer was the release of the defendant and the satisfaction of the plaintiff's claim. The plaintiff filed a replication to that defense and averred that the paper writing which contained the release was procured through the fraud of the defendant. Upon that phase of the case the fourth issue: "Is the paper writing dated December 18, 1894, relied on by defendants as a release or accord and satisfaction, the contract of plaintiff?" was submitted to the jury. The defendant's appeal contains exceptions only to the charge of his Honor on that issue. The Court's instruction was this: "If the jury find that the plaintiff signed the receipt (Exhibit 1) for the purposes therein set forth without any fraud or misrepresentations on the part of the defendants or their agent, Missel, that they should answer the fourth issue, Yes." Upon a most careful examination of the whole evidence we fail to find a *scintilla* as to any fraudulent conduct on the part of Missel, the agent of the defendant company. The plaintiff himself as a witness did not make any charge or intimation that Missel practiced any deceit or fraud upon him in the execution of the release, or in its consideration. It is true he said that he did not know what the paper was when he signed it, that Mr. Missel had been keeping his money and his account with the defendant, that he had great confidence in Missel, that Missel brought the paper to him to sign and he signed it, but he did not testify that the paper writing did not contain the contract and agreement between him and the company, or that he wished even then to repudiate it. Nor did the plaintiff testify that he was not informed of the agreement and release set out in the paper writing before he executed it. Missel testified that the terms of the settlement were fully gone into between him and the plaintiff just immediately before the plaintiff signed the receipt, and the plaintiff did not contradict the statement. The testimony of (8) the plaintiff's wife added nothing to the strength of his case. She said that Missel brought the account and receipt to the plaintiff, saying, "There was an itemized statement of your account and a receipt, and gave him the money and statement of the account." And she said

further that neither paper was read by the plaintiff. But certainly on the face of that statement there was no fraud on the part of Missel, and nothing tending to show that the plaintiff had not been informed by Missel of the contents of the paper writing before he signed it.

The instruction of his Honor was erroneous, for there was no evidence tending to prove fraud on the part of the defendant in the execution of the release.

New trial.

Cited: Jeffreys v. R. R., 127 N. C., 383; *Boutten v. R. R.*, 128 N. C., 342.

JAMES W. HINES v. LOUIS MOYE, SIMMONS, POU & WARD, AND R. W. WILLIAMSON.

(Decided 10 October, 1899.)

Act of 1893, Ch. 6—Ejectment—Judgment Lien—Judicial Sale and Resale—Purchaser, Quasi Party, How Discharged—Color of Title.

1 A suit instituted to determine conflicting claims to real property, under Act of 1893, ch. 6, may be properly treated as an action of ejectment, when the complaint alleges ownership in the plaintiff and possession in the defendant.

2. A judgment binds parties and privies only.

3. Where a purchaser at judicial sale fails to comply with his bid, and the sale is unconditionally set aside, and a resale ordered, his interest passes to the purchaser at the resale, and he is discharged from all connection with the proceeding.

4. Color of title is inoperative unless accompanied with possession.

(9) CIVIL ACTION instituted by plaintiff against the defendant, Moye, for the adjudication of conflicting claims to real property, in the county of CRAVEN, and heard, by consent, upon facts agreed, before *Bryan, J.*, at chambers in New Bern on June 23, 1899.

The complaint, among other things, alleged that the plaintiff was the owner of the land and that the defendant was in possession, setting up unfounded claims thereto. The answer of defendant Moye admits the possession, and controverts the claims of the plaintiff.

The other defendants, by consent, intervene as parties, claiming certain rights in the timber growing upon the land, derived from Moye, and substantially adopting his answer in other respects.

His Honor, upon the hearing, treated the case as an action of ejectment, and after the hearing, and argument upon both sides, adjudged that the defendants are the owners, and entitled to immediate possession. From this judgment the plaintiff appealed to the Supreme Court.

The agreed facts are stated and reviewed in the opinion.

Jacob Battle and D. L. Ward for plaintiff (appellant).
Simmons, Pou & Ward for defendants.

MONTGOMERY, J. It was suggested here by the plaintiff's counsel that his Honor not only rendered an erroneous judgment upon the facts agreed, but that he passed directly upon the title of the plaintiff to the land which is the subject of the action. The objection was that the suit was commenced under ch. 6 of the Laws of 1893 to determine the adverse claim of the defendant to the land described in the complaint. The action was treated by the Court as one in ejectment and we think properly so. The complaint alleged title in the plaintiff and admitted actual and adverse possession in the defendant Moye, and the (10) prayer for relief was that it might be declared that the title of the plaintiff was good and valid; that he recover possession, and that an injunction be granted restraining the defendant from cutting timber on the land.

The land, situated in Craven County, was conveyed by John I. Killebrew and wife to the defendant Moye by deed dated August 10, 1888, and properly registered February 4, 1889. On the 22d of March, 1888, a judgment in favor of Thomas H. Battle to the use of E. F. Arrington against John I. Killebrew had been docketed in the Superior Court of that county, the land at that time being the property of Killebrew. At the Fall Term, 1890, of Nash Superior Court a judgment was entered in a civil suit commenced by the creditors of Killebrew, including the plaintiff, who had become the owner of the Battle judgment, for the purpose of ascertaining the amounts and priorities of the various liens upon the real estate of Killebrew, in which judgment a commissioner was appointed who was directed to sell the tract of land in controversy to satisfy the Battle judgment. The defendant Moye was not a party to that action. The land was sold by the commissioner and bid off by the defendant Moye; and upon the report of the commissioner the sale was confirmed at the Fall Term, 1891, of Nash Superior Court and the commissioner ordered to make title to the purchaser upon the payment of the purchase money. The purchase money not having been paid at maturity, after due notice to defendant Moye, the sale was set aside and a resale ordered at which the plaintiff became the purchaser.

The last-mentioned decree was not docketed nor recorded in Craven County until after the defendant had taken possession of the land and had sold to the intervenors, Simmons, Pou & Ward, certain timber rights in the land as set out in their answer. The defendant Moye took possession of the land on January 1, 1899, and the deed conveying the timber rights by Moye to his codefendants was registered in Cra-
(11) ven County on the 2d of May, 1899, before the commencement of the present action, and before the docketing of any of the judgments from Nash County in the creditors' proceeding except the order of sale.

It was agreed as a further fact in the case that the codefendants of Moye took the deed in good faith and without actual notice of claim of plaintiff and without other notice than the constructive notice furnished by the record. It was further agreed that no one was in the actual possession of the land from 1893 to January, 1899, when the defendant Moye took possession.

As against the defendant Moye, the contention of the plaintiff is, that notwithstanding the judgment lien had expired and the defendant was in possession of the land before the decree of the court of Nash County had been docketed in Craven and before the plaintiff's deed from the commissioner had been registered in Craven, the plaintiff's deed from the commissioner to him and the decrees under which the deed was made are sufficient to establish his legal title to the land and his right to the possession thereof, on the ground that the defendant became a party to the proceeding under which the plaintiff procured his deed for all intents and purposes when he became a purchaser of the land at the first sale and that, therefore, his interest, whatever it might have been under the Killebrew deed, passed to the plaintiff, the purchaser, at the resale. It is not necessary to the decision of this case that we pass upon the effect of Moye's purchase at the first sale upon any interest he may have had in the land at that time. That sale was set aside and a resale ordered, and there was no provision contained in the order of
(12) resale holding the defendant Moye liable for any part of the costs of the proceeding or for any possible difference between his bid at the first sale and the highest bid at the resale.

We are therefore of the opinion that under such an order of resale the entire connection of Moye with the proceeding was ended and he thenceforth stood as an indifferent person to the whole matter.

As against the intervenors, Simmons, Pou & Ward, the claim of the plaintiff is, that although he does not claim the land under the court decrees and the commissioner's deed, as of the full legal title, he can yet claim under the deed as color of title. Of course to set up the de-

cree and the deed as color of title adverse possession for seven years had to be shown in himself or some one else under whom he claimed. The case on appeal, however, shows that it was one of the agreed facts that no one had been in possession between 1893 and 1st of January, 1899. But the plaintiff insists that the principle referred to in *Denning v. Gainey,* 95 N. C., 534, that "in the absence of actual possession the superior and oldest title drew to it a constructive possession," applies to this case. In *Denning v. Gainey,* both parties were claiming under separate deeds and under titles purely legal, with actual possession in neither, and the contest was over a disputed boundary. The cases are entirely dissimilar.

There was no error.

Affirmed.

Cited: Benton v. Collins, post, 95.

W. H. NICHOLS v. THE BOARD OF COUNCILMEN OF EDENTON.

(Decided 10 October, 1899.)

Amendment of Town Charter—Compensation of Town Officers.

1. Amendment to a statute operates from its enactment, leaving in force the portions which are not altered. Code, sec. 3766.

2. The Act of 1869-70, incorporating the town of Edenton, provides for its government by a board of commissioners, allowing to each of them $25 per annum. The amendatory act of 1876-77 provides for the government of the town by the mayor and six councilmen, known as "The Board of Councilmen of Edenton," making no mention of compensation, but the duties, functions and powers of the councilmen are the same as those exercised by the Board of Commissioners: *Held,* that the councilmen are entitled, by right, to the same pay allowed the commissioners.

CIVIL ACTION, originating in the justice's court of CHOWAN (13) County, and carried by appeal to the Superor Court and heard before *Bowman, J.,* at Spring Term, 1899, a jury trial being waived.

The plaintiff was elected, in May, 1897, one of the councilmen of Edenton for a term of two years, qualified and served, and claims $37.50 for his services. It was conceded that he was entitled to that amount, if he was entitled to any pay at all, which the defendant denies. Upon

the facts found by his Honor, judgment was rendered for the plaintiff, and the defendant appealed.

The facts found are stated in the opinion.

W. M. Bond for defendant (appellant).
W. J. Leary for plaintiff.

FAIRCLOTH, C. J., renders the opinion of the Court.
CLARK, J., renders dissenting opinion.

(14) FAIRCLOTH, C. J. Action for $37.50, the salary of plaintiff as one of the board of councilmen of defendant. This amount is conceded, if plaintiff is entitled to recover. The facts found are as follows:

By a private act, 1869-70, ch. 123, the defendant town was regulated and governed by a board of commissioners, and by sec. 37, "Each one of the commissioners of the town of Edenton shall receive $25 per annum, and they shall be required to fix the salaries of the other town officers not otherwise provided for in this act." This charter was amended by act 1876-77, ch. 88, and provided that the affairs of the town should be controlled by the mayor and six councilmen, known as "The Board of Councilmen of Edenton," and that all laws and parts of laws in conflict with this act are repealed. The amendment makes no mention of compensation of the councilmen. It is found as a fact that the duties, functions and powers of the councilmen are the same as those exercised by the board of commissioners, and that the plaintiff was duly inducted into his office and has faithfully discharged its duties. Judgment was rendered for plaintiff and defendant appealed. The defendant's fallacy is in assuming that the act of 1869-70, ch. 123, was repealed by the act of 1876-77, ch. 88. The latter does not purport to repeal the former, but expressly to amend it. In such cases the unrepealed parts remain in force as if reenacted. Code, sec. 3766.

It follows that the officer performing the duties, etc., of the commissioners, by whatever name known, is entitled to the benefits of sec. 37 of the original act. This is his *right* and the board of councilmen are powerless to divest him of it by any resolution.

Affirmed.

(15) CLARK, J., dissenting. The charter of 1869-70 (Private Laws, ch. 123) provided for five commissioners elected each year by the whole town, with sundry specified powers, rights and incidents annexed peculiar to the office; among them that if any commissions should be sick or absent from town any justice of the peace might act in his

place, and allotting a salary of $25 per annum to each of the five commissioners.

The act of 1876-77 (Private Laws, ch. 88) enlarged and reorganized the town into wards and provided that "The municipal affairs of the town of Edenton shall be controlled by a mayor and six councilmen who shall be known as the Board of Councilmen of Edenton," and provided for their election, two by each ward, and for terms of two years, with a provision repealing all laws in conflict with the new act. The board of councilmen elected in May, 1897, passed a resolution that no salary should be allowed themselves. In January, 1899, the plaintiff brought this action for 18 months salary at $25 per year.

When the act of 1876-77 reorganized the town providing that its government should be by six councilmen elected by wards for two years, and repealed all laws in conflict therewith, this was a complete abolition and annihilation of the offices of the five commissioners elected for the term of one year, by the whole town, and with this abolition all the powers, rights and incidents annexed to the abolished office ceased. "Councilman" is not a continuation of the office of "Commissioner" with the peculiar or special incidents annexed to the latter, and was not made such by a provision that the former should continue in office till the new officers qualified. Whatever rights and incidents the two offices have in common are due to the nature of the office and are simply incidents annexed to such positions by common law and the general statute, 2 Code, ch. 62, "Towns and Cities." In claiming the salary of $25 the plaintiff is claiming a right not given to his board (16) by the general law or any special statute, but a peculiar incident annexed to an office which was abolished twenty years before he was elected. It is true the act of 1876-77 is an amendment of the act of 1869-70, but within its scope it is a complete repeal of the first act.

All the cases from *Hoke v. Henderson,* down to the present, hold that the Legislature can abolish any office created by the Legislature.

In *Day's* case, 124 N. C., 362, it is true it was held that when an office was abolished, if the same duties, though divided up, were devolved upon other persons, the incumbent of the abolished office was entitled to continue to draw the salary and discharge his former duties, notwithstanding the expression of the legislative will to the contrary. But here, the plaintiff, one of a board of six "councilmen" elected for a term of two years, and by an entirely different constituency, claims that he is entitled to draw the salary of one of a board of five "commissioners" which office he never filled, an office elective by the whole town for a term of one year, and which was abolished twenty years before the plaintiff was elected.

He claims the salary on the ground that he is discharging substantially the same duties. Inasmuch as scarcely any office can be abolished whose duties will not devolve upon, or be discharged by, some one else, if not only the incumbent of the abolished office but all those discharging similar duties shall be entitled, even after the lapse of twenty years, to the salary of the abolished office, the powers of the Legislature will be much restricted in the direction of effecting any retrenchment and reform in the public service. A salary will be well nigh indestructible and immortal. The charge upon the public treasury once created (17) will abide with us and stick to us like another shirt of Nessus, and future generations will be born that they may continue to pay it. Different is the title of this office, the number of its occupants, the terms of its duration, the constituency by which it is filled, but, Proteus-like, whatever form it may take, it is the same office, and one elected twenty years or a remoter period after the Legislature decrees its destruction, may claim its salary because of the similarity of the duties!

"You may break, you may shatter, the vase if you will,
But the scent of the roses will cling 'round it still."

Overruled by Mial v. Ellington, 134 N. C., 131.

HENRY BAYER AND HENRY S. BAYER, COPARTNERS, TRADING AS HYGIENIC PLATE ICE MANUFACTURING COMPANY *v.* THE RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY.

(Decided 10 October, 1899.)

Petition for Certiorari—Remedial Writ—Substitute for Lost Appeal—Negligence of Counsel—Practice.

1. The writ of *certiorari* is an extraordinary remedial writ, to be granted or not, in the sound discretion of the Court where the petitioner has lost his only remedy without fault or neglect on his part.

2. Where the petitioner for such relief has not been guilty of laches, the neglect of his counsel of matters purely within the counsel's province will not be imputed to him, and the relief will be granted, especially where the counsel is insolvent and unable to respond in damages for their negligence.

3. Counsel for the appellant prepare the case on appeal and, according to practice and long usage of the profession, it is their duty, and not that of their client to serve the case, unless handed to him for the purpose—*Semble,* the tender of a case or counter case within the time agreed, to

the opposing counsel, is equivalent to service, unless objected to; where there is a refusal to accept such service, it must be made by an officer.

PETITION of defendant for writs of *certiorari,* to be directed to (18) judge and clerk of the Superior Court of WAKE County for the settlement and transmission of case on appeal by defendant in this cause, tried at April Term, 1899.

MacRae & Day, J. D. Shaw, J. B. Batchelor, S. H. MacRae, and W. H. Neal for petitioner.

Armistead Jones, F. H. Busbee, Ernest Haywood, and Simmons, Pou & Ward, contra.

FURCHES, J. On the 12th day of October, 1894, plaintiff commenced an action against defendant in the Superior Court of Wake County, in which it alleged that the defendant wrongfully and negligently burnt its ice factory in the City of Raleigh. The defendant denied these allegations and alleged contributory negligence on the part of plaintiff. This action was tried at April Term, 1899, of said court, when the plaintiff recovered and obtained judgment for $20,000. From this judgment the defendant appealed; notice of appeal was waived in open court; appeal bond fixed at $50, which was given by defendant. And the defendant also gave a *supersedeas* bond for the stay of execution until the appeal should be heard in the Supreme Court.

By consent of parties, forty days was given to the appellant to make up the case on appeal and thirty days for appellee to except or make up counter case. The time allowed expired on June 15th, and defendant's case on appeal was not served or tendered until the 19th—four days after the time allowed by the agreement had expired. The plaintiff refused to accept service of defendant's case on appeal, for the reason that it had not been tendered within the time agreed upon. And while plaintiff made out a counter case, it insisted on its objection as to time and objected to the judge who presided at the trial settling the case on appeal.

The defendant after notice to plaintiff applied to the judge to (19) settle the case on appeal. But plaintiff attended and there objected to the judge's settling the case, for the reason that defendant's case on appeal had not been tendered or served in time; and upon this state of facts the judge held that he had no power to settle the case on appeal, and declined to do so, stating that he had his notes of the trial and could settle the case in a very short time, if he had the power, and that he would do so.

At the opening of the present term of this Court and upon notice to the plaintiff, the defendant filed its petition asking for a writ of *certiorari,* sworn to by Mr. St. John, vice-president of defendant company, and the affidavits of J. C. MacRae and W. H. Day were also filed in support of said petition.

It appears from the petition that the defendant employed J. B. Batchelor, W. H. Day and J. C. MacRae, three reputable lawyers of good standing, residents of the city of Raleigh, and practicing attorneys of the Raleigh bar, to attend to and manage said action for it; that the defendant caused the appeal to be taken, and that it gave the appeal bond required by law, as fixed by the court; that it also gave a *supersedeas* bond for the stay of execution; that this was all done in good faith, as it was advised that defendant had good ground for said appeal, upon which it expected to obtain a new trial; and that it never abandoned or thought of abandoning its appeal; that all three of said attorneys are *insolvent* and that defendant is without remedy or redress, except by the intervention of this court and the issuance of the writ of *certiorari,* as prayed in the petition.

The attorneys Day and MacRae admit that they are *insolvent,* and it is not disputed by plaintiff or any one that the attorney Batchelor is also *insolvent.*

(20) The said MacRae states in his affidavit that it was agreed between the attorneys that he should prepare and serve the case on appeal; and that on account of his own bad health and sickness in his family he was not able to do so within the time agreed upon. He also alleges that Mr. Batchelor was only consulting counsel, and that Mr. Day had been elected or appointed to an important public office which took a large portion of his time.

The plaintiff admits that Mr. MacRae was unwell a part of the time and that he had sickness in his family, but alleges that he was in his law office the most of the time. The plaintiff also alleges that Mr. Bachelor was more than a mere consulting counsel, that he took an active part in the trial of the case, examined some of the witnesses and argued the case to the jury. Plaintiff admits that Mr. Day has been appointed to an important public office, but it alleges that he continued his practice as an attorney; and that it was the duty of both Batchelor and Day to make up the case on appeal if MacRae could not do so.

This is a substantial statement of the facts in the case, and if the precedents of this Court and the decision of other courts do not intervene to prevent our doing so, we are of the opinion that the writ should issue.

The writ of *certiorari* is a remedial writ and should be issued in proper cases, where the petitioner has lost his remedy without fault or neglect on his part, and where he is without any other remedy. But it is an extraordinary writ, to be granted or not, in the sound discretion of the court, and will not be granted for the relief of a party who is by his own negligence in default—where he has lost his remedy by his own laches or negligence.

Negligence is admitted, but the defendant says that it was not its negligence but that of its attorneys; that it took the appeal and gave the bond; that this was all it could do; that it could not (21) make out the case on appeal; that this was the business of its attorneys, the only parties who could do so, and that it had every reason to believe, and did believe, that they would do so.

If this is so, the question presented is this: Will the negligence of defendant's attorneys be charged to defendant and prevent the issuance of the writ, or will the writ issue, notwithstanding the negligence of its attorneys?

The plaintiff contends that it was the duty of the defendant to serve the case on appeal *after* it had been prepared by its attorneys and that *it* was guilty of negligence in not doing so. We do not assent to the truth of this proposition. If the case had been made out in time and given to the defendant to serve and *it* had neglected to do so, this would have been *its* negligence—would have been charged *to it,* and the writ refused. But we understand it to be the practice of the profession (and the writer of this opinion knows that it has been the practice in that section of the State where he has practiced for thirty years) for the attorney who made out the case, or counter case on appeal, to serve the same or cause it to be served. That was what was done in this case. The attorney who prepared the case on appeal served it on the counsel of the plaintiff, and they recognized this service, without waiving the fact that it was not served in time, and proceeded to make a counter case, by way of exceptions. We have no reason to suppose that if this case on appeal had been tendered to the opposing counsel, within the time agreed upon, but what they would have treated it as a service. Of course they would have had the right to refuse to accept such service, and then the appellant would have been put to the necessity of having it served by an officer.

In *Walton v. Pearson,* 82 N. C., 464, the case on appeal was (22) tendered by the attorneys of the appellant to the attorneys of the appellee, and they refused to accept it, for the reason that it had not been tendered within the time. In that case this Court granted the appellant the writ of *certiorari.* And it does not seem to have been suggested that the *appellant* (Walton) had been guilty of negligence in not

having the case on appeal served in time. But plaintiff further contends that defendant is bound for the negligence of its attorneys, and is not entitled to the writ, unless they can excuse themselves for their negligence; that it was the duty of all three of the defendant's attorneys to attend to the making out the case on appeal; that if it is admitted that McRae has excused himself (and this was not admitted) that the fact that Day had been appointed to an important public office did not excuse him, as he continued his practice and appeared for defendant on the trial of the case; and that no excuse had been offered for Batchelor except that it was alleged that he was only consulting counsel, which was denied by plaintiff.

Plaintiff contends that these facts are sufficient to defeat defendant's right to the writ, and cites *Boyer v. Garner,* 116 N. C., 125; *Dunn v. Underwood, ibid.,* 525; *Stanback v. Harris,* 119 N. C., 107; *Winborne v. Byrd,* 92 N. C., 7; *Griffin v. Nelson,* 100 N. C., 235; *Churchill v. Ins. Co.,* 92 N. C., 485, as authority sustaining this contention.

Dunn v. Underwood, Stanback v. Harris and *Griffin v. Nelson* were all cases for failure to print the record, and are not in point if it is not the duty of the appellant to serve the case on appeal, as it seems to us we have shown it is not.

Winborne v. Byrd and *Churchill v. Ins. Co.* are both cases where there was no appeal bond, and are not in point, for the same reason.

Boyer v. Garner was an application for a writ of *certiorari* to have an appeal perfected, where it had not been served within the time allowed. This application was put upon two grounds; that one of
(23) the appellant's counsel had been sick and that the other was engaged in business in another county. It was resisted upon the ground that both counsel were bound, in the discharge of their duties to their client, to see that the case was made out, and the fact that one of the attorneys was on duty in another county did not excuse him. The writ was also resisted upon the ground that the appellant had given *no appeal bond* which was shown and admitted to be true. This fact, that appellant had given *no appeal bond,* was a sufficient reason for refusing the writ, and seems to have been the principal reason why it was refused. But, in the opinion of the court, it is said that it was the duty of the other attorney to see that the case was made out, and the fact that he was engaged in other work outside of the county did not excuse him from his obligation to his client to do so. And if damage ensued to his client on account of his negligence, he would be liable to him for such damage.

And if it can be contended that what is said in this opinion entered into, and influenced the court in refusing a writ when it had another good ground for refusing it, the facts in that case are not the same as in this case. There, it is not even suggested that the attorneys of the

appellant were *insolvent* and that appellant was without relief, except through the writ of *certiorari*. Here, it is shown by the appellant (admitted by two) that all three of the attorneys of the appellant are *insolvent*, and this is not controverted by the appellee; and that the appellant has no relief except by the intervention of this writ.

In *Chadbourn v. Johnson*, 119 N. C., 288, relief was refused where it appeared that counsel was solvent and able to answer in damages for his negligence. And it is held in *University v. Lassiter*, 83 N. C., on p. 42, that the Court will give relief where the attorney is in- (24) solvent—the court quoting and adopting the language of Chief Justice Kent in *Denton v. Noyes*, 6 John., 295: "If the attorney for the defendant be not responsible or perfectly competent to answer to his assumed client, the Court will relieve the party against the judgment, for otherwise a party might be undone. I am willing to go still further and in every such case let the defendant in to a defense of the suit. To carry the interference further, beyond this point, would be forgetting that there is another party in the case equally entitled to our protection."

It has been held with very great uniformity under sec. 274 of The Code that a party not in fault—not guilty of laches *himself*—is entitled to relief against the neglect of his attorney, for matters which were purely within the province and duty of the attorney, and which the party himself could not do. That in such cases it was not necessary that the attorney should show excusable negligence on his part. *Grill v. Vernon*, 65 N. C., 76; *Bradford v. Coit*, 77 N. C., 72.

And why the same rule should not obtain in cases like the present we do not clearly see. But it is not necessary in this case that we should declare this to be the proper rule and we do not do so.

It is argued that if we grant the writ prayed for in this case it will establish a dangerous precedent, that it will in effect destroy the statutory limitation for making and serving cases on appeal, and that the Court will be continuedly annoyed with such applications. We do not think so; the statute prescribes the legal limit and the matter ends there unless this Court, in the exercise of a sound judicial discretion, issues its remedial writ of *certiorari*. And no attorney who expects to hold his practice can afford to be guilty of such laches without some very good excuse. Especially so when he has to allege, or to have (25) it proved, that he is insolvent before his client can obtain such relief.

It seems to us, speaking in the language of Chief Justice Kent, that, to refuse the writ in this case, "the defendant would be undone."

The writ will issue to the clerk of the Superior Court of Wake County, commanding him to notify Judge Brown that it is the judgment of

this Court that he proceed at once to settle the case on appeal—observing as far as may be the rules for settling cases on appeal; and that, when the case so settled shall be filed with the clerk, he proceed at once to make and certify a full, true and perfect transcript of the record of said case on appeal, including the case so filed by Judge Brown, to this Court, that the same may be proceeded with according to law and the course and practice of this Court.

Let the writ issue as prayed for.

Certiorari.

Cited: Barber v. Justice, 138 N. C., 22; *Cozart v. Assurance,* 142 N. C., 524; *Harrill v. R. R.,* 144 N. C., 545.

B. F. WHITE v. WILLIAM UNDERWOOD.

(Decided 10 October, 1899.)

Summons, Order of Arrest and Bail—Service of Civil Process on a Prisoner in Jail.

1. The sheriff can serve process anywhere in his county—the jail possesses no "privilege of sanctuary"; service of process upon a prisoner there is valid.

2. The exemption of witnesses and jurors from civil arrest accorded by statute (Code, secs. 1367 and 1735), and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to parties arrested in criminal proceeding.

3. Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other. Code, sec. 131.

(26) CIVIL ACTION heard before *Bowman, J.,* at Spring Term, 1899, of HERTFORD Superior Court, upon a motion made by defendant to vacate the process and order of arrest and bail issued by the clerk in this cause.

His Honor found the following facts:

On the 15th day of February, 1899, at the instance of the plaintiff in this action, the defendant was arrested under a State warrant charging the defendant with a secret assault, and on the same day he was committed to the common jail of Hertford County in default of bail in the sum of $800; and on the next day, to wit, the 16th of February, 1899, the clerk, with full knowledge of the fact that the defendant was

then in jail, issued the original process in this cause, and the order of arrest herein filed, and delivered the same to the sheriff, who went into the jail on same day and attempted to execute the said process and order of arrest; the said defendant is still in jail in default of bail under said order of arrest and is bound over in the sum of $500 for his appearance at the next term of this court in said criminal action.

Upon the foregoing finding of the facts, the Court holds that the said process and order of arrest were illegal and the attempted service of the same was void in law, and it is therefore ordered that the said defendant be discharged from custody and the said order vacated.

From this ruling and judgment, the plaintiff appealed to the Supreme Court.

Winborne & Lawrence for appellant.
D. C. Barnes for appellee.

CLARK, J. The summons in this action and an order of arrest and bail ancillary thereto were served upon the defendant while confined in jail upon failure to give bond for his appearance to an- (27) swer a criminal charge for some secret assault. Code, sec. 131.

The sheriff has authority to serve process anywhere in his county, in jail as well as elsewhere. The jail possesses no "privilege of sanctuary." The reason for the exemption of witnesses and jurors from civil arrest (Code, secs. 1367 and 1735) and of nonresident parties and witnesses voluntarily attending court here from service of any civil process (*Cooper v. Wyman,* 122 N. C., 784), do not apply to parties arrested in criminal proceedings. *Moore v. Greene,* 73 N. C., 473. There is no public policy to encourage the latter.

In *Davis v. Duffie,* 1 Abb. Appeal, 486, it is said by the Court of Appeals of New York, affirming same case, 8 Bosw., 617: "It was decided in *Phelps v. Phelps,* 7 Paige, 150, that service upon a convict in a state prison, as in this case, was regular and valid to confer jurisdiction; and this has been the settled rule of law and practice both in England and in this country for a long period of time. 2 Madd., Ch. Pr., 200; 1 Hoff., Ch. Pr., 109; 1 Barb., Ch. Pr., 50. Even if Davis could be deemed civilly dead, as would have been his condition had he been sentenced to imprisonment for life (2 R. S. 701, sec. 20), still he would have been answerable to his creditors according to the usual practice of the courts. Chitty says: 'This situation of *civiliter mortuus* is never allowed to protect him from the claims of private individuals or the necessities of public justice; so that although he can bring no action against another, he may be sued, and execution taken out against him.' See also remarks of Chancellor Kent in *Platner v. Sherwood,* 6 John.,

Ch., 130. Indeed the decisions are uniform, that although the right of a convict to prosecute an action is suspended and his property in some instances forfeited, still he may be sued and the suit against him may be prosecuted to judgment."

(28) In *Dunn's appeal* (35 Conn., 82), it was held that where a defendant was in jail under sentence, leaving a copy of a paper at the jail was compliance with a statute requiring service by "leaving a copy at usual place of abode."

No complication can arise from the defendant's being under arrest at the same time in the criminal action and in this proceeding. The same condition arises whenever a defendant is under arrest on two or more criminal warrants. As long as he remains in jail on the warrant in the criminal action, he need give no bail in the civil action, and when released in one he has the opportunity to give bail in the other. If service of the order of arrest had been invalid, the motion for an alias order should have been allowed "at any time before judgment." Code, sec. 295.

In holding the service of summons and of the order of arrest and bail void, and in vacating the said order, there was error, and an appeal lay. *Fertilizer Co. v. Grubbs,* 114 N. C., 470.

Reversed.

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(29)

DAISY HOLLOMON v. E. D. HOLLOMON, EXECUTOR OF R. W. HOLLOMON.

(Decided 10 October, 1899.)

Widow—Minor—Dissent From Will—Year's Allowance—Members of the Family.

1. In dissenting from her husband's will and applying for year's allowance, the widow, being a minor without guardian, may be represented by next friend, duly appointed as prescribed by Rule 16, Superior Court, 119 N. C., 963, and in accordance with the Code, sec. 180.

2. Where the testator provides for his infant children by a former marriage—appointing a guardian of their persons and property, directing him to take them to live with him, and educate them out of the profits of the estate—they do not constitute a part of the family after his death, and such widow is not entitled to extra allowance for the support of her stepchildren.

APPLICATION for year's allowance for Daisy Hollomon, widow of R. W. Hollomon, instituted before a justice of the peace in Mitchells Township, BERTIE County.

From the finding of the commissioners there was an appeal to the Superior Court, and from the ruling of the clerk an appeal was taken to the judge at term, and determined before *Hoke, J.*, at Spring Term, 1899.

R. W. Hollomon died leaving him surviving the plaintiff, his widow, under age, and two infant children by a former marriage. His will was admitted to probate and the defendant, named as executor, duly qualified.

The following is a copy of the will:

WILL OF R. W. HOLLOMON.

In the name of God, amen. I, Rocius W. Hollomon, of Bertie County, North Carolina, do make, declare, ordain and publish the following as my last will and testament, hereby expressly revoking any (30) and all wills heretofore made by me:

Item 1. Reposing confidence in the wisdom and integrity of my brother Efferson D. Hollomon, I hereby appoint, nominate and constitute him my executor to this will.

Item 2. I direct my executor to pay my debts and funeral expenses out of the first moneys coming into his hands.

Item 3. I wish all of my personal property of every kind to be disposed of by my executor as the law directs, and he shall distribute it under the statute of distributions as set out in The Code of North Carolina.

Item 4. I direct my executor to have set apart and allotted to my wife, in the manner prescribed by law, her dower of thirds in my lands.

Item 5. I lend to my two children during their lives all of the real estate I own now or may own at my death, and I direct my executor to take charge of such lands as are not allotted to my wife as her dower, and rent out the same until my children become twenty-one years old. After both of said children become twenty-one years old then they are to take possession of the said lands and use and enjoy them for life.

Item 6. At the death of my two children I give, devise and bequeath the said lands in fee simple to the children born of my said two children and to their heirs forever.

Item 7. In the event my two children die without having issue born to them, then I devise and bequeath said lands, all of them, to my heirs generally living at the death of the survivor of said two children.

Item 8. It is the clear intent and purpose of this will to lend all of my lands to my daughter, Bessie A. Hollomon, and my son, Clingman Hollomon, for and during their lives, and to vest the fee simple in any children they may have, the said land to be divided into (31)

two equal shares, and one share to go to the children of Bessie and one share to go to the children of Clingman. If Bessie has children and Clingman has none, then her children get all the land. If Clingman has children and Bessie none, then his children get all. If neither of them has children, then my brothers and sisters and their heirs get the land.

Item 9. I hereby appoint my brother Efferson B. Hollomon as guardian of my two children, and give him entire charge and control of their persons and property. He is to take them to live with him and to care for and educate them out of the profits of my estate. He is to give no bond, but to be subject to the orders of the court in executing said trust.

In testimony of all of which I, Rocius W. Hollomon, do hereunto set my hand and seal, this March 23, A. D. 1898.

R. W. HOLLOMON. [Seal.]

At the request of R. W. Hollomon, in his presence and in the presence of each other, we write our names as witnesses to this will. He declares all of the foregoing to be his will and testament, and he executed and signed the above paper writing in our presence.

This March 23, 1898. JOHN C. BRITTON.
W. S. TAYLOE.

The widow dissented from the will, and being under age without guardian, her father, John J. Myers, was duly appointed next friend, and represented her in this proceeding and also in her application for year's support. The commissioners in laying off the allowance assigned the widow $300, and allowed nothing to her for support of the stepchildren, giving as the reason in their report.

(32) We find as a fact that the deceased, R. W. Hollomon, left him surviving two children, Bessie Hollomon and Clingman Hollomon, both under the age of fifteen years—children of the said R. W. Hollomon by a former marriage, both of whom resided with the said R. W. Hollomon and wife, Daisy Hollomon, at the death of said R. W. Hollomon, in the home with them. We further report that we did not allow anything to the said widow for the said two children, they not residing with said widow at the time of her application, but living with their testamentary guardian, E. D. Hollomon.

To this action of the commissioners in allowing her nothing for the children the widow excepted and appealed to the Superior Court, and the clerk at the hearing modified the ruling of the commissioners by allowing the widow $100 for each of the children, and also overruled an

objection made by the defendant to the regularity of the proceeding in allowing the widow to be represented by a next friend.

The defendant excepted to the ruling of the clerk and appealed to the judge at term. His Honor sustained the rulings of the clerk, and the defendant excepted and appealed to the Supreme Court.

Francis D. Winston for defendant (appellant).
B. B. Winborne and St. Leon Scull for appellee.

CLARK, J. The first exception is that the widow, who is an infant, did not enter her dissent by her guardian, as provided in Code, sec. 2108, but by next friend, and that she is represented in this proceeding and has appealed by such next friend. The next friend was duly appointed in the mode prescribed by Rule 16, Superior Court, 119 N. C., 963. The objection is entirely technical and if it had any force we would allow the motion to make the guardian party in this court in the interest of justice, under The Code, sec. 965. But the exception is altogether without merit, for The Code, sec. 180, expressly (33) provides that in "actions and special proceedings" (which embrace all civil remedies, Code, secs. 125, 127), whenever any infant or other person under disability shall be without guardian, then such infant, etc., "may appear by next friend." The rule necessarily contemplates the appointment of next friend in some cases, and it is only when there is no guardian that they are needed.

The second exception is that the widow was allowed, in addition to the $300 for herself, $100 each for her two stepchildren. They were children of the husband by a former marriage and were living with him at his death, but by virtue of his will they were immediately transferred to the custody of his brother, who was appointed their guardian and executor of the will. The will gives him "entire charge and control of their persons and property" and he is directed "to take them to live with him and to care for and educate them out of the profits of the estate" which is left entirely to the two children, subject only to the widow's right of dower. The executor immediately took the children home to live with him, leaving them only a few days with the widow, at her request, as her guests. In no sense were they "members of her family" at any time after the death of the husband.

Section 2118 allows $300 for the widow and "$100 in addition thereto for every member of the family besides the widow." Section 2119 restricts the "family" to children of the deceased, or of the widow, or to whom either stood in *loco parentis,* under fifteen years of age "who were residing with the deceased at his death." The object of this last clause was to exclude from the bounty children who might come in after

such death to make themselves "members of the family" and evidently was not meant to embrace those who, as in the present instance,
(34) cease as a consequence of the death to be members of the family and chargeable as such to the widow, for The Code, 2116, says that the year's provision is "for the support of herself and family." The $300 is for her support. The additional $100 for each child under fifteen years of age is not for her benefit, but to enable her to provide for such children, if any there be, who are members of the family.

It would be "sticking in the bark" indeed to take $200, which must come out of the property placed in the hands of the guardian for the support of these very children, and give it to the stepmother, who by the will is deprived of their custody and relieved of all expense of their support.

The counsel for the plaintiff relies upon *In re Hayes,* 112 N. C., 76. There, the child was living with the widow, and without controversy a member of her family up to its death. Having come within the terms and intention of the statute, it was held that its subsequent death could not deprive the mother of the $100 additional allowance provided for such child. In that case, the objection to the allowance for the child came from the administrator representing creditors, and here from the children themselves whose property is being taken. Besides, it was pointed out in the opinion in *Hayes's* case that the expense of medical attention and burial probably consumed the $100 allowed. Here, the custody of the children being given to the guardian by the will, and he having taken them to his home at once, neither by the letter nor the spirit of the statute is the widow entitled to an allowance for them.

So much of the judgment as allows the plaintiff $200 on account of the two children is reversed.

Cited: Stewart, In re, 140 N. C., 31.

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(35)

S. F. AND J. S. MOORE, PARTNERS OF FIRM OF S. F. MOORE & CO., v. W. T. BRADY.

(Decided 10 October, 1899.)

Claim and Delivery—Verbal Mortgage—Possession—Description.

1. A parol mortgage may be enforced in this State, if such a mortgage as could be enforced had it been in writing.

2. An action for possession of property must be brought against the party in possession.

3. The property must be so described as to identify it.

CLAIM AND DELIVERY for a bale of cotton, commenced in justice's court of NORTHAMPTON County, appealed to the Superior Court, and determined before *Hoke, J.*, at Spring Term, 1899. The action was commenced October 12, 1898. There were no written pleadings. The plaintiff claimed the possession of a bale of cotton of the value of $25 under a verbal mortgage to him from the defendant made in February, 1898, to secure a balance of that amount due by account—which cotton Henry Bracy, a tenant of defendant, would owe him as rent, at the end of the year.

Under this auxiliary proceeding the officer took from the possession of Bracy the bale of cotton in controversy, as the rent bale—there being in his possession other cotton of the crop of 1898.

The defendant controverted the verbal mortgage, and its legal effect if made, and also the validity of the legal proceedings, so far as he was concerned, and moved to nonsuit the plaintiff.

His Honor declined to nonsuit, and instructed the jury as follows:

That if they were satisfied from the evidence that defendant gave to plaintiffs a verbal mortgage on a bale of cotton, to be paid (36) him by Henry Bracy as rent, or that Brady told plaintiffs that the bale of cotton belonged to them, then the jury should find all the issues in favor of the plaintiffs, provided they were also satisfied by the evidence that at the time the action was commenced, the defendant was in the actual possession of the bale of cotton seized, or had control thereof.

Defendant excepted.

There was verdict for plaintiffs, and judgment accordingly. Defendant appealed.

R. B. Peebles for defendant (appellant).
No counsel contra.

FURCHES, J. This action was commenced before a justice of the peace for the possession of a bale of cotton, plaintiff claiming that he was the owner of the same by virtue of a verbal mortgage. The defendant seems to have been indebted to the plaintiffs, which they agreed to be $25, and to secure the same stated that one Henry Bracy, a tenant of defendant, would be due him a bale of cotton as rent; and agreed verbally to mortgage the same to plaintiff, to secure the payment of the $25. This was in February and the action was brought in October.

So it would seem that the cotton that plaintiff contends was mortgaged to him was to be planted and raised after the date of the transaction which plaintiff claims to have been a verbal mortgage. The terms of this agreement, according to the plaintiff's testimony, was as follows: "That defendant told plaintiff that at the end of the year a tenant of his, one Bracy, would owe him a bale of cotton for rent; that it would be worth $25; that he, defendant, would give plaintiff a mortgage on the bale of cotton; that plaintiff accepted this offer and looked
(37) for a blank mortgage to reduce it to writing, but finding none, he called J. H. Carter to witness the agreement."

The defendant denied that he mortgaged plaintiff any cotton; denied that he was in possession of any cotton belonging to plaintiff by mortgage or otherwise, when this action was commenced or afterwards; and contended that, admitting the conversation, as stated by plaintiff, it conveyed no cotton to plaintiff, and that his action must fail.

The justice granted the writ of possession and it was in evidence by the officer who had this writ or order in his hand, that he went to Henry Bracy (the party named as tenant) and got a bale of cotton under said order; that Bracy had other cotton, but he did not know whether it was ginned or not. Upon this evidence, under the instructions of the court, the jury found a verdict for the plaintiff, upon which he had judgment. Defendant excepted and assigned as grounds for his exceptions the matters set out above.

A parol mortgage may be enforced in this State, but it must be such a mortgage as could be enforced if it had been in writing. And it seems to us that there is error, and that the plaintiff can not sustain his action upon this evidence for two reasons, even if the transaction between plaintiff and defendant is sufficient to constitute a mortgage.

An action for the *possession of property* must be brought against the party in possession. *Haughton v. Newberry,* 69 N. C., 456; *Webb v. Taylor,* 80 N. C., 305.

We note the fact that it is said in the last case cited that the property must be in the defendant's actual possession or under his control. This must mean that it is in the possession of defendant's agent, attorney or factor, who would be entitled to the control of the property.

In this case the language of the plaintiff is that the defendant said that Bracy would *owe* him a bale of cotton. It is not claimed
(38) that the cotton seized by the officer was in the actual possession of the defendant.

But the further reason is that no particular bale of cotton was named or described—"Will owe me a bale of cotton"—and it appears from plaintiff's evidence that Bracy had other cotton. This being so, the

mortgage conveyed no cotton, and plaintiff's action must fail on that account. *Blakely v. Patrick,* 67 N. C., 40; *McDaniel v Allen,* 99 N. C., 135.

New trial.

Cited: Thomas v. Cooksey, 130 N. C., 151.

IN RE JOHN S. MCMAHON

(Decided 17 October, 1899.)

Habeas Corpus—Prisoner in State Prison—Commutation of Sentence—Statutory Diminution of Imprisonment. The Code, Sec. 3445—Act of 1885, Ch. 379—Act of 1899, Ch. 457.

1. A prisoner for life is not entitled to diminution of imprisonment on account of good behavior, by reason of section 3445 of the Code and amendatory acts.

2. A prisoner whose term has been commuted from a life sentence to a term of years is so entitled, from and after the date of such commutation, but not before.

PETITION of John S. McMahon, a prisoner in State Prison, for writ of *habeas corpus,* preferred to Hon. W. A. MONTGOMERY, Associate Justice of the Supreme Court. Writ awarded directed to the penitentiary authorities, and case heard before his Honor at chambers on September 7, 1899.

Upon the hearing, after argument on both sides, his Honor (39) adjudged that the petitioner was not then entitled to his discharge, and remanded him into custody. From this judgment the petitioner appealed to the Supreme Court. The grounds of the application for discharge are fully stated in the opinion.

J. C. L. Harris for petitioner (appellant).

Zeb Vance Walser, Attorney-General, and Shepherd & Busbee and Argo & Snow, contra.

FURCHES, J. The petitioner was convicted of murder at June Term, 1889, of Macon Superior Court and sentenced to be hanged, and the sentence was commuted by the Governor to imprisonment for life. The prisoner was received in the penitentiary on the 8th day of June, 1889,

under this commuted sentence, where he has been confined ever since that time; that on the 15th day of August, 1899, his sentence was further commuted by the Governor to imprisonment in the penitentiary for the term of twelve years, and he would be entitled to his discharge at the end of twelve years from the date of his imprisonment, without statutory commutation.

But the prisoner contends that chapter 457 of the Laws of 1899 repealed that part of chapter 379 of the Laws of 1885, and all that part of section 3445 of The Code, that gave commutation to prisoners, and that under the act of 1899 he is entitled to a commutation of five days per month for each month he has been in the penitentiary; and this being so, he was entitled to his discharge from imprisonment on the 7th day of September, 1899, the day this writ was issued.

It is admitted by respondents that if the petitioner is entitled to five days commutation for every month since he has been in the penitentiary, he was entitled to his discharge from imprisonment on the 7th day of September, 1899, as he contends. But respondents deny
(40) that he is entitled to said commutation, and deny that he is entitled to be discharged from said imprisonment.

The petitioner contends that the nature and grade of his offense is not changed by either one of the acts of commutation; that the penalty or punishment only is lessened by the clemency of the Governor, acting under the power conferred upon him by Article III, sec. 6, of the Constitution; that the act of 1899 is retroactive and that he is entitled to five days commutation under this act for every month he has been confined in the penitentiary since he first entered the same.

Doubtless the grade of the crime of which he was convicted is not changed, but the punishment is. He is now a prisoner for a term of years and this satisfies the requirement of the statute. And it seems to us, if the reasoning of the petitioner is strictly followed, that he would be entitled to no statutory commutation, as there is no statute giving a prisoner, sentenced to death, a commutation on his time. This favor is only extended to parties imprisoned for a *term of years.* The statute (Code, sec. 3445) gave it to those *imprisoned for a term of years,* in case of good conduct, to be judged of by the penitentiary authorities —one day, two days, and then three days per month. Chapter 379 of the Laws of 1885 increased this commutation to three days per month for the first three years, four days for the fourth year and five days per month after the fourth year. Chapter 457 of the Laws of 1899 made it uniform, and increased it to five days per month, and repealed the former acts so far as they conflicted with the act of 1899. This act is entitled an act "to amend section 3445" and not an act to repeal that

section. The act of 1899 went "into effect, from and after its ratification," and as there could not be two rules for commutation in force at one time, the act of 1899 necessarily repealed that part of section 3445 in conflict with it. But as was proper this act of 1899 expressly repealed that part of these former acts in conflict with the act (41) of 1899. But these acts were in force until the passage of the act of 1899, and rights and benefits that prisoners had acquired before that time were not taken away from them by the act of 1899; even if it could be taken from them by the Legislature, it was not done.

The policy of the Legislature in passing this act was, as we suppose, to induce convicts to submit to the government of the penitentiary authorities, and thereby to reduce the expenses and lessen the cost of controlling and guarding the prisoners. But it did not and could not apply to prisoners for life; their terms could not be shortened, as there was no limit to work to, until death, and then commutation would do them no good. But no statutory commutation could be allowed except by legislation, and the statute allowing commutation expressly limited it to those *imprisoned for a term of years.*

And there seems to be the same reason for allowing commutation to prisoners whose sentences have been reduced to a term of years by the clemency of the Governor, as there is for extending it to those originally imprisoned for a term of years—that they may thereby be induced to be better prisoners.

It is said that the Governor in commuting the life sentence of the petitioner to a term of years (we have not his order, nor have we been furnished with a copy) said, "twelve years, subject to his right to commutation for good behavior." And taking it that this was said by the Governor, it only expresses what we hold the law to be. If it was not the law the Governor could not make it the law—he has no law-making power—and we can not suppose and do not suppose that he undertook to make any law applicable to the petitioner. To show that he did not intend what the petitioner contends for, it can not be supposed that when the Governor, on the 15th day of August, 1899, com- (42) muted the prisoner's life sentence to a term of imprisonment for twelve years, that he meant to say that he should be discharged on the 7th day of Sptember, only twenty-three days thereafter. Had ths been so, it seems to us that he would have discharged him then.

The view we take of this case compels us to disagree with the contention of the petitioner; that he is not entitled to anything under the statutory commutation acts, that he was not entitled to anything under the original sentence of death, but we have to hold that he is entitled to more now than he was then—that he is now entitled to the statutory commutation as a prisoner for years.

The discussion of this case leads us to the following conclusions:

1. That a prisoner for life is not entitled to the *statutory* commutation, contained in the act of 1899, or in the statute of 1885 or in section 3445 of The Code.

2. That a prisoner whose term has been commuted from a life sentence to a term of years is entitled to the *statutory* commutation contained in these statutes, from and after the date of such commutation.

3. That the act of 1899 was amendatory of the former acts, and only changed the rule by which *statutory* commutations should be determined, after its passage.

4. That the passage of the act of 1899 did not deprive—take away from prisoners the *statutory* commutation they had earned up to the time of its passage, but that they are still entitled to the same, and also to what they may be entitled to under the act of 1899; that what they had earned before the passage of the act of 1899 and what they have earned under the act of 1899 may be added together to entitle them to a discharge, if, by so adding, they are entitled to the same; (43) that is, if, by so adding, they complete the term of years for which they are imprisoned.

Applying these rules, it is seen that the petitioner is not entitled to his discharge, and the judgment appealed from is affirmed.

JOSEPH SWAIN v. F. A. PHELPS, EXECUTRIX.

(Decided 17 October, 1899.)

Amercement of Sheriff—Neglect to Serve Process—Code, Sec. 2070—Penalty $100.

1. An amercement of a sheriff is a penalty imposed by law for neglect to serve process when no sufficient cause is shown for his failure to discharge an official duty.

2. The courts have no dispensing power to relieve from the penalty prescribed by law.

MOTION to amerce W. G. Burden, sheriff of BERTIE County, for failure to serve the summons on the defendant returnable to February Term, 1898—the motion was made, upon notice, returnable to February Term, 1899, at which term judgment *nisi* was entered, and *scire facias* ordered returnable to September Term, 1899, when the rule was heard before

Bowman, J., and discharged. The plaintiff excepted and appealed. The reasons influencing his Honor are stated in the opinion.

R. B. Peebles for appellant.
F. D. Winston and Jones Fuller, contra.

CLARK, J. The sheriff to whom the summons issued returned it "served," and was sued for the $500 penalty for false return. The court permitted him, for reasons set out in his affidavit, to amend this return and power of the court below to allow this amend- (44) ment was sustained on appeal. *Swain v. Burden,* 124 N. C., 16.

The return as amended sets out that the summons was sent by the deputy sheriff by mail to a justice of the peace who read the same to the defendant therein named. This action is for the $100 penalty for failure to serve process. This presents a different question from the power in the court to permit amendment of the return so as to make it speak the truth. It has been made to speak the truth and it appears that there was neglect for which The Code, sec. 2079, imposes $100 penalty, and the courts have no "dispensing power" to relieve from the penalty prescribed by the law. It is no excuse that the sheriff had no corrupt or bad intentions and that the plaintiff was saved from any resulting injury by the voluntary appearance of the defendant. If there had been corrupt intent, there was the additional punishment of indictment; and if any injury to plaintiff had resulted, there was the additional remedy of a civil action against the sheriff for damages. This amercement of $100 is given for the neglect to serve process when no sufficient cause is shown, and none has been shown.

The highest considerations of public policy require that sheriffs shall not be negligent in the service of process committed to them. *Turner v. Page,* 111 N. C., 291; *Boyd v. Teague, ibid.,* 246; *Finley v. Hayes,* 81 N. C., 368; *Morrow v. Allison,* 33 N. C., 217; *Hathaway v. Freeman,* 29 N. C., 109. Ignorance of the officer is no excuse. *Hauser v. Wilson,* 29 N. C., 333. Whether any damage was done to the plaintiff is immaterial. The amercement is for failure to discharge an official duty. *Buckley v. Hampton,* 23 N. C., 322.

The motion to dismiss the appeal is denied. The motion to amerce was a motion in the cause made by the plaintiff therein (45) and he had a right to appeal from its refusal. Code, sec. 547.

Upon the facts found, the judgment *nisi* should be made absolute.

Reversed.

T. E. ROBERTS AND W. T. HUGHES, LATE PARTNERS WITH I. A. BROGDEN UNDER THE NAME AND FIRM STYLE OF ROBERTS, HUGHES & BROGDEN *v.* H. G. CONNOR, EXECUTOR OF A. BRANCH, DECEASED, DOING BUSINESS AS BRANCH & CO., BANKERS.

(Decided 17 October, 1899.)

Removal of Causes for Trial—Executors—The Code, Section 193—Appeal.

1. An appeal lies from an order for removal of cause for trial to another county, under section 193 of the Code, and is not premature.

2. Where an executor, several years after the death of the testator, conducts a banking business in the name of his testator in the county where letters testamentary issued, and a suit is instituted against him in another county, the residence of plaintiff, upon a cause of action growing out of the banking operations and disconnected with the duties of defendant's office as executor, it is *the bank* that is complained of, and not *the executor*. The mention of the defendant as "executor, etc.," is a mere designation of the bank, and does not entitle him to an order of removal of the cause for trial to the county where he qualified.

CIVIL ACTION instituted in FRANKLIN Superior Court, and heard upon motion of defendant before *Moore, J.*, at April Term, 1899, of
(46) Superior Court of Franklin County, to remove the cause for trial to Superior Court of Wilson County.

The plaintiff lived in Franklin County—the defendant lived in Wilson County, where his testator died, and where defendant qualified as executor.

The motion was made under section 193 of The Code.

The motion was raised on the ground that for several years after the death of testator, A. Branch, the defendant had been operating a banking business in Wilson County, under the name in which he was sued, and that the cause of action grew out of his banking business and was not connected with his duties as executor.

His Honor allowed the motion, ordered the removal, and plaintiffs appealed.

F. S. Spruill and W. H. Ruffin for appellants.
Cook & Son for defendant.

FURCHES, J. This appeal is from an order of the Superior Court of Franklin County removing the cause to Wilson County for trial, and the merits of the controversy are not involved.

The plaintiff Roberts resides in Franklin County, and the defendant Connor resides in Wilson County, and the bank spoken of and doing business as "Branch & Co., Bankers," in located in Wilson County; and the matters complained of are that the bank wrongfully appropriated money of plaintiff's to the payment of unauthorized checks.

The action was commenced on the 8th day of October, 1898, returnable to October Term, 1898, and on Monday of that term of the court the plaintiffs filed their verified complaint. At this term, time was given defendant until January Term to answer, and at January Term sixty days further time was allowed the defendant to an- (47) swer. Before the sixty days had expired, the defendant served notice of his intended motion to move the court at the next term for an order transferring the action from Franklin County to Wilson County for trial. At April Term, 1899, this motion was made upon the ground that the defendant Connor is sued as the executor of "A. Branch." The motion was allowed and the order of removal made, and the plaintiffs appealed.

The defendant here contended that the appeal was premature and moved to dismiss upon that ground. But we do not agree with defendant, and refuse the motion to dismiss the appeal. *Alliance v. Murrill,* 119 N. C., 124.

The defendant Connor contends that he is sued as executor of A. Branch, and for this reason the motion to remove should be allowed under section 193 of The Code. We do not think so. While the defendant, Connor, is designated as the surviving executor of "A. Branch," it is perfectly manifest that it is the alleged wrongful acts of "the bank" that are complained of. There are no allegations in the complaint charging or suggesting that the action is founded on a debt or liability of "A. Branch," nor is it suggested that the defendant has violated any of the trusts imposed on him by the terms of the will of "A. Branch." If these things had been alleged in the complaint, it would have been a proper case for removal.

It is the acts of the bank—*Connor the bank,* that are complained of, for transactions of the bank—Connor the bank—which have occurred long since the death of "A. Branch" and for which the bank through Connor, its manager, is liable, if the plaintiffs shall succeed in making a recovery. *Froelich v. Trading Co.,* 120 N. C., 40.

The motion of Connor as "executor of A. Branch" is simply to designate the authority under which Connor is operating the bank. It is no more than it would have been if the bank had been char- (48) tered by an act of the Legislature, and Connor had been president, and the plaintiffs had stated in their complaint that "Branch &

Co., Bankers" is an institution, or a bank, chartered by the Legislature of North Carolina, doing business at Wilson, N. C. This would not have involved the terms or provisions of the charter in a transaction like this, but simply the fact whether the bank had misapplied the funds of plaintiffs as they allege.

For these reasons it does not seem to us that it is a proper case for the application of section 193 of The Code, and the motion to remove should not have been allowed.

The Court being of this opinion, any discussion of the other point presented by the appeal, as to whether the application to remove was made in apt time, would be but obiter, and we prefer not to enter this field of discussion for the reason that "sufficient unto the day is the evil thereof."

There was error in making the order of removal, which is

Reversed.

Cited: Lassiter v. R. R., 125 N. C., 508; *Connor v. Dillard,* 129 N. C., 51; *Hauser v. Craft,* 134 N. C., 319; *Brown v. Cogdell,* 136; N. C., 32; *Garrett v. Bear,* 144 N. C., 26.

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(49)

J. J. HOWARD, J. M. HOWARD AND J. A. MEADOWS v. THE MUTUAL RESERVE FUND LIFE ASSOCIATION (OF NEW YORK.)

(Decided 17 October, 1899.)

Superior Court—Jurisdictional Amount—Foreign Corporations, when subject to Courts here, when not—Individual Rights—Corporation Business Matters—Demurrer. Amendment of Pleadings in Supreme Court.

1. The Superior Court has no original jurisdiction of a legal cause of action, founded on contract, when in no event can the plaintiff recover as much as $200.

2. Money paid under an illegal assessment with a full knowledge of all the facts is not recoverable.

3. The courts of our State will not interfere with the internal management of the business matters of foreign corporations.

4. Our courts would have jurisdiction over foreign corporations where individual rights would be concerned. In such cases they would be open to the plaintiff.

5. An amendment of the complaint, asked for in the Supreme Court, which involves questions of fact and a matter of law entirely foreign to the case as made up on appeal, is denied.

CIVIL ACTION for legal and equitable relief instituted in the Superior Court of CRAVEN County by the plaintiff J. J. Howard, a resident of this State, who had a life insurance in the defendant Mutual Life Insurance Company, a foreign corporation, of the State of New York.

The plaintiff demanded judgment:

1. For $155.65, the illegal part of the assessments collected from him on mortuary calls under resolutions of 1895 and 1898, with interest from the dates of payment.

2. That the defendant be restrained from further demanding or collecting the illegal portion of said mortuary calls.

3. For costs. (50)

4. For general relief.

The defendants filed a demurrer to the complaint, and the case coming on to be heard before *Hoke, J.*, upon complaint and demurrer at February Term, 1899, his Honor sustained the demurrer, and the plaintiffs appealed.

The points presented in the pleadings are thoroughly reviewed in the opinion.

Simmons, Pou & Ward for appellants.

J. W. Hinsdale and Shepherd & Busbee for defendants.

MONTGOMERY, J. The defendant, a foreign corporation, is an insurance company organized on the assessment plan. The plaintiff J. J. Howard, a resident of the State, insured his life in defendant company for the benefit of the plaintiff J. M. Howard, and at the time the application was accepted, a "certificate of membership" was issued, in which the defendant agreed and promised to pay to the beneficiary the value of the policy upon the death of the plaintiff J. J. Howard, in consideration of the payment to the defendant by J. J. Howard of the admission fee and the dues for expenses to be paid quarterly in each year, and of all mortuary assessments. A by-law of defendant company in force at the time the plaintiff became a member, was incorporated in the certificate of membership, and is in the following words:

"Whenever the death fund of the association is insufficient to meet an existing claim by death, an assessment shall be made upon the entire membership in force at the date of such death for such a sum as the board of directors shall have established and published, according to the age of each member"; and by another by-law in force at the time the plaintiff became a member of the company, certain de- (51) finite rates of assessment for each member, according to age, were fixed, and that those upon members of the age of the plaintiff J. J. Howard were fixed at $2.10 for each $1,000 of insurance.

Up to the 12th of June, 1895, the assessments against the plaintiff on account of the said mortuary fund were levied and collected according to the rates agreed upon in the beginning. But at that date and also in January, 1898, the board of directors changed the rates of assessments, greatly increasing them as to the plaintiff J. J. Howard and all others who became members before the year 1890, without increasing at the same time in a proper ratio the assessments of members who had insured since 1890. The plaintiff has opposed the increased assessments but has been compelled to pay to the company, under protest, the sum of $155.65 in excess of the rates agreed upon and fixed at the time of his insurance.

The plaintiff was at the time of the commencement of this action beyond the insurable age.

The prayer for relief is for judgment for $155.65, the illegal part of the assessments collected from him on mortuary calls under the resolutions of 1895 and 1898, with interest from the date of payment; that the defendant be restrained from further demanding or collecting the illegal portion of said mortuary calls; for costs and for general relief. The demurrer was sustained by his Honor, and is in the following words:

1. The defendant demurs to the cause of action stated in the complaint herein for the recovery of money alleged to have been illegally exacted and paid, for that it appears upon the face of the complaint that the court has no jurisdiction of said cause of action because in no event can the plaintiff recover as much as $200.

2. The defendant demurs to the cause of action stated in the complaint, in which the plaintiff seeks equitable relief by way of
(52) injunction of the defendant's making or levying the assessment complained of, for that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action: (1) Because the plaintiff being a member of a foreign corporation undertakes by this action to interfere with the internal management and administration of its affairs. (2) Because the plaintiff has not set forth that he has not exhausted his remedies within the corporation as a member thereof before bringing this action. (3) Because this court can not enforce its injunction against the defendant. (4) Because, conceding for the purpose of this demurrer that the assessments complained of are illegal, the plaintiff has an adequate and complete remedy at law, and this action is premature.

3. The defendant demurs to the cause of action stated in the complaint in which the plaintiff seeks equitable relief, for that it appears on the face of the complaint that this court has no jurisdiction of the

subject matter of the action, because the plaintiff, as a member of the defendant company, which is a foreign corporation, seeks equitable relief by way of injunction against the defendant making or collecting the assessments complained of, and prays the court by this action to interfere with the internal management of a foreign corporation and the administration of its affairs.

It is clear that two causes of action are embraced in the complaint though they are not separately stated; one legal, for the recovery of $155.65 for alleged illegal assessments paid by plaintiff to defendant; the other equitable, for injunctive relief to restrain the defendant from further demanding or collecting, in the future, such illegal and increased assessments.

The Superior Court in which this action was commenced is without original jurisdiction to entertain the legal cause of action, the amount claimed being under $200. The proper jurisdiction for (53) such an amount as is claimed in this action is in the court of a justice of the peace. Section 194 of The Code refers only to actions of which the Superior Court has jurisdiction, and was not intended to give to such courts jurisdiction of civil actions founded on contract wherein the sum demanded shall not exceed $200. It is true that the plaintiff in this complaint alleged that he had paid to the defendant various amounts and that he was not able to give the dates and the amounts, and asked that the defendant "file with its answer a schedule with the amounts so paid together with the dates of payment." Such pleading is too vague for any purpose. The plaintiff seems either not to have wanted an accounting with the defendant or thought he could not procure it in this action. But it is difficult to see how the plaintiff could recover of the defendant the amount of the alleged illegal assessments, for they were paid with a full knowledge of all the facts.

We have a statutory provision which provides for the recovery of money paid for taxes illegally collected, when paid to a public officer under protest, but we know of no rule of law which would permit a person to pay money upon the demand of another with a full knowledge of all the facts and afterwards recover it.

The first and third grounds under the second head of the demurrer (the equitable cause of action) are based upon the legal view that the courts of one state can not interfere with or exercise jurisdiction over the internal management of corporations formed and resident in another state; and especially, upon the view that the courts of one state can not by injunction afford equitable relief even to one of its residents, who is a member of a foreign corporation, by an order commanding and requiring such corporation to do or not to do certain

(54) specified acts connected with the internal management of its corporate affairs. It seems that that part of the demurrer is well taken, for the authorities appear to be both numerous and respectable to the effect that the courts of one state will not interfere with the internal management of the business matters of foreign corporations by injunction or otherwise. It is considered best that such matters should fall under the exclusive jurisdiction of that State under the laws of which such foreign corporations were organized and where they are resident. Thompson on Corporations, sec. 7904; *North State Copper Co. v. Field,* 69 Md., 151; *Moore v. Mining Co.,* 104 N. C., 545; *Clark v. Mutual Reserve Fund Life Association,* Court of Appeals, D. C., 13 App.; *Taylor v. Same,* 33 S. E. Rep., 385; *Condon v. Same,* 42 At. Rep., 944. The reasons for such a rule are apparent. Only the courts of the State in which the corporation has its residence can enforce their judgment and orders against them; only those courts have power to remove the officers of such corporation for dereliction of duty, or to declare a forfeiture of their charters.

Section 3062 of The Code provides the means of bringing foreign corporations into the courts of our State, and section 194 provides that an action may be brought in our Superior Courts "by a resident of this State for any cause of action," while, by the same section, a plaintiff not a resident of this State shall only have his action "when the cause of action shall have arisen or the subject of the action shall be situated within the State." These provisions of our law had for their object the securing for suitors in our courts of the benefits of our own laws and the conferring upon our courts jurisdiction to declare and enforce their rights when the matters which were the subject of litigation were in their jurisdiction, or the remedy sought could be granted. They were not intended to give our courts jurisdiction over the

(55) persons who are the officers of a foreign corporation residing in another State and over the internal management of such corporations over which our courts would be powerless to exercise any control or to enforce obedience to any of their orders.

Sections 124, 295 and 297 of The Code of Maryland are in substance like sections 194 and 3062 of our Code. The Maryland statutes have been construed by the Court of Appeals of that State in the case on *Condon v. Mutual Reserve Fund Life Association* (the defendant in this action), 42 Atlantic Rep., 944; and in *Mining Co. v. Field,* 64 Md., 151. In the first-mentioned case the Court said: "The object of our statute, and of similar statutes passed by other states, is to provide for the collection of debts due from foreign corporations to our own citizens, and to enforce contracts made here by foreign corporations through its

agent, and to protect our citizens from frauds or wrong, whether the wrongdoer be foreign or domestic. But it was not the intent of our statute to give our courts jurisdiction over the internal affairs of a foreign corporation. Our courts possess no visitorial power over them, and can enforce no forfeiture of charter for violation of law or removal of officers for misconduct; nor can they exercise authority over the corporate functions, the by-laws, nor the relations between the corporation and its members arising out of and depending upon the laws of its creation. These powers belong only to the State which created the corporation."

Section 1780 of the New York Code of Civil Procedure provides that, "An action against a foreign corporation may be maintained by a resident of the State or by a domestic corporation of any cause of action," and in the case of *Fisher v. Charter Oak Life Insurance Co.*, (1885), 20 J. & S., 179, the court (Superior—now merged with the Supreme) said: "The performance of the contract by defendant would involve the doing of such things by its officers as would be done by them if they were proceeding to ascertain if a dividend of (56) profits should be declared in a case where profit could be divided among shareholders. The defendant is a foreign corporation. This court has no facilities or processes sufficient or fitted to compel a foreign corporation to take the proceeding described. It can not bring the officers or the books or the assets of the corporation within its jurisdiction. It must enforce such a judgment, if at all, by proceeding for contempt, and yet there are no persons here whose actions can direct the proceedings of the company. Under such circumstances it is said that a court of equity will not interfere with the internal administration of the affairs of a foreign corporation."

The question now arises whether or not the matters complained of in the plaintiffs' action are such as are certainly those pertaining to the management of the internal business affairs of the defendant company and can only be the subject of the jurisdiction of the courts of New York, the home of the defendant. The leading case on this subject is *Mining Co. v. Field, supra,* and on the point we are now discussing, the Court said: "That where an act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and in the case of a foreign corporation our court will not take jurisdiction. When, however, the act of the foreign corporation complained of affects

the complainant's individual rights only, then our court will take jurisdiction whenever the cause of action arises here."

(57) It seems clear to us that, tried by that test, the matters complained of by the plaintiffs affect J. J. Howard only as a member of the defendant company, that they relate to the internal management of the company, and that if the courts of one state were to undertake to grant to the plaintiff the relief he seeks—an injunction forbidding it to collect or levy any further assessments on their present plan—they would be required to investigate and control that management. The defendant company was incorporated on the assessment plan, and every certificate member (there being no capital stock) becomes an insurer as well as an insured. He is a member of the corporation, and what he complains of is his treatment as a member of the company. The plaintiff does not allege fraud. His complaint is the illegal increasing of his assessments, and his prayer is for an injunction to prevent the collecting of such in the future. There is no alleged fraud against the defendant in procuring the plaintiff to become a member by which he has suffered loss and damage, and the only question was whether the violation of his right affects him individually or as a member of the corporation. We have determined how that was.

It is to be remembered however, notwithstanding what has been said in this case, that our courts would have jurisdiction over foreign corporations where individual rights would be concerned.

If the defendant had perpetrated an actual fraud on the plaintiff J. J. Howard in inducing him to become a member of the corporation, by which he was subjected to pecuniary loss, or if an actual fraud had been perpetrated against him in the levying and collecting of assessments based, for instance on the reported losses by death which were knowingly false to the directors, in such cases our courts would be open to the plaintiff. So too, if this suit was for the recovery

(58) of the amount due on the policy by the benificiary, if the defendant had declared the policy forfeited because of a failure to pay the increased assessments, the matter would be in the jurisdiction of our court. In such a suit, the courts would be compelled to pass upon the question as to whether the assessments were illegal and fraudulent, to interpret the policy and to determine whether the amount of the policy could be recovered. In such a suit, the courts of North Carolina would not be required to regulate, by injunction, the internal management of a foreign corporation, but would be called upon simply to enforce the contract of insurance between the parties, or to assess and adjudge damages for its breach.

But the subject matter and the officers of the defendant corporation are beyond the jurisdiction of our courts in this case, and the remedy sought is not in our power to grant. We have not found it necessary to consider the other grounds of demurrer.

In this Court, a motion was made by the counsel of plaintiff to amend the complaint. The amendment prayed for is in substance that the defendant company since the commencement of this action has become a domestic corporation under the provisions of chapter 62 of the Laws of 1899. The amendment involves questions of fact and a matter of law entirely foreign to the case as made up on appeal, and it is on those accounts denied.

The judgment of the court below in sustaining the demurrer is Affirmed.

Cited: Sloan v. R. R., 126 N. C., 491; *Bonner v. Stotesbury,* 139 N. C., 8.

(59)

CAROLINE EDWARDS v. W. M. DEANS AND J. P. DEANS.

(Decided 17 October, 1899.)

Location of Land—Indefinite Description in Written Contract of Conveyance—Parol Evidence in Aid.

Where the description in the written contract to convey is too indefinite to cover and describe the land, if there has been a recent survey with plat of the land referred to in the contract, designating the 30 acres to be conveyed, parol evidence of entrance, occupying, improving and claiming the land up to the marked lines, is competent evidence to aid in the description, and may eventually mature the title to the outer boundary.

CIVIL ACTION for trespass on land tried before *Hoke, J.,* and a jury at Spring Term, 1899, of the Superior Court of BERTIE County.

The alleged acts of trespass—entering upon the land, 30 acres, claimed by plaintiff, and cutting and carrying timber from it were not controverted by defendants—but they did controvert plaintiff's title.

She claimed the land as only child and heir at law of her deceased father, Ben Ellyson, and showed a line of deeds, commencing in 1854 from one John Harrell, for 112 acres of land with boundaries, down to Josiah White, 21st of June, 1856, for same 112 acres with boundaries, and a contract from Josiah White to Ben Ellyson, dated 10th March, 1875, to convey 30 acres of land, also a deed from John H. White,

executor of Josiah White, for same 30 acres set out in said contract—a copy of which, marked "A," is appended.

"A"—CONTRACT.

This indenture, made this 10th of March, 1875, between Josiah White, of the first part, and Benjamin Ellyson, of second part,
(60) both of State of North Carolina and county of Bertie: Witnesseth, that said White has sold said Ellyson 30 acres of land lying and being in the State and county aforesaid, adjoining the land of E. P. Simons and the land of the said White, containing 30 acres by actual survey, for which the said Ellyson is to pay $300, payable in three years. At the end of the said term of three years, if the whole sum is paid, the said White, his executors or administrators, is to make the said Ellyson a firm deed to the above-bargained premises, or above contract is to be void; otherwise to remain full force and virtue, to which we both agree.

Signed, sealed and delivered in the presence of us

JOSIAH WHITE, [SEAL]
BENJAMIN ELLYSON, [SEAL.]

Witness:
JOHN H. WHITE.
HENRY W. BEATMAN.

Proved and registered January 20, 1898.

The defendants objected in apt time to said contract and deed for that the same do not describe any land, and are on their face too vague and indefinite to admit any aid from parol testimony.

Objection overruled, and defendants excepted.

Plaintiff then offered parol evidence as to the land conveyed and covered by said contract and deed, to which defendants objected because said contract was too vague and indefinite to admit it, and moved to nonsuit the plaintiff.

Objection and motion of defendants overruled, and they excepted.

The parol evidence admitted by his Honor over objection of defendants, appears in the opinion. There was verdict and judgement for plaintiff. Appeal by defendants.

(61) *R. B. Peebles for appellants.*
Francis D. Winston for plaintiff.

FAIRCLOTH, C. J. This action is for trespass on land. The entry and acts complained of were proved and defendants' liability was made

to turn on validity of plaintiff's title, and that depends upon the sufficiency of the description of the land in a contract between Josiah White and Ben Ellyson, made March 10, 1875, (Exhibit "A"), containing this recital, "that said White has sold said Ellyson 30 acres of land, lying and being in the State and county aforesaid, adjoining the land of E. P. Simons and the land of the said White, containing 30 acres *by actual survey,* for which the said Ellyson is to pay three hundred dollars, payable in three years." The *locus* is the western part of a tract of 112 acres owned by said White, known as the Amos Harrell tract.

There was undisputed evidence that White agreed to sell Ellyson 30 acres off the western portion of the Harrell tract, and that Ellyson moved on said 30-acre tract, cleared ten or twelve acres and built a house thereon, also that White and Ellyson got a surveyor and went down to that side, saying that they were going to make a survey. On their return the contract, Exhibit "A," was written and signed, having a plat, and Ellyson went on the 30-acre tract.

It was also proved that when they went down to make the survey, as they said, there was no marked line running through the tract on that side, but in a year or two after the contract, there was a marked line of comparatively new cutting of 30 acres where Ellyson lived from the western side of the Harrell tract and that Ellyson cleared up to the line and put his fence upon it; also that White (father of the witness) and Ellyson *"always recognized this marked line as the division line between them."*

There was evidence tending to show Ellyson's continued occu- (62) pation of the cleared land and of his hauling wood off the woodland.

The defendants objected to the admission of the above evidence on the ground that the written contract was too vague to receive aid by parol evidence, which objection was not sustained.

The court, among other matters not excepted to, charged the jury that the description containing contract of Josiah White to Ben Ellyson was not sufficient to cover and describe the land, nor to permit parol evidence to identify the land therein referred to, unless at time and just before contract was signed there had been a survey of the thirty acres marking off the same by visible lines and boundaries, and to which this writing referred when it said "thirty acres by actual survey." That if such survey was actually made defining land by known and visible boundaries and Ben Ellyson entered under his contract, referring to such survey, and built, and cleared land thereon, and occupied same continuously, claiming to own land referred to in his contract to the boundaries of the survey, which were known and visible—then the

effect of such occupation and claim would extend to outer boundaries of survey, and if continued sufficient length of time would mature title to such boundary.

The time required was first explained more particularly in part of charge not herein set out.

Defendants excepted to such portion only of charge as held that the contract was capable of being aided by parol, and of such portion as held evidence competent or sufficient to be submitted to jury, on question to identify land.

Verdict for plaintiff. Motion for new trial by defendants for error on part of court in holding said contract capable of being aided by parol.

(63) 2. In holding evidence offered competent or sufficient to be submitted to jury on question or identifying land under contract.

3. In failing to nonsuit plaintiff.

Overruled. Judgment on verdict for plaintiff. Appeal taken. Notice waived, and appeal bond fixed at $25.

Above settled as case on appeal by judge, counsel having disagreed and waived right to be present.

W. A. HOKE,
Judge Presiding.

This finding of the jury in obedience to the charge settles the facts on which the judgment was entered.

In *Farmer v. Batts,* 83 N. C., 387, this court reviewed a list of cases, contrasting those held sufficient and those held insufficient to receive aid by parol proofs. There the writing was "one tract containing 193 acres, it being the interest in two shares, adjoining the lands of J. B. E. O. and others: *Held,* not too indefinite to admit parol evidence to indentify the land." In *Perry v. Scott,* 109 N. C., 374, the language, "On the south side of Trent River, adjoining the lands of Colgrove, McDaniel, and others, containing 360 acres," was not too vague and indefinite to receive aid by parol evidence.

According to these cases, we think the written evidence in the present case was properly aided by the parol evidence and properly admitted to be considered by the jury, and we see no error in the judgment.

Affirmed.

(64)

MARTHA A. TYLER AND HER CHILDREN, EDWARD L. TYLER ET AL. *v.* LEROY CAPEHART, ALANSON CAPEHART AND MINNIE M. CAPEHART, EXECUTORS OF W. J. CAPEHART.

(Decided 17 October, 1899.)

Estoppel—Former Judgment—Res Judicata—Res Non Judicata.

1. A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings.

2. Although the present cause of action might have been set up as a second cause of action in a former suit, but was not; and was not actually litigated, and was not "such matter as was necessarily implied therein," the plea of *res judicata* will not avail.

CIVIL ACTION for value of trees cut from land of plaintiffs by W. J. Capehart, testator of defendants, in excess of $1,177, debt due him, as per agreement. Tried before *Hoke, J.*, at May Term, 1899, of BERTIE Superior Court upon the plea of *res judicata*—other defenses by consent being reserved. His Honor gave judgment in favor of plaintiffs upon this issue, and defendants excepted, and appealed.

In support of the alleged estoppel, the defendants read in evidence the record of a former suit between the same parties, the complaint therein being as follows:

The plaintiffs complaining in this cause say:

1. That on or before April 2, 1887, the plaintiff John E. Tyler was the owner in fee simple of a tract of land which was devised to him by his father, called the Home Place, where the said plaintiff then and now lives, adjoining the lands of C. M. Raby, J. J. Jillcott and others, also the Sally Cox land, separated from the last (65) named by the public road from Roxobel to Winton, also devised in said will to said John E. Tyler, and containing together 340 acres more or less.

2. That on that day John E. Tyler and his wife conveyed the said lands to W. J. Capehart by deed duly executed and registered in Bertie County, Register of Deeds' office, book 61, page 451.

3. That when the deed aforesaid was taken by the said Capehart he promised and agreed with plaintiffs to have and to hold the said land in trust for the plaintiff Martha A., who was his daughter, for life and then to the other plaintiffs, her children, in fee simple, and that he would make a deed to them accordingly, reserving only the

right to sell enough timber from the said land to pay him the sum of $1,177 of debts due by John E. Tyler to him and to other parties which he agreed to pay for him.

4. That said Capehart died in March, 1895, leaving a last will and testament in which the defendants, except W. P. Burrus and L. R. Tyler, were named as executors and devisees, respectivly, to whom the said lands passed according to the terms of the will charged with the trust aforesaid.

5. That Wm. J. Capehart totally failed to convey the said land to the said Martha A., and her children.

6. That said Capehart sold from the said land during his life sufficient timber from said lands to pay the debts heretofore named in full with interest thereon.

Wherefore they pray judgment that the defendants be declared trustees for the plaintiffs and that they be required to convey said lands to the plaintiff Martha A., for life, and to the *feme* plaintiffs in fee simple.

PRUDEN, VANN & PRUDEN,
Attorneys for the Plaintiffs.

(66) The answer to the foregoing complaint admits sections 1 and 2—denies sections 3, 4, 5 and 6—but admits that W. J. Capehart died in March, 1895, leaving a last will, to which the defendants qualified as executors.

The cause coming on to be heard before *Boykin, J.*, at January Special Term, 1896, the following judgment was rendered by him by consent:

In this cause it is ordered, adjudged and decreed that Adelia Tyler is the owner in fee simple of the Sally Cox place mentioned in the complaint, and Leroy Capehart, Minnie Capehart and Alanson Capehart are not the owners thereof. It is further ordered and adjudged that Adelia Tyler is the owner of a life estate in and to the home place mentioned in the complaint in this action, and that the children of the said Adelia Tyler, named in said complaint, are the owners in remainder of said Home tract, as mentioned in the complaint, and that Leroy Capehart, Alanson Capehart and Minnie Capehart are not the owners of any interest in said land.

It is adjudged that plaintiffs retain possession of the said lands and recover the costs in this action to be taxed by the clerk of the

court. Witnesses who attended court in the will case are not to be taxed in this case.

E. T. BOYKIN,
Judge Presiding Special Term, 1896.

This judgment rendered by Judge Boykin is relied upon in support of their plea of *res judicata* in the present action and as a bar by estoppel to recovery by the plaintiffs. The complaint in the present action is as follows:

The plaintiffs, complaining of the defendants, say:

1. That Wm. J. Capehart died in March, 1895, domiciled in (67) Bertie County, leaving a last will and testament, in which the defendants were named and have duly qualified as executors.

2. That in April, 1887, John E. Tyler was the owner in fee simple of two tracts of land in said county devised to him by his father, one the home place, adjoining the lands of J. J. Jillcott, C. M. Raby and others and lying on the road from Roxobel to Winton, the other lying on the opposite side of the said road and known as the Sally Cox land and adjoining the lands of J. J. Jillcott, H. Bryant and M. F. Raby.

3. That on the day named said Tyler and his wife conveyed the land aforesaid to W. J. Capehart by deed duly executed and registered in Bertie County, book 61, page 457.

4. That at the time of execution of said deed the said Capehart promised and agreed to and with the said Tyler and wife that he would hold the said land in trust for the plaintiff Martha A., who is his daughter, for and during her natural life with remainder in fee simple to her children, the other plaintiffs above named, and to convey the same to them accordingly, reserving only the right to cut enough timber from the said laid to pay himself the sum of $1,177, due him by John E. Tyler, and to other persons which he had assumed to pay for him.

5. That the land described was well set in timber trees of great value which the said Capehart after the execution of said deed cut and removed from said land and converted to his own use before the legal title was conveyed to the plaintiffs.

6. That the value of the timber so cut and removed from said land and converted to his own use was largely in excess of the said $1,177, to wit, $3,600.

7. That the said Capehart died without reconveying the lands according to the terms of his agreement and seized of the same charged with the trust aforesaid, and since his death the title of the same has

(68) been conveyed to the plaintiff; wherefore plaintiffs demand judgment for twenty-four hundred dollars, with interest therefrom and the costs of this action.

MARTIN & PEEBLES,
PRUDEN & PRUDEN,
Attorneys for the Plaintiff.

The answer to this complaint, among other defenses, set up the judgment signed by Judge Boykin, as a plea in bar.

The other defenses being reserved, *Hoke, J.*, after argument, overruled the plea in bar, and defendants appealed to the Supreme Court.

F. D. Winston for defendants (appellants).
R. B. Peebles for appellees.

CLARK, J. The plaintiffs brought a former action against the defendants, alleging a conveyance of a certain tract of land to the defendants' testator in parol trust to reconvey when he had sold timber off the land to the amount of $1,177 due said trustee, and that he "had sold sufficient timber from the land to pay said debt" and asking a reconveyance. This was not contested, and a reconveyance was by consent decreed in that action. The plaintiffs in this action allege that the value of the timber sold from the land by the defendants' testator while such trustee was $3,600, and seek to recover the surplus above $1,177. The defendants set up the plea of *res judicata.*

The present cause of action might have been set up as a second cause of action in the first proceeding. But adjoining it was optional with the plaintiffs. They were not compelled to do so. *Gregory v. Hobbs,* 93 N. C., 1; *Lumber Co. v. Wallace, ibid.,* 26; Code, sec. 267. The allegation in the former action was that the defendants' testator had
(69) received from sale of the timber "sufficient" to pay off the trust debt, but whether he had received any, and if so, what amount, over and above the $1,177, which entitled the plaintiffs to a decree for reconveyance, was not actually litigated and was not "such matter as was necessarily implied herein," which is the test laid down in *Williams v. Clouse,* 91 N. C., 322; *Wagon Co. v. Byrd,* 119 N. C., 460. In the latter case, no issue as to J. O. Martin was submitted but he had filed his answer in which he denied the plaintiff's title and claimed to be sole owner. The issue thus raised by the pleadings "was therefore in litigation, and it was incumbent upon Martin to tender the proper issue and to support it by proof," and as he failed to do so it was held that the judgment decreeing title in the plaintiff was an estoppel on Martin—"not having spoken when he should have been heard, he should not be heard when he should be silent."

The appellant, who relies upon *Wagon Co. v. Byrd, supra,* places stress upon the expression therein quoted from 1 Herman on Estoppel, sections 122, 123, that a judgment is an estoppel and final "not only as to the matter actually determined but as to every other matter which the parties might litigate in the cause and which they might have had decided." These words must be construed with the context. The controverted point in that case was whether a judgment was an estoppel as to the issues raised by the pleadings, and which could be determined in that action, or only as to those actually named in the judgment. The Court held the former to be the rule settled by the reason of the thing and by the authorities. It was not held that where (as in the present case) other causes of action could have been joined the judgment was final as to them also. It was only intended to say that the cause of action embraced by the pleadings was determined by a judgment thereon, whether every point of such cause of action was actually decided by verdict and judgment or not. The determin- (70) ation of the action was held to be a decision of all the points raised therein, those not submitted to actual issue being deemed abandoned by the losing party, who did not except. *Wallace v. Robeson,* 100 N. C., 206. The opinion in *Wagon Co. v. Byrd, supra,* farther on expressly says "the judgment is decisive of the points raised by the pleadings or which might properly be predicated upon them." This certainly does not embrace any matters which might have been brought into the litigation, or any causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings.

The decision in *Wagon Co. v. Byrd* went to this extent and no further. It has since been cited as authority (by FURCHES, J.), in *Hussey v. Hill,* 120 N. C., 315, and in *Meadows v. Marsh,* 123 N. C., 189.

In the present case the cause of action for reconveyance was equitable, the other for the money received for sale of timber after the receipt of $1,177 necessary to pay off the claim of the trustee was an action at law, and while they might have been, and probably ought to have been, joined in the former action, no issue as to the latter cause of action was raised by the pleadings, nor was it a necessary ingredient in passing upon the matter in litigation, which was the right to a reconveyance and nothing more. *Jordan v. Farthing,* 117 N. C., 181. In overruling the plea of former judgment there was

No error.

Cited: Glenn v. Wray, 126 N. C., 731; *Cabe v. Vanhook,* 127 N. C., 426; *Austin v. Austin,* 132 N. C., 266; *Mauney v. Hamilton, ib.,* 306; *Barringer v. Trust Co., ib.,* 412; *Best v. Mortgage Co.,* 133 N. C., 24; *Burwell v. Brodie,* 134 N. C., 546; *Scott v. Life Asso.,* 137 N. C., 520; *Bunker v. Bunker,* 140 N. C., 23; *Shakespeare v. Land Co.,* 144 N. C., 521; *Turnage v. Joyner,* 145 N. C., 83.

(71)

J. H. HINES AND WIFE, ADA, ET AL. v. W. P. MERCER AND WIFE, ET. AL.

(Decided 17 October, 1899.)

Will—Devise—After Acquired Land—Code, Sec. 2141.

1. In construing wills, the intention is the controlling fact to be carefully ascertained.

2. Prior to the statute (Code, sec. 2141), the title of no land after the date of the will could pass thereby; but since the statute all lands owned by the testator at his death will pass, unless a contrary intention shall appear by the will.

3. Where a testator uses general terms—as *"all of my estate"*—or, *"all of lands or real estate"*—then, the devise will speak at the date of the death, as a general rule; but, where he refers with particularity of description to a specific subject of gift, showing that an object in existence at the date of his will was intended, and referring to the state of things existing at that time and not at his death, then the operation of the general rule is excluded.

SPECIAL PROCEEDING for sale of land for partition, transferred to civil issue docket and tried before *Hoke, J.*, at April Term, 1899, of EDGECOMBE Superior Court.

The facts agreed were substantially as follows:

Jesse Mercer, the testator, under whose will both parties claim the after-acquired land in controversy, was, in 1888, (at the date of his will), and in 1892 (at the time of his death), the owner and possessor of certain real estate in Edgecombe County, known as his home tract, on which he resided, and also of a tract of land in said county at or near Temperance Hall in said county. This land is not in controversy.

The said testator, Jesse Mercer, was also seized and possessed at the time of his death of the land in controversy, which he acquired in 1891,
(72) which land is also at or near Temperance Hall Church, and 169 yards distant from the tract heretofore mentioned as at or near Temperance Hall, but does not adjoin said tract.

First and sixteenth items of the will of Jesse Mercer are as follows:

Item 1. I do give and devise and bequeath to Dr. William P. Mercer, and his heirs, all of my home tract of land on which I reside, being in above county and containing five hundred and fifty or five hundred and sixty acres, more or less, and including my tract of land at Temperance Hall and all of my household and kitchen furniture and all of my mules and other stock and farming implements and all my corn and fodder, said articles being used and kept on my said home tract of land; and I do direct and require and charge that said William

P. Mercer shall pay the sum of $4,000 to be divided out among the beneficiaries of this will as hereinafter prescribed; and I further direct and charge that he shall give Hannah Hines a home on said tract of land and also support and care for her out of the fund hereinafter provided.

Item 16. All the remainder of my estate (including the $4,000 mentioned in item 1), rights and property, real or personal and mixed, I do give and devise and bequeath unto John R. Mercer, Malvina Hines and Elizabeth Horne (wife of J. L. Horne) to be divided between them, the said three, equally.

If the land in controversy is embraced in the 1st item of the will, sole seizin of the same is in the defendant W. P. Mercer.

If said land is embraced in the 16th item of the will, the plaintiffs and defendants are tenants in common of the same, each being entitled to the undivided interest specified in the complaint.

His Honor to decide whether the title to said land passes under (73) the 1st or 16th item and may hear evidence if he deems it necessary.

The sale of the land in controversy was not objected to.

His Honor, upon consideration of the facts admitted in the pleadings and upon the case agreed, adjudged that the parties to this special proceeding are tenants in common of the tract of land in controversy in the pleadings, ascertained their respective rights, and directed a sale, appointing a commissioner for that purpose.

W. P. Mercer excepted to the judgment and appealed to the Supreme Court.

John L. Bridgers for defendants (appellants).
Jacob Battle for appellees.

FAIRCLOTH, C. J. This is an application to sell land for partition and the controversy involves the title of the land sought to be sold.

In 1888, the date of his will, Jesse Mercer was seized in fee of one tract of land known as his "home tract," also a tract "at or near Temperance Hall" in the same county. The latter tract contained 70 acres. In 1891 he became seized of another tract containing 91 acres, and died in 1892 leaving a last will and testament dated December 12, 1888. Item 1 of said will devised to W. P. Mercer as follows: "All of my home tract of land on which I reside (containing 550 acres) and including my tract of land at Temperance Hall," and all of his personal property on the home tract, stock, farming utensils, etc., and then charges said devisee with the payment of several specific pecuniary sums in favor of others, amounting to $4,000.

In item 16 he gives "all the remainder of my estate (including the $4,000 mentioned in item 1) rights and property, real or personal
(74) and mixed . . . unto John R. Mercer, Malvina Hines and Elizabeth Horne, to be divided between them, the said three, equally." The 70-acre tract and the 91-acre tract are 169 yards apart and each one is about the same distance from Temperance Hall Church. The 91-acre tract is the land in dispute. W. P. Mercer claims it under item 1, and the others claim it under item 16.

In construing wills, the intention is the controlling fact and the Court will look with anxiety to ascertain the testator's intention. The multitudinous forms of expression and the use of words, the legal meaning of which are not understood by the testator, usually raise grave questions for the Court.

Prior to the statute, the title of no land acquired after the date of the will could pass thereby, but since the statute, all lands owned by the testator at his death will pass "unless a contrary intention shall appear by the will." Code, section 2141. This statute, making the will speak from the death, relates to the subject matter of disposition only, and does not in any manner interfere with the construction in regard to the objects of the gift. The reason for this is that the objects of the testator's bounty were not found within the mischiefs which were intended to be prevented by the statute. *Robbins v. Windley,* 56 N. C., 286.

Without wading through all the decided cases, according to the best authorities we have, this general rule seems to be established: That where a testator uses general terms, as "all of my estate" or "all of my lands or real estate," then the devise will speak at the date of the death; but, where he refers to a specific subject of gift, with sufficient particularity in the description of the specific subject of it, showing that an object in existence at the date of his will was intended, referring to the existing state of things at the date of the will and not at his
(75) death, then the operation of the general rule is excluded. The death is a prospective event, but the date of the will refers to actual conditions. I Jarman on Wills, 318 (5th Ed); 29 Am. and Eng. Enc., 360-3, and notes.

In re Champion, 45 N. C., 246, we have a case treading near the line. The devise was to his wife: Item 1—"All my real estate, consisting of several lots in Shelby," etc., and in item 2: "All of my personal estate of whatever nature." After the date of the will he contracted to purchase another tract, but had not paid for it at his death: *Held,* that his rights in the unpaid-for land passed to his

wife, and it was put on the ground that looking at the whole instrument, the intention to give the whole estate to his wife was manifest.

Applying these rules to the case at bar, we do not find any general terms to make the will speak at the death as to the 91-acre tract, but the language "all of my home tract on which I reside, and including my tract of land at Temperance Hall," refers to specific property, the description being sufficient, and conveys the idea that the testator had in his mind the condition of things then existing. It may be inferred without violence to any part of the writing that the testator intended, if it occurred to him, that any future acquisitions should pass under item 16.

It has been suggested that charging the pecuniary legacies on W. P. Mercer indicates an intention to give him the whole estate, at his death. If so, there was no need of a residuary clause. But we can form no opinion on that suggestion, as we know nothing of the value of the several parcels of the property.

Affirmed.

Cited: Brown v. Hamilton, 135 N. C., 11.

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(76)

MARY S. WHITAKER (BIRD) v. ALLEN GILLIAM ET AL.

(Decided 17 October, 1899.)

Purchase Pendente Lite—Notice.

1. A purchaser of land, in litigation, is conclusively fixed with notice and takes his conveyance from a party to the suit subject to the final adjudication—the right of appeal—petition to rehear—and in certain cases, a writ of error to the U. S. Supreme Court.

2. A motion to intervene as a party will be denied, when useless, or calculated to obstruct the course of justice.

MOTION to be made parties to this action pending in Superior Court of BERTIE County, at Spring Term, 1899, before *Hoke, J.,* by R. C. Bazemore and Francis D. Winston. Motion denied, and they excepted, and appealed.

His Honor settled the case as follows:

This is a civil action tried at the Spring Term of Bertie Superior Court in 1899, before *Hoke, J.,* upon the motion of R. C. Bazemore and Francis D. Winston to be allowed to become parties to the action.

The following are the facts upon which the motion was made:

This is an action of ejectment brought in this court by Mary Susan Bird, plaintiff, against the defendants, Allen Gilliam and Eliza Gilliam. At Spring Term, 1897, *Bryan J.*, rendered judgment that the plaintiff, Mary Susan Bird, was not the owner of the land described in the complaint and from that judgment the plaintiff, Mary Susan Bird, appealed to the Supreme Court, and the appeal was heard in the Supreme Court at the September Term, 1897, when same reversed the judgment of *Bryan, J.*, and declared that Mary Susan Bird was the owner of

(77) the land described in the complaint, and that said opinion was rendered and certified down to the Superior Court of Bertie County on the first Monday in November, 1897, and R. C. Bazemore and Francis D. Winston read the opinion then and there on file in the office of the Superior Court Clerk of Bertie County; that the Supreme Court completed its labors and adjourned for the term in December, 1897, on the 15th day. That the Supreme Court met for its February Term on Tuesday, the 8th day of February, 1898, and the Superior Court of Bertie County convened in regular term on Monday the 22d day of February, 1898, at which term the plaintiff, Mary Susan Bird, moved for a judgment in accordance with the decree of the Supreme Court, and defendants resisted the said motion, and filed their petition as allowed by section 473 of The Code of Civil Procedure, and asked for betterments and demanded that a jury be empaneled to assess the defendants' allowance for permanent improvements put upon the said land; that the Court refused plaintiff's motion for judgment, and granted defendants' motion, and directed that a jury be empaneled at Spring Term, 1898, as asked for, and to which judgment plaintiff noted an exception and appealed; that after the adjournment of the Superior Court of Bertie County, on February 26th, the defendants, on the 27th day of February, 1898, moved the Supreme Court, and filed their petition asking that the cause be reheard, and that on the 5th day of May, 1898, the Supreme Court granted the petition, and ordered a rehearing, which was had at the September Term, 1898, when the Supreme Court reversed its judgment and gave judgment affirming the judgment of *Bryan, J.*, declaring that the plaintiff owned no interest in the land, and that no notice was given of a motion to rehear the said cause in the Supreme Court until after February 22, 1898.

(78) That at May Term, Superior Court Bertie County, before Judge Hoke, R. C. Bazemore and Francis D. Winston filed an affidavit duly verified, alleging that on the 29th day of December, 1897, they had purchased of plaintiffs for valuable consideration, the land described in pleadings, and took a deed from said plaintiffs, and that said

deed was duly registered in Bertie County, on January 5, 1898, and on such affidavit, at said May Term, 1899, moved the court that they be allowed to become parties-plaintiff to this action, and plead to same and assert and maintain their right to said land under said deed. The motion was denied. Appellants excepting, took an appeal in open court. Notice waived, and appeal bond fixed at $25. The above is settled as case on appeal to Supreme Court from this court, counsel having disagreed and waived their right to be present.

W. A. HOKE,
Judge Presiding.

F. D. Winston for appellant.
R. B. Peebles for appellees.

CLARK, J. When this case was first heard, 121 N. C., 326, it was decided in favor of the plaintiff. On rehearing this judgment was reversed, 123 N. C., 63. After the first judgment of this Court, and before the expiration of the time within which the application for rehearing could be filed, the plaintiff sold the land to the petitioners. Upon the going down of the certificate of the last opinion, the petitioners filed an affidavit, that they had purchased for value and without notice, and asked to be let in to assert their rights. The motion was denied.

In a proper case, additional parties can be made, even after judgment, Code, sec. 273, but certainly it is useless when the grounds fully appear and can be adjudicated upon the motion, for none of their allegations are denied. Indeed, it appears the petitioners (79) took their deed before the petition to rehear was filed, and therefore without notice of a rehearing; but they had notice by law of the fact that the rehearing could be applied for at any time till after the expiration of the first twenty days of the next term of the Supreme Court, and took the rights of the plaintiff—no more—which were subject to further review by a rehearing. No entry of *lis pendens,* under Code, section 229, is required in any case when the action is in the county where the land lies. *Collingwood v. Brown,* 106 N. C., 362; *Arrington v. Arrington,* 114 N. C., 156.

A party recovers a tract of land in the Superior Court. It is final unless appealed from, but the defendant has ten days after the adjournment of court in which to appeal. One who, relying upon the judgment of the Superior Court, takes a conveyance from the successful party before the expiration of the ten days, takes it subject to the right of appeal and of the judgment which may be entered therein; and he is conclusively fixed with notice of the litigation. *Rollins v. Henry,* 78 N. C., 342; *Dancy v. Duncan,* 96 N. C. 111. If a judgment is entered

in this Court in certain cases a writ of error may be sued out to the United States Supreme Court in two years. The assignee of the judgment in such case takes subject to the action of the higher tribunal. A rehearing by this Court is in the nature of an appeal from this Court to itself. The Code, section 966, prescribes that it may be entered at any time before the expiration of the first twenty days of the next succeeding term. While it has been held that under the present Constitution (Article I, section 8), the Supreme Judicial Power being independent of the other departments, the Legislature can not prescribe rules of practice for this Court. (*Herndon v. Ins. Co.,* 111 N. C., 384; *Horton v. Green,* 104 N. C., 400); yet this Court, under the power to prescribe and regulate its own methods of procedure and practice,
(80) has copied, almost *verbatim,* the provisions of The Code, section 966, in its Rule 52, 119 N. C., 950.

It was the petitioners' own fault that they took a conveyance of the plaintiff's recovery before the expiration of the period within which an application to rehear could be filed. If, by so doing, the rights of petitioners to rehear could be defeated, the relief intended to be given by such reviews of the action of the court, would be almost, if not altogether, denied, by the anticipatory promptness of any party who might be affected by such reviews. It can make no difference that petitions to rehear are now, as appeals from the Superior Court formerly were, matters of grant and not of right. The effect upon the right of all parties when granted is the same.

No error.

SYDNOR PUMP AND WELL COMPANY v. ROCKY MOUNT ICE COMPANY.

(Decided 24 October, 1899.)

Nonsuit—Counterclaim—Practice.

1. When a nonsuit has been entered, it is too late to file a supplemental answer containing a counterclaim, and the Court properly ordered it to be stricken out.

2. A counterclaim is simply a cross action in the pending action of the other party, and when well pleaded deprives the plaintiff from taking a nonsuit where the counterclaim grows out of the same cause of action stated in the complaint.

3. Where there is no action pending, there can be no counterclaim pleaded.

CIVIL ACTION determined before *Hoke, J.,* at Spring Term, 1899, of the Superior Court of EDGECOMBE County.

The complaint demanded the payment of $3,970.16 for digging (81) a well 500 feet deep, at Rocky Mount, under contract with defendant, and alleging the insolvency of defendant, asked for a restraining order and appointment of a receiver.

An answer was filed controverting the demand of the plaintiff, and intimating that a further answer would be filed, demanding affirmative relief.

A preliminary hearing was had before his Honor as to the auxiliary remedies asked for in the complaint, and after argument on both sides his Honor dissolved the restraining order, and refused to appoint a receiver, and taxed the plaintiff with the costs of the application. Thereupon, the plaintiff submitted to a judgment of nonsuit, which was also signed by his Honor.

Subsequently, during the same term, and in open court, but without bringing the matter to the attention of the judge, the defendant filed a supplemental answer, containing a counterclaim. His Honor, upon being informed of it, ordered the supplemental answer to be stricken out; from which order the defendant appealed to the Supreme Court.

Gilliam & Gilliam for defendant (appellant):
Jacob Battle for plaintiff.

FAIRCLOTH, C. J. This action is upon a contract to sink a well on defendant's land, and the complaint and answer were filed in January and February, 1899. The plaintiff obtained a restraining order which was heard at April Term, 1899, when it was dissolved, and at the same term the plaintiff moved for a receiver, and that motion was refused. On Saturday of the first week of said term, the plaintiff took a nonsuit, which was entered of record. On the same day, after the nonsuit was entered, the defendant filed another answer, with the (82) clerk of the court, in which he set up a counterclaim against the plaintiff, without permission of the judge or notice to him. His Honor on motion, thereupon ordered said answer to be stricken out, finding as a fact that there was no action pending when the answer was filed. The defendant excepted to said order, also to the judgment of nonsuit, and appealed.

A counterclaim is simply a cross action in the pending action of the other party, and, when well pleaded, it deprives the latter from taking a nonsuit, where the counterclaim grows out of the same cause of action stated in the complaint. This was held in *Whedbee v. Leggett,* 92 N. C., 469, and cases there cited.

But where, as a matter of fact, no action was pending between the parties, the counterclaim could not be pleaded, and the second answer filed was properly stricken out.

It has been suggested that the whole matter was *in fieri* during the term, and that the judge had the power in his discretion to set aside the judgment of nonsuit and leave the plaintiff still in court. If that be conceded, unfortunately for the defendant, he did not do so, and the defendant had no right to demand that it be done.

The difference between a counterclaim and a demand for affirmative relief was pointed out in *Rumbough v. Young,* 119 N. C., 567.

Affirmed.

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(83)

W. A. BENTON v. R. V. COLLINS, A. C. BENTON AND WIFE, EMILY, CHARLES RICH AND WIFE, SUSAN, IDA COLLINS, VANA COLLINS AND S. E. EURE, TRUSTEE.

(Decided 24 October, 1899.)

Wrongful Personal Injuries—Fraudulent Deed in Trust—Partial New Trials—Power of Superior Court—Limitations and Discretion—Practice—Inadequacy of Damages—Homestead—Modes of Allotment—Commissioners—Sale of Excess.

1. The power of the Superior Courts and the practice of the Supreme Court to grant new trials on some of the issues, and let the others stand, are settled in this State.

2. Before granting partial new trials, it should clearly appear that the matter involved is entirely distinct and separable from matters involved in the other issues, and without danger of complication therewith.

3. Where punitive damages are demanded by plaintiff, matters in mitigation are admissible to defendant under the general issue.

4. The Superior Courts have power to set aside a verdict for inadequacy of damages as well as for excess of damages, and as such power is discretionary, it is not reviewable.

5. Where a deed of trust by defendant is adjudged fraudulent as to creditors, the court, by virtue of its equitable powers takes control of the land conveyed, and may order its sale after allotment of defendant's homestead.

6. For the allotment of the homestead, the court may direct the Clerk to appoint three commissioners for that purpose, including all the lands embraced in the fradulent conveyance, in any county of the State; and the court may appoint a commissioner to sell the excess—both sets of commissioners to report to the court.

BENTON *v.* COLLINS.

CIVIL ACTION to recover damages for wrongful personal injuries inflicted by defendant R. W. Collins, also to set aside alleged fraudulent conveyance of his lands, in contemplation of this action, (84) to his codefendants, originally tried before *Timberlake, J.,* and a jury at April Term, 1897, upon which trial issues were found in favor of plaintiff, and damages assessed at $350. The verdict as to damages was on motion of plaintiff set aside for inadequacy, and a new trial granted upon the issue relating thereto—from which ruling the defendant took an appeal, which was dismissed as premature—121 N. C., 66. At the second trial, before *Brown, J.,* at October Term, 1898, the issue as to damages was the only one submitted and was found in favor of plaintiff, and damages assessed by the jury at $600. Judgment for plaintiff—appeal by defendants. The judgment is appended in full.

Judgment.

This cause coming on to be heard at October Term, 1898, of the Superior Court of Franklin County, before the Honorable George H. Brown, Judge presiding, it appears to the court that [at] April Term, 1897, of this court the following issues were submitted to the jury in a former trial of this cause, viz.:

1. Did the defendant R. V. Collins wrongfully damage the plaintiff, as alleged in the complaint?

2. If so, what is the amount of such damage?

3. Was the deed of trust executed by R. V. Collins and wife to S. E. Eure with the fraudulent intent to hinder, delay and defraud said R. V. Collins's creditors?

And that at said trial the jury responded to the first issue, "Yes."

To the second issue, "$350."

To the third issue, "Yes."

And the judge presiding at said trial set aside the finding of the jury of the second issue and allowed the findings of the first and third issues to stand.

The defendants appealed to the Supreme Court, and said Court (85) dismissed said appeal, and at this term the second issue only was submitted to the jury, who for their verdict found therein, $600.

It is thereupon, on motion of C. M. Cooke & Son, attorneys for the plaintiff, ordered and adjudged by the Court that the plaintiff, W. A. Benton, recover of the defendant Ruffin V. Collins $600, with interest from the 24th October, 1898, till paid, and the costs of this action to be taxed by the clerk.

It is further ordered and adjudged by the court that the deed made by R. V. Collins and wife to S. E. Eure, dated the 26th day of September, 1894, and registered in Nash County, in book 90, page 324, and afterwards registered in Franklin County, purporting to convey a tract of land in Nash County, described as follows: Bounded on the north by the lands of James Powell, on the east by Turkey Creek, on the south by the lands of M. Brantley, and on the west by the lands of Ellen Strickland, containing 386 acres; and a tract of land in Franklin County described as follows: On the west, north and east by the Arrington land, and others, and on the south by the land of Badger Stallings, known as the mill tract, containing 50 acres, was executed with the fraudulent intent to hinder, delay and defraud the creditors of the said R. V. Collins, and is hereby set aside.

It is further ordered and adjudged that subject to the homestead of the defendant R. V. Collins, he is entitled to have said lands sold to pay his said judgment and costs; and to the end that his homestead may be allotted, the clerk of the court will appoint three fit and capable persons as commissioners to appraise and allot to the said R. V. Collins his constitutional homestead in said land, who, after being summoned by the sheriff of Franklin County and duly sworn, will appraise
(86) and allot said homestead by metes and bounds from either one of said tracts of land or both, and they will make report to the next term of this court, and the excess over the homestead will be sold by C. M. Cooke, who is hereby appointed commissioner for that purpose, who, after advertising the time and place of sale for four successive weeks in some newspaper published in Franklin County, and one published in Nash County, will sell the same at the courthouse door in the town of Louisburg at public auction for cash, and he will report his proceedings to this court, and all parties to this action, and all parties hereto claiming under them by any conveyance since the commencement of this action, are foreclosed of any right they may have in said lands, and this cause is held for further orders.

G. H. BROWN, JR.,
Judge, etc.

It is further ordered that the clerk of this court, after enrolling this judgment, will transmit a certified copy to the clerk of the Superior Court of Nash County, who is hereby ordered to enroll the same on the docket of the Superior Court of Nash County.

G. H. BROWN, JR.,
Judge.

Statement of Case on Appeal.

This was a civil action heard first before *Timberlake, J.,* and a jury at April Term, 1897. The plaintiff, at the time of suing out his summons, applied for and obtained an order of arrest for the defendant R. V. Collins.

The plaintiff filed his complaint and amended the same as set out in the record.

The defendants filed their answer to complaint, as also appears in record.

The following issues were submitted to the jury, viz.:

1. Did the defendant R. V. Collins wrongfully damage the (87) plaintiff as alleged in the complaint?

2. If so, what is the amount of such damage?

3. Was the deed in trust executed by R. V. Collins and wife to S. E. Eure with a fraudulent intent to hinder, delay and defraud said R. V. Collins's creditors?

By consent of the defendant the Court, before any evidence was offered, answered the third issue, "Yes."

The jury answered the first issue "Yes," and the second issue, $350.

Upon the coming in of the verdict, the plaintiff moved the court to set aside the answer of the jury to the second issue, and for a new trial upon said issue, upon the ground that the damages assessed by the jury were inadequate.

The defendant opposed this motion. The court allowed the plaintiff's motion, ordered the finding of the jury upon the second issue to be set aside upon the ground that the damages were inadequate, and awarded a new trial upon said issue alone.

The defendant excepted to this ruling, and from the order so made appealed to the Supreme Court. Notice of appeal was waived. Bond fixed at $25. This appeal was carried up by the defendant, and dismissed by the Supreme Court as prematurely made. (See N. C. Supreme Court Report, Vol. 121—66.)

The cause came on to be heard before G. H. Brown, Jr., at Fall Term, 1898.

The defendant Ruffin Collins renewed his exception to the setting aside of the verdict of the jury at April Term, 1897, upon said issue No. 2, as to amount of damages and the granting of a new trial thereon; and under the decision of the Supreme Court, in the opinion dismissing the appeal as prematurely made, his exception was (88) reserved to him by the court, and the appeal to the Supreme Court was renewed by the defendant on the ruling of *Timberlake, J.,* at April Term, 1897.

The three issues which had been eliminated in the first trial were the issues upon which the trial proceeded.

They were as follows, to wit:

1. Did the defendant R. V. Collins wrongfully damage the plaintiff as alleged in the complaint?

This issue was answered by a jury, at April Term, 1897, "Yes," and was not submitted to the jury again.

2. If so, what is the amount of such damage?

3. Was the deed of trust executed by R. V. Collins and wife to S. E. Eure with the fraudulent intent to hinder and delay and defraud said R. V. Collins's creditors?

This issue was likewise answered "Yes" by consent of counsel at April Term, 1897, before the introduction of evidence.

The jury (that is the one empaneled at Fall Term, 1898) answered the second issue, "$600."

The defendant moved the court for a new trial upon the ground of the several errors alleged, and exceptions taken.

The motion for a new trial was denied, and defendant excepted.

There was judgment for plaintiff as set out in the record, to the form and substance of which the defendant excepted and appealed therefrom to the Supreme Court.

Notice of appeal given and waived in open court. Appeal bond fixed at $25. Time allowed appellant to state case on appeal.

It is agreed that the same allowance in the taking of testimony, and without any other restriction, is given to the defendant in the trial before Judge Brown when the single issue was tried, as was given in the trial before Judge Timberlake when three issues were
(89) tried.

F. S. Spruill for appellant.

C. M. Cooke & Son for appellees.

MONTGOMERY, J. In the first trial of this action—an action for damages growing out of an assault and battery committed by defendant Ruffin Collins upon the plaintiff—all of the issues were found for the plaintiff. In response to the issue as to the amount of damages which the plaintiff was entitled to recover, the jury answered $350, and his Honor set aside that part of the verdict on the ground that the damages assessed were inadequate, and let the others stand. On appeal from that ruling this Court declared the appeal premature; and upon a second trial the defendant Ruffin Collins renewed his exception to the order on the first trial setting aside that part of the verdict as to

damages and the granting of a new trial on that issue alone. The two issues which were eliminated from the second trial, and which were found by the jury for the plaintiff on the first trial, to wit, the first and third issues, were in these words: (1) "Did the defendant R. V. Collins wrongfully damage the plaintiff as alleged in the complaint?" (3) "Was the deed of trust executed by R. V. Collins and wife to S. E. Eure with the fraudulent intent to hinder and delay and defraud said R. V. Collins's creditors?"

Upon the second trial, the jury, in response to the single issue as to damages, answered $600. His Honor gave judgment for the plaintiff and against the defendant R. V. Collins for that amount, and after reciting that the conveyance by the defendant R. V. Collins and his wife of his lands lying in Nash and Franklin counties had been conveyed in fraud of his creditors, ordered that, subject to the (90) homestead exemption of defendant R. V. Collins, the lands so fraudulently conveyed to be sold to satisfy the plaintiff's judgment, and the clerk was instructed to appoint three commissioners to appraise and allot to the defendant R. V. Collins his homestead therein, who should report their proceedings to the next term of Franklin Superior Court; and it was further ordered that the excess over the homestead should be sold by a commissioner then named by the court, and that his report should be returned to the next term of that court.

The case is before us on two exceptions, one to the ruling of his Honor in the first trial setting aside the verdict for inadequency of damages, and the ordering of a new trial on that one issue alone; and the other to the judgment as to its form and substance as to the allotment of the homestead and the sale of the excess.

Both points raised on the appeal are important as matters of court practice and procedure, and as matter affecting the substantial property rights of the defendants.

On the question as to the power of the Superior Courts to grant new trials on one or more of several issues, and to let the others stand, and the practice of this Court to order new trials on particular or restricted issues, the authorities are numerous, and cover a long series of years. The following are some of them: *Strother v. R. R.*, 123 N. C., 197; *Mining Co., v. Smelting Co.*, 122 N. C., 542; *Rittenhouse v. R. R.*, 120 N. C., 544; *Nathan v. Railway*, 118 N. C., 1066; *Pickett v. R. R.*, 117 N. C., 616; *Blackburn v. Ins. Co.*, 116 N. C., 821; *Tillett v. R. R.*, 115 N. C., 662; *Jones v. Swepson*, 94 N. C., 700; *Bowen v. R. R.*, 91 N. C., 199; *Price v. Deal*, 90 N. C., 290; *Jones v. Mial*, 89 N. C., 89; *Lindley v. R. R.*, 88 N. C., 547; *Crawford v. Mfg. Co., ibid.*, 554; *Roberts v. R. R., ibid.*, 560; *Allen v. Baker*, 86 N. C., 91; *Burton* (91)

v. R. R., N. C., 192; *Meroney v. McIntyre*, 82 N. C., 103; *Holmes v. Godwin*, 71 N. C., 306; *Key v. Allen*, 7 N. C., 523; *Barnes v. Brown*, 69 N. C., 439.

Before such partial new trials, however, are granted, it should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters. Such partial trials are not of strict legal right, but of sound legal discretion. There was no violation of the limitation in such matters in the case before us. The issues were clearly separable, and each one could have been answered without dependence or complication upon the others.

The contention of the defendant is that on the second trial various matters favorable to the defendant on the issue as to the amount of damages *might have been* cut off, which would have been relevant and competent on the first trial under the first issue, and that therefore the defendant might have suffered by the manner in which the case was tried on the second trial. The argument of the defendants' counsel is that upon the first issue as submitted in the first trial, "Did the defendant R. V. Collins wrongfully damage the plaintiff as alleged in the complaint?" all the circumstances attending the assault are drawn out. If there be anything to repel malice to mitigate the damages, any conduct on the part of the plaintiff provoking the assault, foul language, insulting words, it comes out in the investigation of the evidence on the first issue, and the same jury hears the evidence as to the extent of the wound, the loss of time, pain, permanence and effect of injury, and that the jury which hears the whole could judge more impartially all of the issues than another jury could, hearing only the testi-
(92) mony on the issue as to damages. The answer to that argument, is that whatever evidence could have been introduced on the first trial upon the first issue in mitigation of damages—such matters as the defendants' counsel urged in his argument—could be, as a matter of law, gone into on the second trial upon the issue as to damages. If no attempt was made by the plaintiff in the second trial to show malice in the defendant in making the battery upon the plaintiff, then the damages could have been only actual damages. If malice or aggravation was attempted to be proved to recover punitive damages, then it was permissible for the defendant to show the conduct of the plaintiff as to provocation in mitigation of damages. "The general rule is, that anything which is a complete answer to the action must be pleaded either in bar or in justification; but it is also well settled in many cases that matters which go to the *quantum* of damages merely to

palliate the character of the offense, or to mitigate the amount which the jury may award, may be given in evidence under the general issue." Sedgwick on Measure of Damages, 547. In *Frazier v. Berkley,* 7 Car. & Payne, Lord Abinger said: "In actions for personal wrongs and injuries, at *nisi prius,* a defendant who does not deny that the verdict must pass against him may give evidence to show that the plaintiff in some degree brought the thing upon himself." That is the rule applicable to the case before us. If this were not the rule, the plaintiff in actions like the one before us might get full compensation for damages which he might have partly caused by his own conduct. "Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that mentioned." *Robinson v. Rupert,* 23 Pa. St., 554.

As to the matter of setting aside of the verdict by his Honor (93) because of inadequacy of damages, this is so far as we can find the first case in the history of judicial proceedings in the State. And it may be further said that it has been generally thought that our courts could not set aside a verdict for inadequacy of damages. Nevertheless, it may be said to be true that it is generally considered that there is no reason which can be advanced in favor of setting aside verdicts because of excessive damages, which does not apply to setting them aside for inadequacy of damages. It seems to be settled upon examination of numerous authorities, that at common law the courts claimed and had the power to set aside verdicts for inadequacy of damages; but it further appears from the earlier cases that it was most seldom done. And, too, in the cases where such verdicts were set aside, they were extreme cases—cases where the jury had been palpably influenced by caprice, or gross partiality, or some other unworthy motive, and where the damages did not amount in point of fact to damages at all, but were mere attempts to evade substantial damages. The English judges, however, as we have said, did not doubt their power to set aside such verdicts but declared in many cases that they would not do it because they had no rule to go by. This was especially the case in actions of tort for damages for personal injuries. In a recent English case, *Philips v. Railway,* Queen's Bench Div. Law Reports, 1878-79, Vol. 4, p. 406, the common-law rule was relaxed. The action was for damages, for personal injuries sustained through the defendant's negligence, and there was a motion for a new trial on the ground of inadequacy of damages. It appeared upon the facts proved that the jury must have omitted to take into consideration some of the matters involved in the plaintiff's claim for damages. The counsel for the defendant in that action

contended that a new trial could not be granted on account of the damages being too small, because the action was for unliquidated
(94) damages, unless there has been some misdirection on the part of the judge, or some misconduct on the part of the jury. The Court said: "We think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us if we think the damages unreasonably small to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case. The rule must therefore be made absolute for a new trial."

There are conflicting decisions on this question in the courts of several of the states, but we believe that the conclusion arrived at by the English Court, in the case quoted from, is the correct conclusion, and we will adopt it as the conclusion of this Court. Holding then, as we do, that the Superior Courts of this State have the power to set aside verdicts for inadequacy of damages, we logically conclude that such power is discretionary with them, and that it is not reviewable by us. The power to correct prejudiced and grossly unfair verdicts must be vested somewhere, and, in our judgment, it is best that such power be confided to the judges who preside over the trials. They are presumed to be learned in the law, impartial in their judgments and upright in their conduct, and, with most rare exceptions, they have measured up to the standard of that presumption.

As to the order contained in the judgment in reference to the allotment of the homestead to the defendant R. V. Collins, and the sale of the excess by a commissioner, we see no error. The deed of conveyance from the defendants R. V. Collins and wife to Eure, was found to be fraudulent, and all the parties thereto, including
(95) the beneficiaries, were before the court. The court, as a court of equity, got control of the lands conveyed in the deed, and it had the power to order their sale after the defendant's homestead had been allotted him, and the disposition of the proceeds to satisfy the claim of the plaintiff under his judgment. The objection raised by defendant's counsel to the manner in which the court ordered the allotment of the homestead to be made is without force. It is true that the law has declared two ways of allotting a homestead, one by petition, and the other under execution. But there are other methods besides those. In *Littlejohn v. Egerton,* 77 N. C., 379, the Superior Court of Franklin County was instructed by this Court to appoint three commissioners to lay off the homestead of the plaintiff with instructions to give notice at the time

to the defendants, and "in all particulars to observe, as near as may be, the requirements of the Constitution and of the Homestead Act." That the clerk was instructed by his Honor to appoint the three commissioners is not objectionable, for the clerk is but the hand of the court in this matter. Neither is it objectionable that the lands are situated in two counties. The court has the power to make the order, and a report is to be made to the next term of the Superior Court of Franklin County, after the allotment of the homestead and the sale of the excess, by the commissioners in each matter. *Hines v. Moye,* 125 N. C. The last clause of the judgment to which exception is made by the defendants, if erroneous, is harmless, for the reason that none but parties to the action are bound by the judgment in the cause, unless notice of *lis pendens* has been properly filed, and of that we are not informed. There was no error in the proceedings below.

Affirmed.

Cited: Burns v. R. R., post 304; *Jordan v. Newsome,* 126 N. C., 558; *Gray v. Little,* 127 N. C., 306; *Hall v. Hall,* 131 N. C., 186; *Satterthwaite v. Goodyear,* 137 N. C., 305; *Abernethy v. Yount,* 138 N. C., 339; *Isley v. Bridge Co.,* 143 N. C., 53; *Jarrett v. Trunk Co.,* 144 N. C., 302.

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(96)

RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY v. ABERDEEN AND WEST END RAILROAD COMPANY.

(Decided 24 October, 1899.)

Specific Performance—Injunction—Issues of Fact—Questions of Law.

Where issues of fact are raised in the pleadings, involving application for equitable relief, the facts should first be determined by the jury, and the legal questions considered afterwards. In such case a restraining order properly issued was properly continued to the hearing.

CIVIL ACTION to enforce specific performance of certain alleged traffic contracts and agreements in regard to freights and to enjoin a threatened refusal by the defendant to carry out the provisions of said contracts and agreements, heard before *Brown, J.,* upon pleadings and affidavits at February Term, 1899, of the Superior Court of WAKE County.

The motion of defendant was to dissolve an order of restraint which had been granted in the cause.

The pleadings involved issues of fact. His Honor continued the injunction order until the hearing. Defendant appealed.

R. O. Burton and Douglass & Simms for appellant.
W. H. Day, J. B. Batchelor and S. H. MacRae for appellee.

FURCHES, J. This case comes to this Court upon the appeal of the defendant from an order continuing the injunction to the hearing.

(97) Upon examining the pleadings, we find issues of fact raised by allegations in the complaint and denied in the answer, that should be tried by a jury. If the allegations of the complaint, which are denied by the answer, should be found for the defendant, it would seem that such finding would substantially end the case. But if these issues should not be found in favor of the defendant, the facts in the case would be found and settled, and it would then be time enough to consider the important legal questions discussed on the argument. Therefore we are of the opinion that the injunction should be continued to the hearing.

The judgment appealed from is affirmed.

Cited: Harrington v. Rawls, 131 N. C., 40; *Smith v. Parker, ib.,* 471.

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(98)

MARIA COLLINS ET AL. (PROPOUNDERS) v. J. K. COLLINS AND W. J. COLLINS (CAVEATORS), IN RE THE WILL OF J. T. COLLINS, DECEASED.

(Decided 24 October, 1899.)

Probate—Caveat—Appeal—Practice.

1. *Objectors* to the probate of a will who attend before the clerk and contest the will, with counsel and evidence, are virtually caveators, and may be so termed.

2. The probate is a proceeding *in rem*, of which the statute confers jurisdiction on the clerk and court, and to which there are no parties, strictly speaking, who can withdraw or nonsuit the case. Public policy and the law require a speedy adjudication, regardless of objecting persons.

3. Where a paper writing was seen in testator's possession before his death and found among his valuable papers the next day after his death—the possession of this instrument, in due form *on its face*, at his death is *prima facie* proof that it is in fact, what it purports to be, his last will and testament, subject of course to be rebutted, as in other cases of disputed fact.

4. The admission of irrelevant testimony will not authorize a new trial, unless it appears that the objecting party was prejudiced thereby.

5. Where, upon an appeal from the clerk, an issue of *devisavit vel non* is submitted to the jury—who say, "Yes, every part thereof"—the judgment should direct the clerk to take other necessary proceedings therein, as required by law.

ISSUE of *devisavit vel non* in the matter of the will of J. T. Collins, tried upon appeal from the clerk, before *Moore, J.*, at Spring Term, 1899, of FRANKLIN Superior Court.

His Honor submitted his charge in writing—embracing a summary of the evidence.

"The only issue submitted for your consideration in this case (99) is, 'Is the paper writing offered for probate, or any part thereof, and if so, what part, the last will and testament of James T. Collins?'

"The burden of proof on this issue is on the propounders, who are Maria Collins, Peter Collins, T. M. Collins, A. M. Davis and J. C. Davis, her husband, J. C. May and Ada May, his wife, E. H. Gupton, E. D. Gupton, Lena Gupton, L. K. Gupton, Kate Gupton, and Percy Gupton, and William Leonard. The burden of proof being on the propounders, the law requires them to satisfy you by the greater weight of the evidence that the paper writing propounded, or offered for probate by them, is the last will and testament of James Collins, deceased.

"The propounders contend, and insist, that the paper writing offered by them, and every part thereof, is the last will and testament of James Collins, deceased. They say that they have shown by a preponderance of the evidence that James Collins executed this paper writing at a schoolhouse near his home by making his mark in the presence of W. T. Davis, who had written the will at the request of Collins, and who at the request of Collins signed his name as an attesting or subscribing witness to the will; that the alleged testator, Collins, afterwards sent for Dr. Siles, the other subscribing witness, and in the presence of Henry Pearce, one of the witnesses, at his house, requested Dr. Siles to witness the will; and that thereupon, at the request of the alleged testator, and in his presence, Dr. Siles did attest the will by signing his name thereto as a subscribing witness.

"W. G. Collins and J. K. Collins, though not technically what the law call caveators, object to the probate of the alleged last will and testament of James Collins, and insist that the evidence in this case does not warrant the jury in finding that the paper writing offered is the will of the alleged testator.

(100) "If you find from all the evidence in this case that James Collins, in the presence of the witness Davis, executed the paper writing offered for probate by making his mark thereto, understanding at that time that he was making and executing his will, and intending that the paper which he then executed should operate as his will; that said Davis thereupon, at the request of said Collins, and in his presence, signed his name as a subscribing witness to said paper writing; that thereafter said James Collins acknowledged the signing and execution of said paper writing as his last will and testament in the presence of David N. Siles, and requested said Siles to sign his name to said will as an attesting or subscribing witness; that thereupon said David N. Siles did, in the presence of said Collins, 'subscribe' his name as such witness to said will; that the paper writing now offered is the paper executed by said James Collins, and witnessed by said Davis and Siles, at [and] that at the dates of signing and acknowledging the will, the alleged testator, Collins, was of sound and disposing mind and memory; then, if you find all these things as facts, you will answer the issue 'Yes, every part thereof,' otherwise your answer to the issue will be 'No.'

"The law requires that a will of the kind which is now offered for probate shall be written in the testator's lifetime, and signed by him or some other person in his presence, and by his direction, and subscribed in his presence, by two witnesses at least.

"You will consider all the evidence in the case and ascertain the facts which you are required to find from all of it.

"There is no conflicting evidence as to the writing and signing of the will, subscribing of it by Davis, and the genuineness of the signature of Dr. Siles, and if you believe the evidence you will find that the paper writing offered was written in the lifetime of the alleged
(101) testator, was signed by him by his making his mark, and was witnessed by Davis in his presence and at his request. You will likewise, if you believe the evidence, find that the signature of the witness Dr. Siles is his genuine signature. This will bring you to the consideration of the question, 'Did the witness Dr. Siles sign his name to the alleged will in the presence and at the request of the alleged testator, James Collins?'

"In deciding this question you will consider the evidence of Henry Pearce, who says that he saw Siles sign his name to a paper as a witness, the evidence of Davis, who says that Collins told him that he intended to have Siles witness the will, the evidence of the witnesses, who say that Dr. Siles was in the habit of visiting the alleged testator, and was his physician, the evidence as to what the alleged testator

said about the will to the witness King, and the evidence as to the finding the will in the alleged testator's chest after his death. You will also consider the evidence offered for the purpose of contradicting the witness Henry Pearce, this being the evidence of Mr. Williams, the clerk, and the evidence taken before the clerk at the hearing before him.

"If you, having found the other facts enumerated, find that the will was witnessed by Dr. Siles in the presence and at the request of the alleged testator, who at the time declared that the paper writing now offered was his will, you will answer the issue 'Yes, every part thereof.'

"You will consider all the evidence, and the bearing, demeanor and appearance of each witness. You are the sole judges of the testimony, and it is your duty to remember the evidence for yourselves."

To the charge, as given, the said J. K. Collins and W. G. Collins excepted.

The jury responded to the issue, "Yes, every part thereof."

The said J. K. Collins and W. G. Collins moved to set aside (102) the verdict upon the ground that it was not supported by the evidence, and that it was against the weight of the evidence; motion overruled, and J. K. Collins and W. G. Collins excepted.

They then moved for a new trial for the errors and exceptions made and taken during the course of the trial.

Motion overruled and the said J. K. and W. G. Collins excepted.

The court signed judgment, as follows:

This cause came up to this term on the appeal of the propounders from the judgment of W. K. A. Williams, clerk of this court, refusing to admit the paper writing purporting to be the will of J. T. Collins to probate as such will, and was tried before the Hon. Fred. Moore, Judge presiding, and a jury.

The following issue was submitted to the jury:

"Is the paper writing offered for probate, or any part thereof, and if so, what part, the last will and testament of James T. Collins?"

And the jury respond to that issue, "Yes, every part thereof."

Now, on motion of C. M. Cooke & Son, attorneys for the propounders, it is ordered and adjudged by the court, that the said paper writing, and every part thereof, is the last will and testament of James T. Collins.

The clerk of the court will record the said paper writing as proved to be the last will and testament of J. T. Collins.

The costs of this trial will be taxed against the estate of J. T. Collins, to be paid by the personal representatives.

FRED. MOORE,
Judge Presiding.

Caveators appealed to Supreme Court.

(103) *F. S. Spruill for appellants.*
C. M. Cooke & Son for appellees.

FAIRCLOTH, C. J. In the matter of J. T. Collins's will: A paper writing purporting to be the last will and testament of J. T. Collins was exhibited to the clerk for probate by the widow and heirs of the deceased, except J. K. Collins and W. G. Collins, who, without entering a formal caveat, objected to the probate and recording of said instrument. The clerk made inquiry by taking evidence of witnesses, examined and cross-examined by the two objecting heirs. The clerk adjudged that the motion of the propounders for probate be denied. The propounders appealed to the Superior Court, and the clerk certified his acts and doings and entered the case on the civil issue docket.

At April Term, 1899, the matter was tried by a judge and a jury, it appearing to the court that all parties interested in said will or in anywise to be affected thereby were then before the court, including those objecting, and that they were also before the clerk in his inquiry. The objecting parties at the trial, without entering any formal caveat, insisted that there was nothing for a jury to try—that a question of law only was presented by the appeal, and that that depended upon the evidence and ruling before and by the clerk. His Honor held otherwise, and proceeded with a jury to try the issue: "Is the paper writing offered for probate, or any part thereof, and if so, what part, the last will and testament of James T. Collins?" To which the jury responded, "Yes, every part thereof."

We think enough appears in the record certified by the clerk to the Superior Court to justify the Judge in ordering the will to be proved in solemn form. The issue submitted is in the usual form. Eaton's Forms. See also *Cornelius v. Brawley,* 109 N. C., 542.

(104) For some reason, J. K. Collins and W. G. Collins omitted to enter a formal caveat at each trial, although they were present, objecting, examining and cross-examining witnesses and resisting the probate of the will. Let them call themselves "objectors" if they prefer it, but they have been granted every benefit and privilege, and they accepted them, that they could have enjoyed if they had called themselves "caveators."

This is a proceeding *in rem* and the statute confers jurisdiction on the clerk and court. There are no parties, strictly speaking, certainly none who can withdraw or take a nonsuit, and thus put the matter where it was at the start, as in actions between individuals. A non-

suit in the latter case affects no one but the litigants; in the former, creditors, legatees and distributees are interested and they are stayed until the question of testacy or intestacy is determined. The court having *jurisdiction,* public policy and our statutes require that this preliminary question should be determined as soon as practicable, and require the court to do it, regardless of objecting persons. *Hutson v. Sawyer,* 104 N. C., 1. A living witness to the will testified to his and the testator's signing this script in the presence of each other. The main matter controverted was whether Dr. Siles, another witness, then dead, had signed the instrument offered for probate in the manner required by law. His signature thereto was proved and admitted to be genuine, but it was insisted that the evidence failed to identify that paper as the one signed by the witness Siles and the testator as his will. There was much evidence pro and con, some witnesses testifying that they saw Siles sign in the presence of the testator and at his request, and from its size and appearance they believed the script exhibited in court was the same, although they could not read or write; others testifying to other facts and circumstances, and (105) some conflicting statements were made. These matters went to the jury for their opinion, and they gave it. The admission of irrelevant testimony will not authorize a new trial unless it appears that the objecting party was prejudiced thereby. There was no serious objection made to the competency of the deposing witnesses. There were some exceptions to their statements, but they seem not well founded. There were also prayers for instructions, but the charge as given covered all that the objecting parties were entitled to, and we are unable to discover any error in the charge in other respects.

The evidence shows that this paper writing was seen in the testator's possession before his death, and was found among his valuable papers the next day after his death. The possession of this instrument in due form *on its face* at his death is *prima facie* proof that it is, in fact, what it purports to be, his last will and testament, subject, of course, to rebuttal, as in other cases of a disputed fact.

Although the proceeding was somewhat novel, still the real contention was met and tried, and the judgment is sustained. We think, however, *as the probate is in the verdict,* and the probate judge and the clerk being the same person, and in the came court, the judgment should direct the clerk to take other necessary proceedings therein as required by law.

Affirmed.

(106)

JULIUS S. PHIPPS v. CLINTON C. WILSON.

(Decided 31 October, 1899.)

Claim and Delivery—Counterclaim—Damages—Practice.

1. Where claim and delivery are sued out—complaint filed—also answer, denying title of plaintiff, and containing a counterclaim for damages by reason of the unlawful seizure, to which no reply is filed—the question of damages can not be considered until after the issue as to the lawfulness of the seizure is determined.
2. Such counterclaim is inadmissible in this action, as it did not arise out of the same cause of action, and did not exist at the commencement thereof.

CIVIL ACTION for the recovery of personal property, heard before *Robinson, J.*, at February Term, 1898, of GUILFORD Superior Court.

The plaintiff, by virtue of a mortgage with power of sale from the defendant, claimed to be the owner and entitled to the possession of a water wheel or motor, including all patterns and fixtures for the same. The defendant denied the allegation of ownership, and set upon a counterclaim for damages to his business by reason of the unlawful seizure. There was no reply to the counterclaim.

On motion of defendant, his Honor rendered judgment by default and inquiry in favor of defendant upon the counterclaim; from which judgment the plaintiff appealed.

J. A. Barringer and L. M. Scott for plaintiff (appellant).
Charles M. Stedman and J. N. Staples for defendant.

(107) CLARK, J. The plaintiff sued out claim and delivery, the defendant set up as counterclaim damages accruing from such seizure, which he alleges was wrongful. There being no reply filed, his Honor gave judgment by default and inquiry in favor of defendant upon the counterclaim. This was error while the issue raised by complaint and answer as to lawfulness of the seizure was undetermined.

Besides such counterclaim could not be set up in this action, for it did not arise out of the same cause of action, nor did not exist at the commencement of the action. *Kramer v. Light Co.*, 95 N. C., 277; *Puffer v. Lucas*, 112 N. C., 377.

Error.

Cited: Griffin v. Thomas, 128 N. C., 313; *Satterthwaite v. Ellis*, 129 N. C., 71; *Smith v. French*, 141 N. C., 9; *Tillinghast v. Cotton Mills*, 143 N. C., 271.

MATTHEW HOWARD v. DEVEREUX TURNER.

(Decided 31 October, 1899.)

Deed—Want of Consideration—Fraud—Undue Influence—Intimidation—Burden of Proof.

1. With the exception contained in the statute of frauds in favor of creditors and *bona fide* purchasers without notice, a deed will convey land without any consideration.

2. The want of consideration does not of itself constitute fraud, but may be shown as evidence of it, to be considered along with other pertinent circumstances.

3. The general rule is that he who alleges fraud, undue influence or intimidation, must prove it.

4. Where special instructions are desired, they must be asked for.

CIVIL ACTION to set aside a deed for want of consideration and alleged fraud and intimidation, tried before *Bryan, J.*, and a jury at March Term, 1899, of ORANGE County.

The complaint alleged a want of consideration, and false rep- (108) resentations and threats of prosecution by the defendant towards the plaintiff.

The answer denied the allegations of the complaint. Both parties testified, and each contradicted the other, and sustained by his evidence the allegations of his own pleadings.

Two issues were submitted to the jury. One as to the want of consideration; the other as to the intimidation.

There were no special instructions asked by either side.

Among other things, his Honor instructed the jury that the burden of proof of both issues rested upon the plaintiff.

Plaintiff excepted.

The jury found that there was no consideration and no intimidation. Both sides claimed the judgment of the court.

His Honor adjudged that the defendant go without day, and this action is dismissed.

Plaintiff excepted, and appealed to the Supreme Court.

J. W. Graham for plaintiff (appellant).
C. D. Turner for defendant.

FURCHES J. In 1894, the plaintiff bought a lot in the town of Hillsboro, at public sale, for $75, paid $25 thereon, gave two notes of

$25 each for the balance of the purchase money, on one of which notes he has since paid $10, and has paid nothing more.

On the 1st day of September, 1896, the plaintiff executed a deed to the defendant, Devereux Turner, conveying said lot to him, and this action is brought to set aside and cancel that deed. The plaintiff asks this relief upon two grounds: First, that said deed was made without consideration, and, secondly, that it was made through fraud and undue influence. These allegations were denied by the defendant, and the following issues were submitted to the jury:

(109) "1. Was the deed from plaintiff to defendant obtained without valuable consideration?

"2. Was the deed procured by threats or alarm excited in the mind of the plaintiff by the defendant?"

The jury answered the first issue "Yes," and the second "No."

Upon the coming in of the verdict of the jury, both parties moved the court for judgment. The court declined to give the plaintiff judgment and signed judgment for the defendant. This constitutes the ground of plaintiff's first exception.

There were no special instructions asked by either side. But the court instructed the jury that the burden of establishing the affirmative of both these issues was upon the plaintiff; and this forms the grounds of plaintiff's second exception.

Neither one of the exceptions can be sustained.

It was insisted for the plaintiff that the jury having found that the deed from plaintiff to defendant was without consideration, this fact alone raised an equity in favor of the plaintiff sufficient to set aside the deed. But we do not think so. A deed in proper form is good, and will convey the land described therein without any consideration. This seems to be settled law in this State. *Ivey v. Granberry,* 66 N. C., 223; *Moseley v. Moseley,* 87 N. C., 69; *Souther v. Hunter,* 93 N. C., 310.

A court of equity will set aside a deed for want of consideration where creditors of the grantor are interested, or where there is a subsequent purchaser for valuable consideration without notice of the former conveyance. But this is under the statute of frauds, which does not apply in this case. The want of consideration may be shown as evidence of fraud, although the lack of consideration does not of itself constitute fraud. And the court might have instructed the jury

(110) that, if they found there was no consideration, they might consider this fact as an evidence of fraud in passing upon the second issue. *McLeod v. Bullard,* 84 N. C., 515. But the judge was not re-

quested to so charge, and, if he did not, it must be considered as a mere omission—an inadvertence for which we can not give a new trial.

The second exception is also untenable. The general rule is that he who alleges fraud, undue influence or intimidation, must prove it. *Bank v. Gilmer,* 116 N. C., 684; *Hodges v. Lassiter,* 96 N. C., 351. And we see nothing in this case to take it out of the general rule.

There was no relation of trust or confidence existing between the parties; nothing that was calculated to give the defendant any special influence over the plaintiff; nothing that was not common to any other person. There was evidence tending to show that defendant procured the execution of the deed through fraud and intimidation, but this was denied by the defendant, and the jury sustained his denial and say that it was not secured by such means.

If the jury had sustained the plaintiff's contention and found the second issue in the affirmative, the court would set aside and vacate the deed. But as the jury has sustained the defendant upon this issue, we can not do so.

There is nothing in the case to take it out of the general rule, or to change the *onus* and put it upon the defendant. The judgment is Affirmed.

Cited: McNeely v. Morganton, post, 379; *Cowles v. Loftin,* 135 N. C., 491.

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(111)

F. B. ARENDELL v. W. H. WORTH, STATE TREASURER,
AND
W. H. WORTH, STATE TREASURER, v. EDWARD L. TRAVIS, ET AL., EXECUTIVE BOARD OF DIRECTORS OF STATE PRISON.

(Decided 31 October, 1899.)

Indebtedness of State Prison—Appropriations—Construction of Statute —Act March 7th, 1899—Statutes In Pari Materia—Mandamus.

1. The Act of 7 March, 1899 (Laws 1899, ch. 607), authorizing the issue of State bonds to the amount of $110,000, was intended to raise funds for the purpose of paying off indebtedness of the State Prison incurred prior to 1 January, 1899.

2. There were other statutes—Act of 28 February, 1899 (ch. 342), and Act of 8 March, 1899 (ch. 679), to defray the immediate current expenses and the expenses of running the State Prison for the years

1899 and 1900—the Act of 28 February, appropriating $5,000—the Act of 8 March, appropriating $50,000 for each of the years of 1899 and 1900.

3. To arrive at the true meaning and purpose of a statute, other statutes, *in pari materia*, are to be considered and construed together—this rule of construction is to be applied to the statute of 7 March, 1899.

4. As it is the duty of the State Treasurer to keep his accounts, showing the transactions of each fiscal year ending 31 December, he has no right to pay out money except upon proper warrants drawn upon the proper funds in the treasury.

5. The State Treasurer is not liable to a mandamus for refusing to pay a warrant improperly drawn, and he is entitled to a mandamus to enforce the drawing of proper warrants upon the proper funds before paying them, as they are his vouchers.

CONSOLIDATED CASE

THESE TWO ACTIONS, each for a mandamus, were brought to July Term, 1899, of WAKE Superior Court, were consolidated by consent, and heard together before *Moore, J.*

(112) The first is an action by F. B. Arendell against Worth, State Treasurer, to compel the payment of a warrant issued by the Executive Board of Directors of the State Prison upon the Treasurer, covering items of indebtedness incurred both prior to January 1, 1899, and between January 1st and March 6, 1899.

The second is an action by Worth, State Treasurer, against the Executive Board, to compel them to change a warrant drawn by them upon the State Treasurer, and in favor of the State Treasurer, so as to make the warrant show upon its face that it embraced only indebtedness incurred prior to January 1, 1899.

The question involved is, whether the State Treasurer can require the Executive Board of Directors of the State prison to so itemize their warrants for the payment of indebtedness of the State prison, as to indicate the date of the indebtedness and the fund out of which it is to be paid.

The determination of this question requires the construction of the act of 7th March, 1899, (Acts 1899, ch. 607), taken in connection with the acts of 28th February, 1899, (ch. 342), and 8th March, 1899, (ch. 679)—all three of which acts were enacted by the Legislature of 1899, and contained appropriations for the indebtedness of the State Prison.

The State Treasurer contended that the proper construction of ch. 607, Acts 1899, and statutes and resolutions *in pari materia*, re-

quired that the funds derived from the sale of bonds, provided for by ch. 607, should be applied to the indebtedness of the State Prison incurred prior to January 1, 1899, and inasmuch as it was his duty to keep separate accounts of all State institutions for each fiscal year, ending 31st December, the warrants, which are his vouchers, should be so drawn as to indicate the date of the indebtedness and the fund drawn upon.

The Executive Board (through the plaintiff) contended that (113) the purpose of the Legislature in passing the act was to provide by that appropriation for the payment of *all* debts prior to its ratification, 7th March, 1899.

The consolidated case, by consent, was heard upon the pleadings by his Honor, who decided both cases involved against the State Treasurer, and he excepted and appealed to the Supreme Court.

The pleadings, the statutes, and the judgment are summarized in the opinion.

Douglass & Simms and Zeb B. Walser, Attorney-General, for appellant.

J. C. MacRae, Argo & Snow, Shepherd & Busbee and R. O. Burton for appellee.

FURCHES, J. The General Assembly, on the 7th day of March, 1899, passed and ratified an act authorizing the defendant, Worth, to issue and sell $110,000 (par value) North Carolina State coupon bonds, bearing interest at the rate of 4 per cent, from the 1st of January, 1899, until paid. Ch. 607, Laws 1899. This act states that it is passed to provide a fund for the payment of the indebtedness now due on account of the conduct and management of the State Prison (the name having been changed from penitentiary to that of State Prison).

On the 8th day of March, 1899, the same Legislature passed and ratified an act appropriating $100,000, $50,000 of this amount to be used for the maintenance and support of the State Prison for 1899, and $50,000 for 1900. Ch. 679, Acts 1899.

On the 28th day of February, 1899, the same Legislature passed (114) and ratified another act appropriating $5,000 to pay the immediate incidental expenses of the State Prison. Ch. 342, Laws 1899.

All the money thus appropriated, and that arising from the sale of the $110,000 bonds, was only to be paid out by the defendant, Worth, upon the warrant of E. L. Travis, W. H. Osborne and W. C. Newland, constituting the Executive Board of the State Prison. On the 23d of May, 1899, this Executive Board issued to the plaintiff, Arendell, the following warrant:

STATE PRISON OF NORTH CAROLINA,
RALEIGH, N. C., May 23, 1899.

To Hon. W. H. WORTH, *Treasurer of North Carolina:*

Pay to F. B. Arendell, or order, out of the fund provided for the payment of the indebtedness of the State Prison by ch. 607, Laws 1899, the sum of three 32-100 dollars, in full settlement of all claims to and including the 6th day of May, 1899.

$3.32.

E. L. TRAVIS,
W. H. OSBORNE,
W. C. NEWLAND,
Executive Board.

The defendant refused to pay this warrant, and on the 27th day of June, 1899, the plaintiff commenced this action.

The defendant, Worth, as State Treasurer, with the approval of the Governor and Council, on the 1st of March, 1898, had advanced to J. M. Mewborne, then superintendent of the penitentiary, $35,000, for the support and maintenance of the institution, and to enable him to run the same. Said Worth, as Treasurer of State, took from said Mewborne as evidence of this advancement a written instrument in
(115) the form of a promissory note, signed "J. M. Mewborne, Superintendent N. C. Penitentiary," in which it is stated that the amount so advanced is to be paid with 6 per cent interest. That the Treasurer insisted that he should be secured for the money so furnished by him, and on the 1st day of April, 1898, the said Mewborne attempted to do so by executing a paper writing in which it is provided that this debt shall be a first lien on the entire crops of cotton, corn, wheat, oats, rice, and other products made on the State's farms during the year 1898, naming the different farms then being worked by the penitentiary.

Various payments have been made on this note of $35,000: $5,000, in December, 1898; $11,000, on the 4th January, 1899; $6,500, on the 9th February, 1899; $4,000, on the 13th February, 1899, and $3,638 on the 20th February, 1899. But it seems to be agreed that on the 23d day of May, 1899, there still remained unpaid on the $35,000, for money so advanced to Mewborne, the sum of $8,462, and on that day the Executive Board issued the following warrant:

STATE PRISON OF NORTH CAROLINA.

To W. H. WORTH, *Treasurer of North Carolina:*

Pay to W. H. Worth, Treasurer, or order, out of the funds provided for the payment of the indebtedness of the State Prison by ch. 607,

Laws 1899, the sum of eight thousand four hundred sixty-two and no one-hundredths dollars, in full settlement of all claims to and including the 6th day of March, 1899.

E. L. TRAVIS,
W. H. OSBORNE,
W. C. NEWLAND,
Executive Board.

Defendant, Worth, refused to pay this warrant, and soon there- (116) after commenced an action against said Executive Board. Both the action of Arendell and the action of Worth being on the docket at the same time, and involving substantially the same questions, by consent of all parties, the two were consolidated by the following order, and tried together, viz.: "North Carolina—Wake County. In the Superior Court, July Term, 1899. *F. B. Arendell v. W. H. Worth, Treasurer,* and *W. H. Worth, State Treasurer v. E. L. Travis, W. H. Osborne and W. C. Newland,* constituting the Executive Board of the Board of Directiors of the State Prison of North Carolina. In the actions above entitled, by consent of all parties, it is ordered that the said actions be consolidated and heard together, and that they be tried before his Honor *Fred. Moore, J.,* holding said court, without a jury and at this term, his Honor to find the facts and to render judgment thereon. Fred. Moore, Judge Presiding. (Signed by attorneys representing both parties.)

Under this order the trial was proceeded with, when the following judgment was rendered by the court: "The above-entitled actions having been consolidated at this term by consent, and coming on to be heard before the undersigned, a jury trial having been waived by consent, upon motion of plaintiff in the action of *F. B. Arendell v. W. H. Worth, State Treasurer,* for judgment upon the pleadings, and upon motion of plaintiff in the action of *W. H. Worth, State Treasurer v. E. L. Travis et al.,* for judgment upon the pleadings; and the facts being admitted that the warrant set out in the first-entitled action covers items of indebtedness arising both before and after January 1, 1899; and that the warrant set out in the complaint in *Worth v. Travis, et al.,* was for an indebtedness contracted for in 1898. Now, therefore, upon consideration by the court, it is adjudged:

(117) "1. That a writ of mandamus issue out of and under the seal of this court, directed to the said W. H. Worth, State Treasurer, commanding him to pay to the plaintiff, F. B. Arendell, the amount due upon the warrant set out in the complaint in said action of *Arendell v. Worth,* to wit, the sum of $3.32, out of the money in his hands arising from the sale of the bonds mentioned in the pleadings.

"2. That said F. B. Arendell recover of said W. H. Worth, State Treasurer, the costs of said action, to be taxed by the clerk.

"It is further adjudged that the writ of mandamus asked by the plaintiff, W. H. Worth, State Treasurer, in the action of *W. H. Worth, State Treasurer, v. E. L. Travis et al.,* be denied, and that said W. H. Worth, State Treasurer, pay the said warrant, described in his complaint in said action, out of the moneys in his hands arising from the sale of the bonds mentioned in the pleadings, and that the defendants E. L. Travis, W. H. Osborne and W. C. Newland recover of the plaintiff, W. H. Worth, State Treasurer, the costs of said action, to be taxed by the clerk."

To this judgment W. H. Worth, State Treasurer, excepted and appealed to the Supreme Court.

And the following is the statement of case on appeal as settled by the judge: "The two above-entitled actions, each brought for mandamus, were heard before his Honor Fred. Moore, Judge of the Superior Court, at July Term of Superior Court of Wake County, by consent. A jury trial was waived by all parties, and the two actions were consolidated and heard together, under a consent order, which appears in the record. The pleadings in both actions are fully set out in the record, and reference is hereby made thereto, as part of this case on appeal.

(118) "The plaintiff in the case of *F. B. Arendell v. W. H. Worth, State Treasurer,* moved for judgment upon the pleadings in the case, and the plaintiff in the case of *W. H. Worth, State Treasurer, v. E. L. Travis et al.,* moved for judgment in that case upon the pleadings.

"It was admitted that the warrant set out in the case of *Arendell v. Worth* covered items of indebtedness arising before and after January 1, 1899, and that the warrant set out in the case of *Worth v. Travis et al.,* was for an indebtedness contracted in 1898, but that it covered all indebtedness from the State Prison to the plaintiff up to March 6, 1899.

"His Honor rendered the judgment set out in the record, which is made a part of the case on appeal, and that W. H. Worth, State Treasurer, excepted and appealed to the Supreme Court."

So it is seen that the appeal is upon questions of law arising upon the pleadings, which must be taken as true when not contradicted.

There was a motion during the argument in this Court to dismiss the action of *Worth, Treasurer, v. Travis et al.,* which had been consolidated with the action of *Arendell v. Worth,* by consent of all parties to said actions, and by consent of all parties were heard and tried together. We fail to see the reason for this motion and refuse to dismiss.

Both actions, as we gather from the pleadings and from the argument and brief of counsel, are for the purpose of obtaining a construction of the act of the 7th of March, 1899, ch. 607, authorizing the issuance and sale of $110,000 coupon bonds by the defendant, Worth, as State Treasurer. The plaintiff, Arendell, and the Executive Board contending that it was intended by this act to raise money to pay all the State's indebtedness arising out of transactions for the State Prison, up to, and due on the 6th of March, 1899, while the defendant, Worth, contends that it was not so intended by the (119) Legislature, and that it was only intended to raise a fund to pay the State's liability, on account of the *management* of the penitentiary, prior to the first of January, 1899.

Both the debt to Arendell and to Worth are admitted to be due and that they should be paid. But out of what fund they should be paid seems to be considered by the Executive Board and by the State Treasurer a matter of public importance. It therefore becomes our duty to say whether the fund arising from the sale of the $110,000 bonds is liable to be drawn upon by the Executive Board for the payment of indebtedness contracted since the 1st of January, 1899, or not.

The Act of the 7th March (Laws 1899, ch. 607), has this preamble: "Whereas, there are now outstanding and unpaid divers liabilities of the State of North Carolina, arising out of the conduct and *management* of the State Prison." And section 1 of the act which provides for issuing the bonds is as follows: "Sec. 1. That for the purpose of paying off the indebtedness of the State of North Carolina, arising out of the conduct and *management* of the State Prison, the State Treasurer is hereby authorized and directed to issue bonds of the State of North Carolina, payable ten years after the first day of January, 1899, to the amount of $110,000, which shall express upon their face the purpose of their issue."

It is contended by the plaintiff, Arendell, and the Executive Board, that the preamble should be considered in construing the act; that the word "now," used in the preamble gives a definite meaning to the act, and that it should be construed to mean all the indebtedness due on account of the State Prison prior and up to the date of its ratification.

(120) And it can not be well contended that there is not strength in this argument, if this act is considered alone and without reference to other acts passed at the same session, and other recent legislation with regard to the support of the penitentiary and the payment of its indebtedness.

But it appeared from the undisputed statements of the pleadings, which are made a part of the case on appeal, that on the 8th day of March, 1899, the Legislature passed and ratified an act appropriating $100,000 to defray the expenses of running the State Prison for the years 1899 and 1900, $50,000 for 1899, and $50,000 for 1900; that on the 28th of February, 1899, the Legislature passed and ratified another act appropriating $5,000, to defray the "immediate incidental expenses of the State Prison." These acts were all passed by the Legislature of 1899; one a few days before the passage of the act to issue and sell the $110,000 of bonds (ch. 607), and the other, appropriating $100,000 for the support of the State Prison, was passed on the 8th of March, one day after ch. 607; that the Act of 1893 appropriated $25,000 to the support of the penitentiary for 1893 and 1894 (ch. 365 of the Acts of 1893); and the Legislature of 1895, on the 13th of March, appropriated the sum of $14,158.71, to pay the unpaid balance for expenses of 1893 and 1894 (ch. 408 of the Laws 1895); and by the same act (ch. 408), the Legislature of 1895 appropriated $50,000 for the support of the penitentiary—$25,000 for 1895, and $25,000 for 1896; and by ch. 275, of the Laws 1895, the Legislature appropriated an addition $10,000 for the support of the penitentiary for the years 1895 and 1896.

There seems to have been no legislative appropriation for the support of the penitentiary for the years 1897 and 1898.

It is contended for the defendant, Worth, that these acts all related to the support of the penitentiary, or State Prison, by legislative

(121) appropriation; that they are *in pari materia* with the act of the 7th March, 1899, (ch. 607), and should be taken into consideration in construing the Act of March 7, 1899; that it appears from the act of the 27th of February (ch. 342) appropriating $5,000, and from the act of the 8th March (ch. 679), appropriating $100,000, $50,000 of which was for the year 1899, and that this sum, $55,000, made by these two appropriations, is more than twice as much as had ever

before been appropriated for any one year; that it appears from the act of 1895 (ch. 408), that the Legislature made an appropriation of $14,158.71 to pay the deficiency or the balance of indebtedness due on account of the *management* of the penitentiary for the years 1893 and 1894, which defendant, Worth, contends strongly tends to support his contention that the act of the 7th of March was to provide for the payment of the deficiency of 1897 and 1898.

It also appears that the present superintendent had caused an investigation to be made, by competent experts, of the *management* and indebtedness of the penitentiary up to the 1st day of January, 1899, and that it was found to be $110,000—this may not be entirely correct, but it is the amount found to be due by such investigation; and that he had reported the same to the Governor; that this was the indebtedness that the Legislature was providing for by the issue of the $110,000 bonds under ch. 607, Laws 1899; that it was, in substance, doing the same thing that the Legislature had done in 1895 by appropriating $14,158.71 to be used in paying the unpaid balance due on account of the *management* of the penitentiary for the years 1893 and 1894; that the fiscal year of the penitentiary ends on the 31st day of December of each year (Laws 1897, ch. 219, sec. 9); that it is the duty of the Treasurer of the State to keep his accounts, showing the transactions of each fiscal year, and to report the same to the Governor (122) (Code, secs. 3356, 3360, 3361 and article 3, section 7, of the Constitution); that he has no right to pay out money except upon the warrant of the Auditor, the warrant of the Governor in a few specified instances, and, by the Legislature of 1899, upon the warrant of the Executive Board of the State Prison, and that these warrants are his vouchers, and must be drawn upon the proper funds in the treasury, or they are no legal protection to him. It, therefore, becomes a matter of vital importance to him to know whether the fund now in the treasury, arising from the sale of the $110,000 bonds authorized by ch. 607, is liable for the payment of the current expenses of the penitentiary for the year 1899.

The plaintiff, Arendell, and the Executive Board say that it is so liable. They say that they had drawn out of the treasury for the support and management of the State Prison up to July 1st, for the current expenses of 1899, the sum of $34,992.14. This would leave of the $55,000 appropriated by the two Acts of 1899, ch. 342, and ch. 679, a balance in the treasury of $20,118. But the plaintiff and the Executive Board contend that unless they are allowed to draw on the fund arising from the sale of the $110,000 bonds (ch. 607), many debts due by the State Prison must go unpaid. This, of course, would be

unfortunate—they would likely be provided for. But it is only reasonable to suppose that the Legislature thought, when it appropriated $55,000 for the support of the State Prison for the year 1899, (more than twice as much as had ever been appropriated for any one year before), that that amount would be sufficient to pay its running current expenses.

We are of the opinion that these acts are *in pari materia* with the act of the 7th of March, 1899, ch. 607. *Wilson v. Jordan,* 124 N. C., 683, and authorities therein cited.

(123) Taking and considering these acts together, as we must do, we can not believe it was the intention of the Legislature that the funds arising from the sale of the $110,000 bonds under said act, ch. 607, was intended to be used to defray the *current* expenses of the State Prison for the year 1899. To state the case, it seems to us, is to furnish the argument against the contention of the plaintiff and the Executive Board. It could not have been the intention of the Legislature to add an additional fund to the $55,000 specially provided by the other acts for the support of the State Prison for the year 1899.

We, therefore, hold that this fund is not liable for the payment of the warrants of the Executive Board of the State Prison for the current and other expenses of the year 1899, and that there is error in the judgment appealed from.

The judgment appealed from is reversed. The plaintiff, Arendell, is not entitled to judgment, and it appearing that the Executive Board has in its possession data from which it is enabled to separate the indebtedness existing prior to the 1st day of January, 1899, from that created since that date, the defendant, Worth, State Treasurer, is entitled to a writ of mandamus as prayed for by him.

Reversed.

Cited: Abbott v. Beddingfield, post, 263.

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(124)

MRS. MAGGIE L. HENDON v. THE NORTH CAROLINA RAILROAD COMPANY.

(Decided 31 October, 1899.)

Stockholder—Lost Certificate of Stock—Issue—Remedy, Acts 1885, Chapter 265.

1. Where a stockholder in an incorporated company loses his certificate of stock and sues his company for a reissue and the allegation of loss is denied, an issue of fact is raised for trial by jury, and it must be submitted to them.

2. Upon the question of evidence as to the contents of the lost paper, the court will have to pass upon the preliminary question, whether there is sufficient *prima facie* case of loss to let in proof of contents, leaving to the jury the issue of fact as to the loss of the paper and its contents.

3. The act of 1885, ch. 265, relative to the reissue of stock to supply lost certificates, applies to all incorporated companies, and interferes with the chartered rights of none.

CIVIL ACTION demanding the issue of a duplicate certificate of stock in the defendant corporation to replace one owned and lost by plaintiff, tried before *Bryan, J.*, at March Term, 1899, of Superior Court of DURHAM County.

The complaint alleged that the plaintiff was the owner of two shares of stock in the defendant company, for which scrip had been regularly issued to her, and which she had never transferred to any one, but that it had become lost in 1874, and could not be found after diligent search; that she had always been recognized as the owner of two shares, and had received all dividends declared thereon. Judgment was prayed that defendant be required to issue and deliver to her a duplicate certificate for two shares of stock.

The answer admitted that the plaintiff was the owner of two (125) shares of stock in the company, and had been paid all the dividends declared, but required that she be held to strict proof as to the loss. The defense was also made that defendant's charter contained no provision for issuing duplicate certificates of stock to supply the loss of the original; also, that no bond of indemnity had been tendered by the plaintiff, in accordance with the acts of 1885, ch. 265.

The defendant insisted that whether the certificate of stock was lost was an issue of fact to be found by the jury, and asked his Honor to submit an issue to the jury, whether or not said certificate had been lost.

His Honor held that it was not an issue of fact proper to be found by a jury, and refused to submit such an issue. The defendant excepted.

His Honor thereupon heard and passed upon the evidence of plaintiff relating to the loss of the certificate, and the unsuccessful efforts made to find it.

The defendant offered in evidence its charter, passed on January 27, 1849; it was conceded that it contained no provision authorizing the issue of duplicate certificates of stock, and the defendant contended it had no such authority, and that the Court could not require it to be done, by virtue of any subsequent legislation. His Honor ruled otherwise, and defendant excepted.

The following judgment was rendered by the Court:

Judgment.

This action coming on to be heard before his Honor Henry R. Bryan, judge presiding, and it appearing from the pleadings on file that the defendant admits that the plaintiff is now and has been for more than twenty-five years a stockholder of record of the defendant company, holding two shares of its capital stock; and it further appearing from the said answer that the defendant has paid all dividends declared
(126) upon its stock to the plaintiff, and it being now proven to the satisfaction of the court that said certificate of two shares of stock issued to and standing in the name of plaintiff has been lost, and can not, after diligent search, be found, and that the same has been lost or destroyed for more than twenty years, and the contents of the said lost or destroyed certificate being admitted in open court, it is now considered by the Court that the loss of said certificate of stock has been sufficiently proven by the plaintiff; it is further considered, ordered and adjudged that the plaintiff execute and deliver to the defendant a good and sufficient justified bond in the sum of $400, with sureties approved by the clerk of this court, indemnifying the defendant against loss for the issue to the plaintiff of a duplicate certificate for said two shares of stock, and upon the approval of said bond by the clerk of this court, the said bond shall be delivered to the defendant, and thereupon it is ordered and decreed that the defendant shall issue in the name of the plaintiff a duplicate certificate of two shares of stock, executed as required by the by-laws of said company, which said duplicate certificate of stock shall be held as an escrow by the treasurer of the defendant company for the term of five years from the time of the issuing of the said duplicate certificate, and at the expiration of said term of five years, the said company shall, through its treasurer, deliver to the plaintiff, her heirs, administrators, executors or assigns the said duplicate certificate, and the original certificate shall be null and void against the defendant; it is further ordered that the defendant shall pay the costs of this action.

HENRY R. BRYAN,
Judge Presiding.

From which judgment the defendant appealed to the Supreme Court.

(127) *Cook & Green for appellant.*
Manning & Foushee for appellee.

CLARK, J. This was an action alleging loss of a certificate for two shares of stock in the defendant company, and asking for reissue of the certificate for the same. The allegation of loss was the basis of the plaintiff's action, and being denied in the answer, the issue of fact thus raised should have been submitted to the jury.

In the course of a trial when evidence to prove an alleged fact is primarily in writing, and secondary evidence is offered upon the ground that such writing has been lost or destroyed, it is for the Court to find the question of fact, whether the loss or destruction of the writing has been sufficiently proven to admit oral evidence of the contents. *Gillis v. R. R.,* 108 N. C., 441; *Bonds v. Smith,* 106 N. C., 564; 1 Greenleaf Ev., 558.

But in those cases, unlike the present, the loss of the paper was not alleged in the complaint as a ground for its reëxecution and denied in the answer. In *Ellison v. Rix,* 85 N. C., 77, the loss of the note was averred in the complaint and denied in the answer, but the action being only for recovery of the debt evidenced by it, and not for the re-execution of the note, it was held that such averment and denial raised only a preliminary question of fact for the Court, and not an issuable fact for the jury.

In the present case the reëxecution of the certificate being the relief sought, the averment and denial of its loss raised an issue for the jury. Upon the trial, however, upon evidence being offered as to the contents of the lost paper, the Court will have to pass upon the preliminary question whether there is a sufficient *prima facie* case of loss to let in proof of contents, leaving still to the jury the decision of (128) the fact whether there was a loss of the paper, and its contents; otherwise, two trials would be necessary, one to find whether the paper has been lost, and afterwards (if found to be lost), a trial to find its contents. An analagous case is where the declarations or acts of an agent are offered in evidence; there the Court must find whether there is a *prima facie* case of agency established, leaving it still to the jury to find whether in fact there was an agency, and if so, the purport of the acts and declarations of the agent. *Johnson v. Prarie,* 91 N. C., 164, and cases there cited.

The judgment is in accordance with the provisions of chapter 265, Laws 1885. That act is in no wise an amendment to the charter of the defendant company, but a general provision applicable to all corporations, regulating the manner of issuing certificates where certificates of stock have been lost, and requiring indemnity bonds from the plaintiff, and permitting a retention of the reissued certificates by the com-

pany's treasurer for five years as further safeguard. Such act is in the nature of the general regulations prescribed by The Code, Vol. I, ch. 49, and the act creating the Railroad Commission, which have been repeatedly held valid. *R. R. v. R. R.,* 104 N. C., 658; *Ex. Co. v. R. R.,* 111 N. C., 463; *Mayo v. Tel. Co.,* 112 N. C., 343; *Coms. v. Tel. Co.,* 113 N. C., 213; *Caldwell v. Wilson,* 121 N. C., 425.

Error.

Cited: S. c., 127 N. C., 110; *Avery v. Stewart,* 134 N. C., 293.

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(129)

JOHN C. PASS v. MRS. MARY E. BROOKS, WIDOW, AND MOLLIE BROOKS ET AL., HEIRS AT LAW OF JOHN T. BROOKS.

(Decided 31 October, 1899.)

Ejectment—Payment of Purchase Money—Parol Contract—Statute of Frauds—Equitable Relief.

1. When under a parol contract for purchase of land, the purchaser has been let into possession, paid the purchase money and made valuable improvements he may not be evicted until he has been repaid the purchase money and the value of the improvements.

2. Where, under such circumstances, the owner abrogates the parol contract by invoking the statute of frauds, the interest on the purchase money is an equitable set-off to any claim for use and occupation.

POSSESSORY ACTION for land, tried before *Timberlake, J.,* at August Term, 1898, of the Superior Court of PERSON County.

The plaintiff claimed that he was the owner, and entitled to the immediate possession of a tract of one and one-half acres of land, in possession of defendants.

The defendants answered that they were rightfully in possession, under a purchase by John T. Brooks, deceased husband of Mary E. Brooks, and father of the other defendants; that he had paid the plaintiff the agreed price, $39, and had died in possession, after putting valuable improvements upon the land, but the plaintiff had failed to make him a deed.

The plaintiff replied by setting up the statute of frauds.

Upon the issues submitted, the jury found that the agreed price, $39, had been paid by John T. Brooks, and the value of the improvements was $125.

His Honor adjudged that the defendants recover of the plain- (130) tiff the sum of $39, upon payment of which he was to have writ of possession. The defendants excepted and appealed.

J. W. Graham and A. L. Brooks for defendants (appellants).
Boone, Bryant & Biggs for plaintiff.

FURCHES, J. This is an action for possession of a lot of land containing about one and one-half acres. The defendants admit that they have no deed or legal title to the lot, but allege that John T. Brooks, the father of the infant defendants, purchased the same from the plaintiff, Pass, at the price of $39; that he paid the whole of the purchase money, and went into possession under said purchase; that the lot so purchased was vacant at the time of the purchase, and that the price paid ($39), was a full and fair price for the same; that after said purchase, the said John T. Brooks, believing that the plaintiff would honestly carry out his said contract and make him a deed to the lot, proceeded to erect and place upon said lot permanent and valuable improvements; and that the said John T., his widow, Mary E., and the infant defendants, who are the heirs at law of the said John T., have been and remained in possession thereof ever since.

To these allegations of defendants, the plaintiff filed a reply, admitting the sale of said lot on the terms alleged in the answer; denying the payment of the purchase money; alleging that said sale was in parol only, and pleading the statute of frauds.

The defendants attempted to establish a written contract for the sale of the lot, so as to take it out of the operation of the statute of frauds. We are of opinion that they did not, and we sustain the ruling of the court as to this exception.

But the parol contract and sale of the lot is admitted, and the (131) jury find that the purchase money ($39) was paid by the ancestor, John T. Brooks, before his death in 1891 and that he placed on the lot permanent improvements to the value of $125. These admissions of fact and findings of the jury bring the controversy down to a matter of equitable adjustment between the parties.

The contract not having been reduced to writing and signed by the plaintiff, and the statute of frauds being pleaded, the court will not enforce a specific performance of the contract and compel the plaintiff to convey. *Pitt v. Moore,* 99 N. C., 85; *Macey v. Gulley,* 84 N. C., 434. And the plaintiff having the title to the lot is entitled to judgment for possession.

But, as it is admitted that the plaintiff sold this lot to John T. Brooks, the father of the infant defendants, for $39, and the jury having found that the said John T. paid the plaintiff $39 for the lot before his death, and the jury having further found that the said John T. before his death placed improvements (buildings) to the value of $125 on the lot, and that he and defendant have been in possession ever since, the law will not allow the plaintiff to take possession of the lot without repaying the purchase money so paid to him, and without also paying for the valuable improvements put on the lot, by reason of said parol contract; this would be unjust and inequitable. *Albea v. Griffin,* 22 N. C., 9; *Hedgepeth v. Rose,* 95 N. C., 41. The plaintiff can not deprive the defendants of the benefit of their improvements by repudiating his contract. *R. R. v. Battle,* 66 N. C., 541; *Tucker v. Markland,* 101 N. C., 422.

As to whether the defendants should have interest on the $39, or the plaintiff should have rent, are matters of equitable adjustment. If the plaintiff is allowed rent it must be only what the lot would have
(132) rented for in its unimproved condition. It can not be equitable and just that the plaintiff should have rent for the buildings he had induced the defendants to put upon the lot by repudiating his contract. If this were so it would enable the plaintiff to do the inequitable and unjust thing of getting rent for improvements put there by the defendant and which had never cost the plaintiff one cent. Equity will not allow the perpetration of such a wrong.

The plaintiff has the $39, the value of the lot unimproved. The defendants have had the use of the unimproved lot. The defendants do not claim interest on the $39 and equity will set off the one against the other. That is, the defendants are not entitled to interest on the $39, nor is the plaintiff allowed rent on his vacant lot. *Wyche v. Ross,* 119 N. C., 174; *Locke v. Alexander,* 8 N. C., on p. 417.

Therefore, judgment should be entered declaring that the plaintiff is the owner of the lot in controversy; but that he is not entitled to a writ of possession therefor until he pays into the clerk's office for the benefit of the defendant $164—this being the amount of the purchase money and the value of the permanent improvements.

Upon this opinion being certified to the court below judgment will be so entered.

Error. Judgment modified.

Cited: Vick v. Vick, 126 N. C., 127; *Luton v. Badham,* 127 N. C., 103, 107; *Pass v. Brooks,* 127 N. C., 120.

(133)

T. J. GATTIS v. JOHN C. KILGO, B. N. DUKE, W. H. BRANSON AND W. R. ODELL.

(Decided 7 November, 1899.)

Slander—Libel—Misjoinder of Causes of Action—Demurrer—Practice, Code, Secs. 267, 272.

1. While several causes of action may be united in the same complaint, each must affect all the parties to the action and be separately stated. Code, sec. 267.

2. While a demurrer to a complaint for a misjoinder of different causes of action should be sustained by the judge, he should not dismiss the action. It is within his discretion to allow an amendment, and if none is made, it becomes his *duty*, on just terms, to subdivide the action on docket for separate trials. Code, sec. 272.

CIVIL ACTION for libel, heard upon demurrer, before *Bryan, J.*, at April Term, 1899, of the Superior Court of GRANVILLE County.

The complaint alleged slanderous words to have been spoken by defendant Kilgo of and concerning the plaintiff, and libelous publications to have been made by all the defendants concerning him.

A demurrer was filed by defendants for misjoinder of causes of action.

Demurrer was sustained, and the action was dismissed by his Honor.

Plaintiff excepted and appealed.

Guthrie & Guthrie, Boone, Bryant & Biggs, A. W. Graham and Hicks & Minor for appellants.

Winston & Fuller and R. O. Burton for appellee.

FAIRCLOTH, C. J. The defendants demur to the complaint for (134) that the plaintiff has unlawfully joined two separate causes of action in his complaint against different persons and moves to dismiss the action.

The first five sections of the complaint allege that the defendant John C. Kilgo, in August, 1898, uttered in public slanderous words against the character and business relations of the plaintiff, and set out specifically and at length the words complained of, and further allege as follows: "And so the plaintiff alleges that in uttering and publishing and circulating the aforesaid false and defamatory words of and concerning the plaintiff, the defendant John C. Kilgo intended thereby to charge, and did charge, the plaintiff with an offense equiva-

lent to the crime of willful and corrupt perjury, and thereby intended to injure, and *did injure,* the plaintiff in his good name, fame and credit accordingly, as if the plaintiff, in his testimony upon the investigation aforesaid, had been guilty of the crime of perjury." The complaint thereafter further alleges that the defendant Kilgo and his codefendants in this action, Duke, Branson and Odell, contriving and wickedly and maliciously intending to injure the plaintiff in his good name, etc., in September, 1898, did compose, print and publish in certain newspapers, circulating in this State, or caused it to be done, a certain pamphlet containing the aforesaid false, slanderous, libelous and defamatory words of and concerning the plaintiff, and prays for damages. The demurrer was sustained and his Honor adjudged that the action be dismissed and the plaintiff appealed.

The contention of the plaintiff is that the allegations against Kilgo individually do not amount to a cause of action, and that they are only matters of inducement to the charge against all the defend-
(135) ants. They, the defendants, aver that, in uttering the words by Kilgo alone, he intended to injure and *did injure the plaintiff,* and we think that is a statement of a cause of action. The failure to add a prayer for relief against Kilgo individually is not fatal. It would be technically appropriate to pray for damages. Code, sec. 233 (3). We understand that under The Code system the demand for relief is immaterial, and that it is the case made by the pleadings and the facts proved or admitted, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be *inconsistent* with the pleadings and the facts. A general prayer for relief will be implied. *Harris v. Sneeden,* 104 N. C., 374.

It has been held in an action for slander, "separate demands for damages need not be appended to the various allegations setting up the causes of action." *Gudger v. Penland,* 108 N. C., 593.

The balance of the complaint sets out the charges against Kilgo and the three other defendants, with a prayer for damages.

Can these two causes be joined in the same complaint? Code, sec. 267. That section says: "But the causes of action so united . . . must affect all the parties to the action . . . and must be separately stated."

It was held in *Logan v. Wallis,* 76 N. C., 416, that there could not be such a joinder unless all the parties to the action are affected. We do not see how the last three named defendants are in anywise connected with the plaintiff's first cause of action. It seems they were present as a committee when the words of the first cause were uttered,

and that they did not participate in such utterances. This would no more make them liable to an action than all others present and silent. In fact, that case is on "all fours" with *Burns v. Williams,* (136) 88 N. C., 159. The same view was taken in *Land Co., v. Beatty and another,* 69 N. C., 329, where the confusion and inconvenience of joining such causes was fully pointed out, with illustrations.

We approve the judgment below sustaining the demurrer, except that part dismissing the action, and that part is overruled.

When the case is called again for trial, it will be within the *discretion* of the court to allow an amendment. If none is made, it will be the *duty* of the judge, on just terms, to divide the action on the docket for separate trials. Code, sec. 272; *Street v. Tuck,* 84 N. C., 605; *Solomon v. Bates,* 118 N. C., 316, and several intervening decisions.

Judgment modified and affirmed.

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

Cited: Staton v. Webb, 137 N. C., 43.

IN RE LAST WILL AND TESTAMENT OF THOMAS A. BROOKS.

(Decided 7 November, 1899.)

Construction of Will—Estate Durante Viduitate—The Code, Sec. 2180.

1. A devise of all his property to the wife of testator during her widowhood, with the further expression, "Should she remarry, then the law is my will," gives her a life estate in the whole, determinable upon her remarriage; upon which event, she is remitted to dower and child's part, and the children would come in possession at once of the residue.

2. Section 2180 of The Code will not extend her estate to a fee, as the purpose of testator was clear to limit it, at most, to an estate for her life.

CONTROVERSY without action, submitted, under The Code, to his Honor, *Bryan, J.,* at May Term, 1899, of CHATHAM Superior (137) Court, for the construction of the will of Thomas A. Brooks.

COPY OF WILL

I, Thomas A. Brooks, of the county of Chatham, and State of North Carolina, being of feeble health, but of sound mind, do declare this to be my last will and testament, after paying all my debts, except those

debts that are barred by the statute of limitations, I will and bequeath all my real and personal property to my beloved wife, Martha B. Brooks, to have and possess as long as she remains my widow. Should she marry, then the law is my will. I appoint and request that O. A. Hanner to be my executor to this my last will and testament.

THOMAS A. BROOKS.

October 13, 1891.
Test: W. A. TEAGUE.
J. F. LAMBE.

Martha B. Brooks, the widow, died after the death of the testator, leaving children of herself and testator. She never married again.

His Honor adjudged that Martha B. Brooks, the widow, took an estate in fee simple in the property described. From which ruling some of the petitioners appealed, assigning as error that the Court should have adjudged that the widow, Martha B. Brooks, took only a defeasible life estate under the will of her husband.

Gilbert & Moore for appellant.
Murchison & Calvert for appellee.

(138) MONTGOMERY, J. Thomas A. Brooks died in the county of Chatham, leaving a last will and testament, in which he disposed of his property in the following words: "I will and bequeath all my real and personal property to my beloved wife, Martha B. Brooks, to have and possess as long as she remains my widow. Should she remarry, then the law is my will." The widow survived the testator and never remarried. Upon her death, there were living B. B., James D., and Thomas S. Brooks, Hadena B. Edwards, wife of J. D. Edwards, children of herself and the testator. J. D. Edwards has become the purchaser of the interest of B. B., and James D. Brooks, as two of the heirs at law of the testator, in and to the property devised and bequeathed in the will. The object of this proceeding—a controversy submitted without action—was to have a construction of the will as to what interest or estate the widow took under that instrument. His Honor held that she took an estate in fee simple, and so adjudged, and from the judgment J. D. Edwards and his wife appealed to this ourt. We think there was error in the conclusion at which his Honor arrived, and in the judgment rendered. The language of the will clearly shows that the intention of the testator was to limit the estate of the widow to a life interest. A time was fixed beyond which that interest could not

extend. She was "to have and possess the property as long as she remains my widow." Her death terminated of course her widowhood, and with the ending of that condition, ended also the estate of the widow. In reason it could not have been the intention of the testator to cause the widow to forfeit the property upon her remarriage, except as to her dower in the real estate and child's part of the personal property, and at the same time to give her the power, by will, to dispose of it even to strangers. He knew that at her death the property would revert to his heirs at law, and he felt that it would be unnecessary to say so, for he had already limited her estate to one *durante viduitate*. By the further expression "should she re- (139) marry, then the law is my will," he meant simply that she should enjoy, after her remarriage, only such part of his estate as the law would invest her with, whether with or without his sanction or consent and that the children would come in possession at once of the whole, less that part fixed upon her by law. Section 2180 of The Code can not be invoked for the purpose of extending the estate to a fee, for, as we have seen, the intention of the testator was clear to limit it at most to an estate for her life.

Error.

NANCY E. GATES v. A. MAX.

(Decided 7 November, 1899.)

Demurrer Under Act 1897, Ch. 109, (Since Amended, Act 1899, Ch. 131)—Evidence of Plaintiff, How Considered—Tax Books—Declarations of Party in Possession.

1. In cases of demurrer and motions to dismiss under act of 1897, the evidence must be taken most strongly against defendant.
2. If there is more than a scintilla of evidence tending to prove the plaintiff's contention it must be submitted to the jury.
3. Tax book admissible evidence to go before the jury, entitled to some weight, it may be slight, but to be determined by them.
4. Declarations of a party in possession of property are admissible for the purpose of qualifying such possession, but not for the sole purpose of fixing pecuniary responsibility upon a third party, not then present.

CIVIL ACTION instituted in justice's court of DURHAM County, for recovery of $60 rent of store for 1897, and heard on appeal before *Bryan, J.*, at January Term, 1899.

(140) At the close of plaintiff's evidence, the defendant demurred thereto, under the act of 1897, ch. 109.

His Honor sustained the demurrer, and rendered judgment as of nonsuit, against the plaintiff, who excepted, and appealed to the Supreme Court.

The evidence and points raised are stated in the opinion.

Winston & Fuller for plaintiff (appellant).
Boone, Bryant & Biggs for defendant.

DOUGLAS, J. This was an action brought before a justice of the peace to recover rent, appealed to the Superior Court, and thence to this Court. In the court below, at the conclusion of the plaintiff's testimony, the defendant demurred to the evidence, under chapter 109 of the Laws of 1897. The court being of opinion that there was not sufficient evidence to go to the jury, sustained the demurrer, and dismissed the action.

While not necessary in the consideration of this case, it may be noted that the Legislature has amended the Act of 1897, by chapter 131 of the Laws 1899, to meet the suggestions of this Court as expressed in *Purnell v. R. R.*, 122 N. C., 832, 835; *Mfg. Co. v. R. R.*, 122 N. C., 881, 888; *Cox v. R. R.*, 123 N. C., 604, 606, and other cases. The only question now before us is, whether there was more than a scintilla of evidence for the consideration of the jury. The rule to be followed in all such cases is clearly laid down by Justice FURCHES in delivering the opinion of the Court in *Johnson v. R. R.*, 122 N. C., 955, 958, as follows: "In cases of demurrer and motions to dismiss under the act of 1897, the evidence must be taken most strongly against the defendant. Every fact that it reasonably tends to prove must be taken as
(141) proved, as the jury might so find." Citing *Bazemore v. Mountain*, 121 N. C., 59; *Spruill v. Ins. Co.*, 120 N. C., 141; *Ice Co. v. R. R.*, 122 N. C. 881, and *Whitley v. R. R.*

This has become the settled rule of this Court, by a long line of decisions, extending from *Avery v. Sexton*, 35 N. C., 247, to *Cogdell v. R. R.*, 124 N. C., 302.

It is equally well settled that if there is more than a 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. *Cable v. R. R.*, 122 N. C., 892; *Cox v. R. R.*, 123 N. C., 604, 607, and cases therein cited.

The plaintiff testified, in her own behalf, as follows: "That she owned a store near South Lowell. That it was occupied in 1896 by

Somers & Son, and also a portion of 1897. The contract of 1896 was $125 a year, payable monthly. There was no change in 1897. Max did not notify me of any change. I had no other contract with Max. In 1896 Max questioned me very closely as to the class of goods that could be sold at my store. In 1897 Somers & Son remained two or three months. My store was vacant the rest of the year 1897. I did not get any rent for 1897. The rent for 1896 was collected by law. Max said he did not want his name known in this business. I had no dealings with Somers & Son. I rented the store to A. Max. . . . In that contract Max became surety for Somers & Son. I understood him to say he would put a clerk out there. I owed F. C. Geer, and transferred the note for rent signed by Somers & Son, and Max as surety, to them. I think I signed one paper and Max one. Both papers were signed at the same time. Max had to pay Geer a part of that note because he was surety. The contract was never changed. I did not sue for $125 for 1897. I sued for $60 for 1897, I brought suit after the change made by my husband and Mr. Geer. I (142) had no conversation with Mr. Max after 1896, when he signed the note."

W. S. Terry, for plaintiff, testified that "he knows that store. He was there early in 1897, and saw many wagons there. Jacobson was there, and seemed to be boss. Andrews was there also. Jacobson is in Max's employ. They commenced taking goods down, and had them all down next morning. Jacobson sold some of the goods at private sale. He left none in the store. Drove off toward Durham. They also took Somers's horse and wagon."

Dunnigan testified for plaintiff: "I saw this file of papers in Max's store in Durham. I got them from A. Max. He told me that he had some accounts he wanted me to collect. Said they came from the corner store (Gates's store). I collected some of the accounts, and paid over the money to Max. The accounts were put in my hands for collection December 8, 1897."

W. G. Gates, husband of plaintiff, testified: "In the fall of 1896, about Christmas, I was in Max's store. I asked him if they wanted the store for the next year. Max said 'see Somers, and any arrangement you make with him will be satisfactory to me.' In a few days I saw Somers. . . . When we reached the store Somers said they couldn't afford to pay the rent they had been paying. I told him I would take $60 rather than let the house stay vacant. He said he would have to see his 'boss.' . . . That night I saw Max and told him I had seen Somers, and let him have it at $60. He said, 'I am glad you did.'"

Geer, for plaintiff, testified: "I went with Gates to the store to see Somers & Son. I think he told me what Max had said before he went out there. Somers said he would have to reduce the rent. (143) He could not tell until he saw his 'boss,' until he saw his master. He called him also his partner."

We think that this evidence, of which there is certainly more than a scintilla, taken in the light most favorable to the plaintiff, tended to prove her contention that the defendant had a substantial interest in the business, thus making Somers either an agent or a partner.

The defendant further contends that as there is evidence to the effect that the plaintiff had assigned the rent in question to Geer, she has no further interest in the subject matter of the action. This does not appear in the testimony of the plaintiff herself, and hence can not be taken as an admission. She was admittedly the owner of the store-house, and is therefore *prima facie* entitled to the rents. If the defendant relies upon a transfer of the rents to prevent her recovery, he must prove such a transfer. It can not be found by the Court on a motion to dismiss, for this would be the finding of an affirmative fact, which can be done only by the jury. In *White v. R. R.,* 121 N. C., 484, 489, this Court, speaking by Justice FURCHES, lays down the following rule: "The Court can never find, nor direct an affirmative finding of the jury." Citing *State v. Shule,* 32 N. C., 153.

Again in *Bank v. School Committee,* 121 N. C., 107, 109, Justice FURCHES, speaking for the Court, says: "But no matter how strong and uncontradictory the evidence is in support of the issue, the Court can not withdraw such issue from the jury and direct an affirmative finding. To do this is to violate the act of 1796—sec. 413 of The Code." Citing *State v. Shule, supra; Hardison v. R. R.,* 120 N. C., 492; *Spruill v. Ins. Co.,* 120 N. C., 141; *White v. R. R.,* 121 N. C., 484. This doctrine has been repeatedly reaffirmed. *Collins v. Swanson,* 121 N. C. 67; *Eller v. Church, ibid,* 269; *Cable v. R. R.,* 122 N. C., (144) 892; *Cox v. R. R.,* 123 N. C., 604; *Dunn v. R. R.,* 124 N. C., 252.

As to the first exception to the evidence, we think that the tax book should have been admitted to go to the jury for what it was worth. *Austin v. King,* 97 N. C., 339; *Faulcon v. Johnson,* 102 N. C., 264; *Ruffin v. Overby,* 105 N. C., 78; *Pasley v. Richardson,* 119 N. C., 449; *Bernhardt v. Brown,* 122 N. C., 587; *Ridley v. R. R.,* 124 N. C., 37. Such evidence is generally said to be slight, but it still has some weight to be determined by the jury.

As to the exclusion of the evidence of Somers as to the ownership of the property, we have had some difficulty in coming to a conclusion. The general rule is that declarations of a party in possession of property

are admissible for the purpose of qualifying such possession; but we do not think that the authorities go to the extent of allowing such evidence for the sole purpose of fixing a pecuniary responsibility upon a third party, not then present. To what extent such declarations may be aided upon a new trial by evidence tending to show agency or partnership, we are not prepared to say, as the question is not now before us.

The plaintiff offered in evidence this remarkable contract of rental, which was excluded: "Durham, N. C., June 27, 1898. This certifies that I, Squire Thomas, have rented from A. Max the following goods: One suit of clothes and shirts, for which I promise to pay 25 cents cash, and $1.50 per week until the amount of $8 has been paid. Any neglect on my part to pay said rent when due shall entitle said A. Max or his assigns to repossess said articles without hindrance or process of law, I forfeiting all that has been paid on said article as rent for and during the time said property has been in my possession; and I further agree to protect and keep in good order the above-named article, and I will not move said article without written consent of (145) A. Max or his assigns. After all obligations are settled as per agreement, a bill of sale will be given of all the goods. (Signed) Squire Thomas, Agent L. Somers & Son."

As the matter is presented to us, we do not see its relevancy, although admitting its interest as illustrating a phase of business methods that has hitherto never been brought to our attention. For reasons stated above a new trial must be ordered.

New trial.

Cited: Meekins v. R. R., 127 N. C., 36; *Moore v. R. R.*, 128 N. C., 457; *Trust Co. v. Benbow*, 135 N. C., 305; *R. R. v. Land Co.*, 137 N. C., 332.

R. V. JAMES, GUARDIAN, G. W. WATTS, W. H. ROWLAND AND WIFE, W. R. COOPER AND WIFE, v. F. D. MARKHAM, SHERIFF, J. S. CARR, FIRST NATIONAL BANK, AND MOREHEAD BANKING COMPANY.

(Decided 7 November, 1899.)

Judgment—Mortgages—Execution—Injunction—Rule of Inverse Order of Alienation—Supersedeas Bond on Appeal.

1. Where the lands of the debtors are all under mortgages, in different parcels, at different times, a court of equity will not interpose to require a judgment creditor to levy upon and sell the land in the order in

which it was conveyed, where there is no allegation that the judgment or mortgage creditors were insolvent, and that irreparable loss would come to the plaintiffs if the restraining order was not continued.

2. A supersedeas bond, being the act of a party, is not allowable for the purpose of continuing the effect of the restraining order after it has been dissolved by the court—neither will an appeal prolong an injunction which the court has decreed no longer exists.

(146) APPLICATION to continue to the final hearing a restraining order made in this cause, pending in the Superior Court of DURHAM County, to *Bryan, J.*

Two of the plaintiffs, Rowland and Cooper, are debtors of the other plaintiffs, also of the defendants (except Markham, Sheriff), all secured by various mortgages on different tracts, at different times. The defendant Carr, in addition to his mortgage debt, is also the assignee of a judgment against them, of prior lien to any of the mortgages; and execution has been issued, and is in the hands of Markham, Sheriff, for service.

The object of this action is to require Carr and the sheriff to levy upon and sell the land of the debtors in the order in which it was conveyed in the several mortgages.

The complaint filed and used as an affidavit, is a follows:

1. That Mrs. R. V. James is the guardian of certain infant children and as such several years ago loaned to W. R. Cooper the sum of $1,315, taking his note therefor, and that there is due her by said Cooper the said sum of $1,315, with interest upon the same from the 26th day of August, 1897.

2. That several years ago, the plaintiff Geo. W. Watts loaned to Rowland & Cooper the sum of $2,000, and that there is due him thereon the sum of $1,600, with interest from.....day of....., 1897.

3. That at the March Term, 1897, of Durham Superior Court one W. O. Blacknall obtained a judgment against said Rowland & Cooper for $1,250, interest and cost, which was duly docketed in Durham County.

4. That Rowland & Cooper at said time constituted a firm, and were engaged in a general leaf tobacco business. That said firm found itself embarrassed much above its ability to pay, and therefore, the (147) mortgages and other encumbrances hereinafter referred to were executed by the said firm and the individuals composing the same.

5. That on the 26th day of August, 1897, W. R. Cooper and wife executed to Geo. W. Watts a deed of trust to a one-half individual interest in and to the prize house and lot of Rowland & Cooper, on the west side of McMannen Street, in Durham, N. C., (for an accurate

description of which reference is made to book 26, page 406, of mortgages of Durham County), in order to secure the above-recited loan of $1,600, and that on the same day the said W. R. Cooper and wife executed to Mrs. R. V. James, guardian, a mortgage on about fifty (50) acres of land in Patterson Township, Durham County, where Ed. Cooper now resides, (for an accurate description of which see book of mortgages No. 26, page 409), in order to secure the above-recited indebtedness of $1,315.

6. That thereafter, to wit, on the 4th day of September, 1897, said Rowland & Cooper and their respective wives being indebted to J. S. Carr in the sum of $835.50 and also to the Morehead Bank and the First National Bank in large sums, executed to E. C. Murray, Trustee, a deed of trust upon two lots of land in North Durham, Nos. 24 and 25, of the Link's survey, and also upon a brick store of said Cooper on the north side of Main street, all of said property being accurately described in book of mortgages 26, page 433, a copy of said deed of trust being hereto attached, and marked Exhibit "A."

7. That in addition to said instruments and in order to further secure their said creditors and particularly to pay off the said Blacknall judgment, the firm of Rowland & Cooper, during the fall of 1897, executed and delivered a transfer of all its interest in certain property, lying near Murphy, N. C., and which previously belonged to the Murphy Improvement Company, the said interest being worth (148) about $500, and they likewise executed for the same purpose an instrument conveying a judgment for about $1,000 which Revis & Baxton, attorneys, state is valid and collectible on certain lots in Johnson City, Tenn., which cost said firm about $30,000, both of which last-named papers were delivered to the Morehead Bank at Durham, N. C., or its agents. That such papers named certain persons therein which were competent to act and directed them to sell the property therein described, and to retain the proceeds to be used in paying off the Blacknall judgment and thereafter certain other creditors named therein. The plaintiff demands a production of said papers at the trial of this action, and prays that the same may be made a part of this complaint.

8. That since the Blacknall judgment was obtained, to wit, within the past thirty days, the same has been purchased by and assigned to J. S. Carr, and the plaintiffs here offered to pay off said judgment, principal, interest and cost, and also the Morehead mortgage on the Cooper store for $3,000, provided that the said Carr and Morehead Bank would assign the same to the plaintiff Watts, with which request they have refused to comply.

9. That the said Murray has been requested to sell under the deed of trust of the 4th of September, and he has refused so to do.

10. That the property conveyed to the said Murray is well worth $6,000, which amount would pay off the first mortgage of about $3,000, to Mrs. Morehead, now held by Morehead Bank, and also the debt to said Carr and James, and nearly all of the Blacknall judgment; and that the Murphy holdings and the Johnson City property are both available and more than ample to pay off the balance due on the Blacknall judgment, the taxes and all other debts of Rowland
(149) & Cooper, excepting a portion of their indebtedness to the Morehead Bank and the First National Bank.

11. That the said J. S. Carr for and on behalf of himself and the First National Bank, of which he is President, and the Morehead Bank are endeavoring to reverse the equitable and legal order in which the property of said Rowland & Cooper shall be sold by the sheriff in order to pay off the debts of said firm and of the individuals composing the same. That to this end they have instructed the sheriff of Durham County to sell, and unless restrained by this Court, he will sell on the 6th of March, 1899, the following property of said Rowland & Cooper, or either of them, to wit: first, the prize house lot hereinbefore described; secondly, the Alston Avenue tract of fifty (50) acres; third, the excess over the Cooper homestead; fourth, the excess over the Rowland homestead; not selling or offering to sell any lands upon which said Carr or either bank holds a mortgage.

12. That if said sale is carried out the interest of the plaintiffs James and Watts, as above set out, will be destroyed, and they will lose nearly their entire debts, and thereby a preference will be given to the Morehead Bank and the First National Bank, which was not contemplated by said Rowland & Cooper, and contrary to their directions as set out and explained in the instruments hereinbefore referred to, and that the plaintiffs James and Watts have equities which are prior in time and superior to those of the defendants in the lands proposed to be sold by the sheriff as aforesaid.

13. That the next term of Durham Superior Court begins on March the 27th, and the plaintiffs are advised that no legal sale can take place during the month of March until during the first three days of said court.

14. Plaintiffs again agree to pay off the Blacknall judgment,
(150) principal, interest and cost, provided it be transferred to said Watts, and hereby tender a sum sufficient to accomplish said transfer. They likewise agree to pay off the mortgage on the Cooper

store, provided the same be transferred to said Watts, and hereby tender a sum sufficient to accomplish said payment and transfer.

15. That said J. S. Carr, Morehead Bank and First National Bank elected to take under said aforementioned instruments, and took thereunder, and are estopped to deny the validity of same or the order of sale therein provided. Whereof plaintiff pray that said sale be restrained, and that the property hereinbefore described shall be sold in the order in which it was mortgaged to the respective mortgagees and trustees, and plaintiffs pray that when this complaint is duly verified it may be deemed an affidavit in the cause, and as in duty bound they will ever pray.

16. That suit has been begun in Durham Superior Court in favor of plaintiffs and against defendants as above.

W. H. Rowland, being duly sworn, states that the facts set forth in the foregoing complaint are true, except as to such as are stated upon information and belief, and as to those, he believes them to be true.

W. H. ROWLAND.

February 24, 1899.

Sworn to and subscribed before me, February 27, 1899.

C. B. GREEN, *C. S. C.*

His Honor, *Bryan, J.*, at the hearing at Durham, March 27, 1899, ordered that the restraining order be dissolved and the motion for injunction to the hearing be denied.

Plaintiffs excepted, and appealed.

The plaintiffs then prayed the court to indicate what amount of bond would be required to stop the execution sale, pending the appeal. His Honor declined to indicate the amount of bond, or to stop said sale pending plaintiff's appeal to the Supreme Court. Plain- (151) tiffs excepted, as an additional ground for their appeal.

Winston & Fuller for plaintiffs (appellant).

Manning & Foushee, Guthrie & Guthrie and Boone, Bryant & Biggs for defendants.

MONTGOMERY, J. The plaintiffs Rowland & Cooper are the common debtors of the other plaintiffs and the defendants, except Markham. The defendant Carr is a creditor by judgment lien of prior date to the incumbrances by way of mortgage of the other creditors.

The object of this action is to compel the judgment creditor to levy upon and sell the real estate of the debtors, all of which was conveyed

at different times and in separate parcels, by the rule of inverse order of alienation, that is, in the order in which it was conveyed in the respective mortgages; the allegations being that by such an order of sale all the debts can be paid, and that if the rule is not observed the other creditors, than the judgment creditor, will suffer.

An order was granted restraining the judgment creditor and the sheriff from selling any of the debtor's real estate under the execution issued upon the judgment, and upon an application to continue the order of restraint—for an injunction until the hearing—the motion was refused, and the restraining order dissolved.

There was no error in the course taken by his Honor. There was no allegation that the judgment or mortgage creditors were insolvent, and no allegation that irreparable loss would come to the plaintiffs if the restraining order was not continued. The main action is still pending, and whatever rights the plaintiffs may have, can be established in that suit.

The plaintiffs further excepted to the refusal of his Honor to (152) allow a bond in the nature of a supersedeas for the purpose of continuing the effect of the restraining order until the hearing, notwithstanding the order had been dissolved by his Honor. No such practice is allowable. "An appeal being merely the act of the party can not of itself affect the validity of the order of the Court, nor can it give new life and force to an injunction which the Court has decreed no longer exists." High on Injunction, sec. 893; *Green v. Griffin,* 95 N. C., 50.

No error.

Cited: Reyburn v. Sawyer, 128 N. C., 9.

LEN. H. ADAMS v. R. H. BATTLE AND J. N. HOLDING, EXECUTORS OF W. H. PACE.

(Decided 7 November, 1899.)

Deed of Trust—Rate of Commissions Therein—Change of Rate by Subsequent Parol Agreement—Statute of Limitations.

1. While no verbal agreement *contemporaneous* with the execution of an instrument under seal will be heard to contradict or vary its terms, a *subsequent* parol agreement, made in good faith between the same parties is admissible, especially when the result seems to be full justice, without infringement of any sound principle of law.

2. Where a deed of trust stipulated for 4 per cent. of commission on receipts and disbursements, as compensation for the trustee, a subsequent parol agreement between the trustee and the maker of the deed, that if there was no litigation respecting that trust, that only 2½ per cent. commissions should be charged, may be admitted in evidence to establish the substituted rate.

3. Where an action rests solely on a parol agreement it is barred by the three years statute of limitations, but where it is based on the contract in a deed, the three years statute does not apply.

CIVIL ACTION tried before *Brown, J.*, at April Term, 1899, of (153) WAKE Superior Court.

The complaint alleged that the testator of defendants, W. H. Pace, was plaintiff's trustee under a deed of trust for benefit of creditors, made on 22d January, 1890, with a provision of 4 per cent commissions to the trustee upon receipts and disbursements. That at the time, and subsequently thereto, it was agreed between them verbally, that the rate should be reduced to 2½ per cent, if there was no litigation and no unusual trouble connected with the discharge of such a trust, and that there was neither. That said trustee received and disbursed in the execution of the trust about $31,841.62½, and had and retained in his hands at the time of his death $2,467.01, that is, 4 per cent upon said receipts and disbursements. That said trustee acknowledged before his death to the plaintiff, that of the amount so retained he was entitled to only such sum as would amount to the 2½ per cent, and that the balance, amounting to about $894.93, belonged to plaintiff, and that he promised to pay the same. That said trust was executed and settled and all debts secured fully paid, and that there was still a surplus of the trust fund of $894.93 due the plaintiff, and for this amount the plaintiff sues the estate of said W. H. Pace.

The answer denied the debt and the allegations of the complaint constitute the plaintiff's claim; and as a second defense avers that the cause of action did not accrue within three years before suit brought. W. H. Pace died in April, 1893, defendants qualified as his executors May 1st thereafter. This action was commenced October 16, 1896.

There was verdict for plaintiff for $894.93. For which sum judgment was rendered, and defendants appealed.

Case on Appeal

This was a civil action, commenced October 16, 1896, and tried (154) at April Term, 1899, of WAKE Superior Court, before *Brown, J.*, and a jury.

The plaintiff put in evidence the deed of trust from himself and

wife to W. H. Pace, recorded in book 111, at page 194, of the Register's office of Wake County.

Plaintiff then introduced as a witness in his behalf Mrs. Len. H. Adams, wife of plaintiff, who testified: "After the trust was made and executed some days I heard an agreement between L. H. Adams and W. H. Pace. It was agreed between them that if there was no litigation in the courts respecting that trust Pace would charge only 2½ per cent on receipts and disbursements. Two and one-half per cent on each. This was the agreement."

Objection by defendants. Overruled.

Exception by defendants.

On cross-examination of this witness defendant offers to prove by witness and to offer records to prove that on March 20, 1892, plaintiff borrowed $1,300 of Pace, Trustee, and again borrowed from Pace, Trustee, $500 May 30, 1892. This was different trusteeships of Pace and the records offered showed mortgages given by plaintiff and the witness, his wife, to W. H. Pace for said borrowed money.

Plaintiff objected. Objection sustained.

Defendant excepted.

L. H. Adams testified in his own behalf: "I did most of work in settling trust. Received nothing for these services. Trustee hired me as a clerk for two months to sell out stock of goods. Not even a suit before a Justice of Peace. The trust was closed up before Pace's death but I don't know exact date. I mean by that Pace had sold all property in 1892 and I borrowed money and paid up balance of
(155) debts that property did not pay. All debts were paid in full. Pace died April, 1893, and never settled with me. Balance he owes me of funds in his hands from this trust is $894.93. Pace's entire commissions retained by him were 4 per cent, $2,467.01."

Defendants put in evidence the records of Wake Superior Court and showed thereby that the executors of Pace qualified May 2, 1893, and that notice to creditors was duly published in a newspaper in Raleigh for six successive weeks in the months of May and June, 1893, said notice being in the proper form and signed by the executors of W. H. Pace.

R. H. Battle, one of the defendants, testified that plaintiff presented his claim to us as Pace's executors and demanded payment of said executors only a few weeks before suit commenced, which was on October 16, 1896. Claim presented within few weeks before then and defendants refused payment and plaintiff brought suit to next term of court. Claim never presented until a few weeks before suit brought.

J. N. Holding, one of the defendants, testified that plaintiff presented his claim only thirty days before this suit commenced and not before that.

Prayer for special instructions handed up at close of the evidence, by defendants' attorney.

The defendants request the court to give the following special instructions to the jury:

It is alleged in the complaint, paragraph 9, that W. H. Pace executed and settled the trust imposed upon him by the deed from plaintiff prior to his, said Pace's, death; and if the jury believe that said Pace died in April, 1893; that such advertisement was made in May and June, 1893; and duly advertised for creditors to present their claims; that such advertisement was made in May and June, 1893, that plaintiff did not present or exhibit his claim to the executors (156) until September or October, 1896, then plaintiff's action is barred by the statute of limitations.

This instruction was refused, and defendants excepted.

The court charged the jury that if the evidence in this case is to be believed and they find the facts as testified to by all the witnesses, plaintiff is entitled to recover $894.93, with interest from October 16, 1896, when suit commenced. That this action is not barred by statute.

Defendants excepted.

Under these instructions the jury answered the issues in favor of plaintiff.

Motion by defendants for a new trial and *venire de novo*. Motion overruled. Exception by defendants. Judgment for plaintiff. Appeal by defendants. Notice of appeal waived by plaintiff. Bond fixed by Judge at $25.

S. F. MORDECAI,
Attorney for Defendants.

On which case on appeal is endorsed:

Service accepted; copy waived. May 8, 1899.
(Signed) ARGO & SNOW,
Per T. M. ARGO.

S. F. Mordecai for defendants (appellants).
Argo & Snow for plaintiffs.

FAIRCLOTH, C. J., writes the opinion.
FURCHES, J., writes dissenting opinion.
MONTGOMERY, J., concurs in dissenting opinion.

FAIRCLOTH, C. J. On January 22, 1890, the plaintiff, by deed, conveyed a large amount of real and personal property to W. H. Pace in trust to pay plaintiff's debts in the manner described, with power to collect, sell the property at private or public sale, and to do the (157) usual duties of a trustee in such cases. Pace died in April, 1893, and this action was brought October 16, 1896, and it is agreed that the trust was closed in the lifetime of the trustee, except as to the matter controverted in this action. The deed provided that the trustee might retain 4 per cent commissions on receipts and disbursements, that is, 8 per cent on the total amount, which was $2,461.01.

The defendants are the personal representatives of the trustee. The plaintiff was allowed to prove by parol that, some days after the deed was executed, Pace agreed with plaintiff that if there was no litigation in the courts respecting the trust he would charge only 2½ per cent on receipts and disbursements. He also proved that there was no suit brought, and there is no evidence of any unusual trouble in executing the trust. The defendant excepted to the admission of this parol evidence and to the charge of the Court in respect thereto. The verdict was for the plaintiff.

The defendants' contention is that the evidence is incompetent to prove that the parties agreed subsequently that the commissions should be less than specified in the deed, unless done in as solemn a manner as the deed was made, that is, under seal, under the maxim *eo ligamine, quo ligatur*. It seems that no verbal agreement *contemporaneous* with the execution of an instrument under seal will be heard to contradict or vary its terms. The effect of a subsequent agreement by the same parties has been much discussed by different courts, and in some of the states the matter is put to rest by legislation. But we are informed by counsel that the question has not yet been decided in our State, and we find no such decision.

It was an old ironclad maxim of the common law that an obligor would only be released by an instrument of as high dignity as that (158) by which he was bound, that is, being obligated by a seal he could be released only by an instrument under seal. Technically, this is the rule of modern times, unless changed by statute, but practically it is seldom enforced. To this rule, the exceptions were and are so numerous that seldom can the rule be applied. In an action on the bond or other sealed instrument, the debtor pleads and proves the actual receipt of the money by the obligee; no court could hesitate to hold this to be a release and discharge of the bond. Suppose the debt secured by a mortgage, a release and discharge need not be under seal. Suppose the principal of a note under seal pays the debt and the sureties are

sued on the same, would any court require them to show that their principal had been discharged under seal? Suppose again, that a landlord leases land for a term of years under seal, and during the term the premises are greatly damaged without any fault of the lessee, or that they have greatly depreciated in value, or have become partially unfit for the purpose intended, and the landlord, conscious of these and similar facts, agrees verbally with the lessee that, for the balance of the term, he will take less rent than is stipulated in the deed; would not the lessee be protected by such agreement? If proof of payment will discharge, why should not an agreement to discharge have the same effect between the same original parties?

It seems difficult to find a case where the parties, bound to each other by an instrument under seal, will not be discharged by parol proof of facts if they are sufficient in themselves to constitute a discharge. In such matters, the defenses are performance *in pais,* and are probably of more value to business men than the dignity of being sheltered by a seal. The chief reasons for the sacredness of the seal have ceased, since statutes and courts of equity have been liberally removing the hard places of the common law. The dignity of the seal is (159) due more to the original form of the instrument than to the real interest and intention of the parties.

Whether the trustee intended to retain 8 per cent commissions we are not informed, as he had recently before his death closed out the other trust matters, nor is this very material now. He was a practicing attorney and understood technicalities of the law, and we must assume that when he made the parol agreement he did so in good faith. We are led to the conclusion that the evidence was admissible and that the charge of the court was not erroneous.

The result seems to be full justice without the infringement of any sound principle of law.

2. Is the action barred by the three years' statute of limitations? If it rests solely on the parol agreement, it is barred. If the action is based on the contract in the deed, it is not barred.

It will be observed that by the terms of the parol agreement the trustee made no promise to pay the plaintiff anything, but only agreed to retain less commissions than those nominated in the deed, on certain conditions. The entire property passed to the trustee with an express trust impressed on it, and nothing appears to show that it was divested of the trust during the trustee's life. The trustee stated and rendered no account of his administration and no settlement appears to have been made between trustor and trustee. The plaintiff setting out the

trust deed, alleges that the trustee is due him the amount sued for, evidently meaning the difference between the rate of commissions. Now, if anything due the plaintiff remained in the trustee's hands at his death, it resulted to the plaintiff, whether so expressed in the deed or not. The plaintiff demands said sum in his complaint, and it was for the jury to ascertain the amount.

We are of opinion that the action is not barred, and that no error was committed on the trial.

Affirmed.

(160) FURCHES, J., dissenting. I can not concur in the opinion and judgment of the court in this case. The first question discussed in the opinion of the court, as to a discharge by parol evidence, seems to me to have no application. I can not see that any question of discharge is involved in the case.

The whole case, in my opinion, depends on the second question discussed in the opinion—the statute of limitations. It is clear to my mind that the plaintiff can not recover upon the contract contained in the deed of trust, which authorized the trustee to retain for his services 4 per cent on receipts and 4 per cent on disbursements; and it is admitted that he has retained no more than this per cent amounts to. The defendant owes the plaintiff nothing, according to the terms of the deed, which is admitted to contain the terms of the original contract between the parties. This being so—admitted to be so—the plaintiff has no cause of action against the defendant, unless it be upon the verbal contract alleged to have been made between Pace and the plaintiff some time after the date of the deed of assignment—the original contract. And as it is admitted in the opinion that if the plaintiff's cause of action has to rest on the verbal contract, it is barred by the statute of limitations, it seems to me that this admission closes the discussion, and I am of the opinion that there is error, for which a new trial should be awarded.

MONTGOMERY, J. I concur in the dissenting opinion.

(161)

JOHN H. JENKINS, W. T. JENKINS, MARY J. MERCER, JAMES K. JENKINS, REBECCA E. JENKINS, J. H. JENKINS, JR., JAMES R. JENKINS, *v.* IDA M. DANIEL, EXECUTRIX OF A. N. DANIEL, J. G. SPEIGHT AND WIFE, SARAH SPEIGHT.

(Decided 7 November, 1899.)

Mortgage of Wife's Land—Second Mortgage by Husband—Surety—Collateral Security—Extension of Time—Purchaser—Mortgagee.

1. The extension of time, without the consent of the surety, discharges the surety, or the security given by a third party.
2. If a wife signs her husband's note as surety and unites with him in the execution of a mortgage on her land to secure the debt, any stipulated extension of time without her consent discharges the lien on her land. The mortgagee would have no right to sell, and the purchaser would acquire no title.
3. But where there is no agreement to extend the time on the note secured by mortgage, and the husband gives a second mortgage to secure other indebtedness to the same mortgagee, and as additional security for the note, the second mortgage will merely operate as collateral security, and will not be construed as a stipulation for extension of time.
4. A sale under the first mortgage to pay off any balance due on the note passes a good title to the purchaser in fee, clear of any claim for rent or waste.
5. As between the mortgagors and mortgagee, the latter is liable to account for the price the land sold for and for the property contained in the second mortgage, and whatever is found to be due, if any, will inure to the benefit of the wife's heirs—to value of the land.

CIVIL ACTION heard before *Robinson, J.*, upon exceptions to report of referee filed by defendants, at November Term, 1898, of the Superior Court of GREENE County.

The plaintiff John H. Jenkins on the 10th August, 1888, along (162) with his wife, Mary F. Jenkins, since dead, executed a mortgage deed on the wife's land to secure a note for $150 signed by them both for a debt of the husband payable on 1st January, 1890, to A. N. Daniel, testator of defendant Ida M. Daniel.

On 12th February, 1890, the said John H. Jenkins executed a chattel mortgage to said A. N. Daniel to secure certain claims therein mentioned, and as additional security to the note secured in the first mortgage, and if the debts secured were not paid by November 15, 1890, the property to be sold and proceeds applied to the discharge of debts secured. Mary F. Jenkins, wife of said John H. Jenkins, died July 21, 1891, and the other plaintiffs are their children.

A. N. Daniel, mortgagee, exposed the land to sale in 1893, to pay off a balance due of $200 on the note and mortgage, and the defendant Sarah Speight became the purchaser at price of $320, and took a deed for the land.

A. N. Daniel has since died, leaving a last will and testament, in which defendant Ida M. Daniel was named executrix.

The object of this action is to set aside this sale, and for an account for rents, etc., on the ground that it was invalid, and that the purchaser acquired no title; that there was nothing due, sale improperly conducted, extension of time allowed without consent of Mrs. Jenkins, etc. There was a reference under The Code to Hon. James E. Shepherd, as referee, whose report was in all things confirmed by his Honor.

Finding of Fact.

1. That the land mentioned in the mortgage of the 10th of August, 1888, the same under which the sale in question was made, was the separate property of Mary F. Jenkins, the *feme* grantor therein, and that the indebtedness secured therein was the indebtedness of her husband, J. H. Jenkins, the other grantor therein.

(163) 2. That this latter fact, that is, that the said indebtedness was the husband's, does not appear from the face of the said mortgage; nor is there any evidence that Mrs. Speight, who purchased the land under the power contained in the said mortgage, had any notice, actual or constructive, thereof.

3. That at the time of the sale, under the power contained in the said mortgage, the mortgage debt due A. N. Daniel was about two hundred dollars. This the referee finds from the pleadings. (See paragraph 7 of the complaint.)

4. That Mrs. Jenkins died in 1891, having had issue by her said husband, and such issue are plaintiff herein.

5. The sale was made on the premises according to advertisement; that is to say, it was made in the public road in front of the gate of the residence of the said Jenkins, which residence was on the land of Jenkins, lying on the road opposite that sold and being within a short distance from said sale—not over a quarter of a mile. The sale appears to have been well known in the neighborhood, and there were eight or more persons present, three of whom were bidders. The sale was conducted fairly, and the said Jenkins was present, heard the bidding and made no objections in any respect.

6. After considering all of the testimony the referee finds that the price at which the land sold was fair and reasonable, and he is fur-

ther of the opinion that if the same had been sold at the court-house in Snow Hill, the county seat, a larger price would not have been obtained.

Conclusions of Law.

1. That in no aspect of the case is the plaintiff J. H. Jenkins entitled to any relief either in respect to the sale or to the rents. He was, as tenant by the courtesy, entitled to the possession of the land for his life, and his conduct at the sale estops him from making any claim against the defendants.

2. That the sale, having been fairly conducted, and the price (164) reasonable, the other plaintiffs are not entitled to equitable relief.

3. No demurrer having been interposed as to the misjoinder of causes of action, the referee is of the opinion that the true amount of the said mortgage debt be ascertained, and if the said purchase money was in excess of the indebtedness, that the plaintiff should recover such excess of the estate of said Daniel.

4. That as to plaintiff's contention, that the mortgage debt was by operation of law discharged or the remedy suspended by reason of the taking of the crop lien of 1890 (see Exhibit "A"), the only evidence before the referee is the said crop lien, and that of 22d February, 1888. (Exhibit "B.")

a. It is admitted by the pleadings that at least two hundred dollars was actually due on said mortgage at the date of the sale, and the referee can not find from the face of the said papers that the mortgage was by the operation of the law discharged by the taking of the crop lien of 1890 and the cancellation of the same.

b. That if all the debts secured in the mortgage were included in the crop lien of 1890 (and this is to be determined by inspection of the mortgage and liens, there being no other evidence as to this), the referee can not, upon the mere face of the paper, hold there was such a contract of forbearance as would discharge the surety of the wife. He is of the opinion that such lien as to the purchaser had only the effect of additional security.

c. That upon the whole case the referee is of the opinion that the said mortgage, upon which there was at the time of the sale an admitted actual indebtedness of $200, was not discharged by operation of law, and that as no proceedings were taken to arrest said sale and to the alleged equitable claims of Mrs. Jenkins or her heirs, (165) and as there is no evidence that the purchaser, Mrs. Speight, had any notice of such alleged equitable claims, and especially of the fact

that the debt secured by the mortgage was not a joint one, as appears from the face thereof, and inasmuch as the sale was fair and the price reasonable, the referee is of the opinion that the legal title acquired by her should not be disturbed, and especially should this be so in view of the insolvency of the parties rendering it impossible to place her in *statu quo.*

In considering this branch of the case the court has excluded the letter of Daniel addressed to the register of deeds.

The endorsement on Exhibit "B" by Daniel was a part of said exhibit, and the paper was put in evidence by the plaintiff without reservation, but in the view the referee has taken it is considered by him immaterial.

1. The undersigned respectfully recommends that judgment be entered that the plaintiffs are entitled to no relief against Mrs. Speight.

2. That the difference between the purchase money and the mortgage debt be ascertained and that judgment be entered for the same in favor of the plaintiffs and against Ida Daniel, executrix of A. N. Daniel.

3. That the defendants Speight recover their costs.

JAMES E. SHEPHERD, *Referee.*

The exceptions of the plaintiffs which were overruled sufficiently appear in the opinion.

Judgment in favor of defendants. Appeal by plaintiffs.

Geo. M. Lindsay for appellants.
H. G. Connor for appellees.

(166) FURCHES, J. On the 10th of August, 1888, the plaintiff John H. Jenkins borrowed of A. N. Daniel, the testator of the defendant Ida Daniel, the sum of $150, for which the said J. H. Jenkins and his wife, Mary F., executed their note to the said A. N. Daniel, due the 1st day of January, 1890; that at the same time they made and executed a mortgage to the said Daniel upon the land in controversy to secure the payment of said note and some other indebtedness; that the land so conveyed in said mortgage belonged to the *feme,* Mary F., then the wife of the said John H. Jenkins; that on the 12th day of February, 1890, the said John H. Jenkins executed a chattel mortgage and crop lien to said A. N. Daniel, in which it is stated to be "in consideration of $12, and one note due Bynum & Daniel, and one due A. N. Daniel, as described in the mortgage of February 22d, and August 10, 1888 . . . , and the further sum of $150, to be advanced from time to time

during the year as needed," . . . . conveying the following property, one mule, two iron axle carts, three head of cattle, one sow and pigs, all farming implements, one bay mare about eleven years old, and all other personal property of every description, not herein mentioned or described, also a lien on all crops, etc.

"And if by the 15th day of November, 1890, the aforesaid indebtedness has not been discharged by the proceeds of the sale of said crops or otherwise, then the party of the second part is authorized to take possession of said property and sell the same, or so much thereof as will satisfy the amount then remaining due, and all costs and expenses in any way incurred by said seizure and sale.

"But if said indebtedness shall be paid off and discharged by the 15th day of November, 1890, then this conveyance to be null and void."

On the 4th day of July, 1891, the wife, Mary F., died, leaving her husband, J. H. Jenkins, and the infant plaintiff, her surviving; and in February, 1892, the mortgagee sold the land at public auc- (167) tion on the premises, when the defendant Mrs. Sarah Speight, wife of the defendant J. Y. Speight, became the purchaser at the price of $320, and has paid the purchase money, and the mortgagee made her a deed therefor. The plaintiff J. H. Jenkins was present at the sale and made no objection thereto. All the children and heirs at law of Mary F. Jenkins were then, and seem to be still, minors under twenty-one years of age, and sue by their guardian, J. H. Jenkins. The mortgagee, A. N. Daniel, before the date of said sale, to wit, on the 1st day of April, 1891, caused to be canceled all the mortgages he had against the plaintiff J. H. Jenkins, except that of the 10th of August, 1888, under which the sale was made, and the defendant Speight bought.

The plaintiffs admit in their complaint that there was about two hundred dollars due on the note of the 10th of August, 1888, at the date of the sale. But they allege that, as no place was named in the power of sale contained in the mortgage, the sale should have been made at the courthouse in Green County; that on account of the sale not having been so made, the land sold for much less than its value; that defendant Speight has been in possession of the land ever since the sale, receiving the rents and profits, and has damaged the land by tearing away the fences, and has cut and sold a quantity of timber off the land, which, when taken together, amount to more than the balance due on the note of $150, which should be applied to its discharge. The plaintiff further contends that the discharge of the other mortgages in which the $150 was secured was a discharge of the debt and lien upon the land of the wife, Mary F. Jenkins, and mother of

the other plaintiffs, and they contend on the argument here that the mortgage of February, 1890, extended the time for enforcing the mortgage of the 10th of August, 1888, and that the mortgage security
(168) was thereby discharged; that the mortgage only conveyed a life estate in the land.

Of these many contentions of the plaintiffs, there is but one about which it seems there should be any doubt, and that is the extension of time caused by the mortgage of February, 1890.

It is admitted by the plaintiff that there was about two hundred dollars due on the note of $150, at the date of the sale; and this being so, it authorized the sale. *Jordan v. Farthing,* 117 N. C., 181, where it is held that if one dollar is due it authorizes the sale. This was said in a case where there was no claim that the lien of the mortgage had been discharged, and that contention is the serious element that enters into this case. The debt secured was that of the husband, and the land mortgaged as security was that of the wife, and was only security for the husband's debt. *Sherrard v. Dixon,* 120 N. C., 60.

The extension of time without the consent of the surety discharges the surety, or the security given by a third party. *Bank v. Summey,* 119 N. C., 591; *Sutton v. Walters,* 118 N. C., 495.

This presents the question whether the mortgage of February, 1890, extended the time of payment of the note of the 10th of August, 1888, secured in both mortgages. If it does, it was a discharge of the lien of the mortgage of the wife on her land. The mortgagee would have no right to sell under the same, and the defendant Speight would acquire no title by reason of said sale and her purchase.

It is held in *Harshaw v. McKesson,* 65 N. C., 688, that time for the payment of the debt secured by the mortgage, in that case, was extended. But in that case the time was extended by the express terms of the mortgage; the mortgage was given to secure a debt then past due
(169) and unsecured, and the court held that the time agreed to be given was the only consideration for giving the mortgage.

It is also held in *Kane v. Cartesy,* 100 N. Y., 132, that giving a second mortgage, securing a debt secured by a former mortgage, in which the time stated for the foreclosure of the second mortgage was at a later date than that fixed in the former mortgage, was an extension of time of payment, and discharged the lien of the first mortgage.

This case, it must be admitted, is very much like the one under consideration.

While, on the other had, it is distinctly held not to be an extension of time in *Emes v. Weddowson,* 19 Eng. C. L. Rep., 316, (C. & P., 151),

in a case very much like the one now under consideration, where it is said "that an assignment of property for the purpose of securing debts due and to be due, with a power of sale upon giving six months notice, is only a collateral security, and, without a special clause to that effect, does not suspend the remedy by action against the debtor."

The same doctrine is held to be the law in 2 Brandt on Sureties and Guarantees, sec. 367, *to wit*: "It has been repeatedly held that the mere fact that the creditor takes from the principal a mortgage or trust deed of property as collateral security for the debt, does not of itself, in the absence of an agreement to that effect, extend the time or discharge the surety."

In *Meguiar v. Groves,* 1 Fed. Rep., 279, it is said: "The giving of a chattel mortgage to secure a preëxisting debt will not discharge sureties of the debtor, unless the mortgage on its face purports to extend the time of payment of the debt."

Where a mortgage is given by the principal debtor to secure other indebtedness, and a former debt is included in such mortgage, which already has security, and the time of foreclosure of said mortgage is at a later date than the maturity of the doubly-secured debt, (170) this mortgage will be held to be only collateral security to the doubly-secured debt, and not an extension of time, unless it be agreed as a consideration that the time for the enforcement of the doubly-secured debt should be extended, and that such second mortgage did not discharge the original security. Brandt, *supra.*

The case of *Harshaw v. McKesson, supra,* is distinguishable from this case and can not control our opinion here. In that case there was an express agreement for an extension of time, which was the only consideration for the mortgage. That is not so in this case. Here, the second mortgage is given to secure other indebtedness, and for the purpose of obtaining future advances to make a crop. There is no contract or stipulation or agreement to extend time on the note for which the former mortgage was given, and we can not, by construction, give it that meaning and effect.

It seems to us that this second mortgage was or might have been a benefit to the first security, as it became an additional security for the debt, furnished by the principal debtor, which the original security could have compelled the trustee mortgagee to exhaust before the first mortgage would be liable. But this was a matter between the first security and the mortgagee and does not extend to the purchaser at the mortgage sale, as it is admitted that there was a considerable balance due on the first mortgage debt at the time of the sale.

The mortgage conveyed the fee simple estate under section 1280 of The Code.

We do not think the other grounds urged by plaintiff invalidate the sale. It is found by the referee to have been open and fair, and that the plaintiff J. H. Jenkins was present and did not object; that the land brought a fair price, and according to the evidence (in the opinion of the intelligent referee) as much as it would have (171) brought if sold at the courthouse of Green County, which was a considerable distance from the land; and that there was no place specified as to where the sale should take place.

The sale being valid, it conveyed the title to the land to the purchaser, Speight, free of any trust relations between her and the mortgagors, and she is not liable to account for rents and profits, or for waste.

But as between the mortgagors and mortgagee, between whom the trust relations existed, the mortgagee is liable to account to the mortgagors for the price the land sold for, and also for the property conveyed in the second mortgage; and whatever is found to be due, if anything, will inure to the benefit of the infant plaintiffs to the value of the land. And the defendant Ida Daniel being the representative of the trustee, it will devolve upon her to account for these funds. *Hall v. Lewis,* 118 N. C., 517; *McLeod v. Bullard,* 84 N. C., 515.

It was suggested by defendant on the argument that in any event J. H. Jenkins had conveyed his interest, which according to plaintiffs' contention was a life estate (tenant by the courtesy), and that plaintiff could not recover on that account, as that estate had not terminated. However this may be (and we do not decide it), we have preferred to put our judgment upon the merits of the case as affecting the rights of the parties. That the judgment of the court below be affirmed as to the defendants Speight and wife. But if the plaintiffs are so advised, the case should be continued as to the defendant Daniel that the matters may be inquired of, as indicated in this opinion.

Modified and affirmed.

Cited: Fleming v. Barden, 126 N. C., 457; S. C. 127 N. C., 217; *Smith v. Parker,* 131 N. C., 471.

(172)

L. K. ROBERTS v. TOWN OF SOUTHERN PINES.

(Decided 14 November, 1899.)

Town Commissioners—Annual Statement—Penalty—The Code, Section 3816.

1. Town Commissioners are required by The Code, sec. 3816, annually to publish an accurate statement of taxes, and expenditures by them, and for what purpose, under a penalty, for failure, of $100, to any person who will sue for the same.

2. Where a board of town commissioners has failed to comply with the act, their failure subjects them to the penalty, from which they will not be relieved, by their successors supplying the omission.

CIVIL ACTION for the penalty of $100, heard upon appeal from the justice's court, before *Robinson, J.,* at January Term, 1899, of the Superior Court of MOORE County.

The plaintiff complains for the recovery of $100 penalty due under section 3816 of The Code, for failure of the defendants to make the required annual statement of taxes and expenditures between May, 1897, and May, 1898. The defendants denied their liability. Judgment was rendered in favor of plaintiff for $100, and defendants appealed.

Case on Appeal, as Agreed.

This was a civil action tried before *Robinson, J.,* at January Term of the Superior Court of Moore County.

This cause was heard upon the pleadings and the following admitted facts, by the Court:

It was admitted that Southern Pines was duly incorporated; that the defendants were duly elected and qualified commissioners of said town on the first Monday in May, 1897, and that their term expired on the first Monday in May, 1898; that they failed to publish an accurate statement of the taxes levied and collected in said town (173) between the first Monday in May, 1897, and the first Monday in May, 1898, together with a statement of the amount expended by them between said dates, on or before the first Monday in May, 1898—but their successors, elected the first Monday in May, 1898, did make such publication between the 9th and 14th of May, 1898, and that after the first of May, 1898, the plaintiff brought suit for the recovery of the penalty given by statute.

The defendants asked the Court to hold that if their successors made publication, as required by law, in a reasonable time after the first Monday in May, 1898, that the plaintiff could not recover. This his Honor refused, and rendered judgment in favor of the plaintiff, as set out in the record.

Defendants excepted, and appealed to the Supreme Court.

John D. Shaw & Son and J. McN. Johnson for appellant.
W. E. Murchison for appellee.

MONTGOMERY, J. The defendants were commissioners of the town of Southern Pines for the year beginning the first Monday of May, 1897, and ending the first Monday of May, 1898. Under section 3816 of The Code the commissioners of towns are required to publish a statement, annually, of the taxes levied and collected in the town, together with a statement of the amount expended by them, and for what purpose. The penalty of $100 is denounced against any board of commissioners who fail to comply with that section. The defendants in this case did not, during the year in which they were commissioners, make the publication of the statement of receipts and disbursements as required by the statute, but such publication was made by their successors in office elected on the first Monday of May, 1898, within
(174) a few days after their election and qualification. The counsel of defendants requested the court to instruct the jury that if their successors in office made the publication required by law within a reasonable time after the first Monday in May, 1898, then the plaintiff could not recover. The prayer was refused, and the exception brings up the only question for decision.

The plain meaning of the statute is that each governing board of towns and cities shall give an account of its own stewardship. The requirement is that each board shall state and publish, not necessarily in a newspaper, the amount of the tax levy which they have imposed upon the citizens, the amount that has been collected, and how it has been disbursed. It is easy to comply with the statute. The amount of the tax levy is known to them, for they make it; the amount collected ought to be known from the reports of the collecting officer and the treasurer, and their own records disclose the manner in which the public funds have been disbursed. Of course, if the collecting officer, or the treasurer, refuses or fail to make reports of collections, the commissioners will be blameless if they are guilty of no *laches* in the effort to compel such reports, and set this out in their statement. The publication required of town commissioners should embrace all of

the matters required by the statute up to the last day of their official term. The necessity and propriety of such publications are apparent. They keep the town communities informed of the government of the town in respect to its cost, and also as to whether it has been economically or extravagantly conducted. Besides, the commissioners of towns and cities accept, if they do not seek, their offices, and they should be anxious to make a public statement of the manner in which they discharge their trust.

We do not know what motive influenced the informer in this particular case to sue for the penalty, but the language of the (175) statute is plain, and upon it we are to declare its meaning.

There was no error.

L. F. MURRAY v. JOHN A. SOUTHERLAND AND KINCHEN CARTER.

(Decided 14 November, 1899.)

Sale of Land for Assets—Fraud—Innocent Purchaser—Nonsuit After Appeal and Affirmation—Correction of Judgment—Practice.

1. An appeal from a judgment is of itself an exception thereto.

2. A judicial sale of land can not be collaterally impeached in an independent action to recover the land. There must be a direct proceeding to vacate the judgment, either by motion in the cause, if in a partition case, or by an independent action, as in other cases, at option of the party.

3. If an independent action is resorted to in such partition case, in order to avoid a multiplicity of actions, a prayer to vacate may be united with a prayer for recovery of the land.

4. If fraud is the alleged ground for relief, it must be specifically stated, and there must be an allegation that the purchaser participated in the fraud or bought with notice thereof, and was not an innocent purchaser for value and without notice. The Code, sec. 1896.

5. If a judgment of dismissal is rendered below upon the pleadings, when a judgment of nonsuit was intended, the plaintiff's remedy is by motion in the cause, and this can be done even after appeal and affirmation of the judgment.

CIVIL ACTION to recover land, tried before *Bryan, J.*, at September Term, 1899, of PENDER Superior Court, and heard upon the pleadings, a jury trial having been waived, except as to damages in case the Court should hold that plaintiff is entitled to recover.

(176) The pleadings are substantially stated in the opinion. His Honor adjudged that the plaintiff take nothing by his action, and that the defendants go without day and recover of plaintiff costs of suit.

Plaintiff excepted to the judgment, and appealed to the Supreme Court.

J. D. Kerr for appellant.
Allen & Dortch and J. T. Bland for appellee.

CLARK, J. This is an action by the heirs at law of James W. Murray to recover the real estate of which he died seized and possessed. The defendants answer that the land was sold under proceedings to make assets to pay debts, sale confirmed, purchase-money paid, and deed made to purchaser from whom by mesne conveyances title has passed to these defendants. The plaintiff replies, admitting these allegations, but says he is informed and believes that the proceedings set out "were the result of a conspiracy participated in by said administrator and others to defraud plaintiff, who was then a minor of tender years, out of his land as described in the complaint herein, and did defraud him of the same by said proceedings, which plaintiff is informed are irregular, against the course and practice of our courts, illegal and void." Upon the complaint, answer and reply, the court adjudged that "the plaintiff take nothing by his action, and that the defendants go without day and recover of plaintiff costs of suit."

There are no exceptions, but the appeal is itself an exception to the judgment, as that is matter appearing upon face of the record proper. *Thornton v. Brady,* 100 N. C., 38; *Appomattox Co. v. Buffaloe,* 121 N. C., 37.

(177) It is true that when land has been sold under decree of court the sale can not be collaterally impeached in an independent action brought to recover the land. *Sumner v. Sessoms,* 94 N. C., 371; *Smith v. Gray,* 116 N. C., 311.

But a direct proceeding to attack a judgment for fraud can not be brought except in partition proceedings, Code, sec. 1896, by a motion in the cause, but it must be an independent action. *McLaurin v. McLaurin,* 106 N. C., 331; *Smith v. Fort,* 105 N. C., 446. The power to make such attack by a motion in the cause in partition cases is optional and does not deny the right to bring an independent action as in other cases. In such independent action there may be joined (to avoid multiplicity of actions) a prayer upon proper allegations to set aside the judgment and sale and all proceedings connected therewith on the ground of fraud and irregularity, and a prayer that the plaintiff re-

cover possession of the land which had been illegally sold. Both these are in the complaint, but in inverse order—the demand for a recovery of the land being in the complaint and the allegation of fraud with prayer to set aside the sale being in the reply. But should we treat the plaintiff's action as being one to set aside for fraud and irregularity, the judgment and sale in the petition to sell the land to make assets, with a demand joined for recovery of the land, the allegations are wholly insufficient. The allegation of a conspiracy to defraud by the "administrator and others" is too indefinite; nor is there any allegation that the purchaser participated in the fraud or bought with notice thereof; nor that the defendants had knowledge of such fraud and were not innocent purchasers for value and without notice. Code, sec. 1896; *Harrison v. Hargrove,* 120 N. C., 96; *England v. Garner,* 90 N. C., 197, and there are other defects.

The courts do not favor "judgment upon the pleadings," but the pleadings of the plaintiff in this case are so defective that the (178) Court below properly held that he could not recover. His counsel rather indicated in this Court that the appeal was not so much because of expectation to sustain his pleadings as an effort to get rid of the judgment, which, in its present shape, might be an estoppel *(Allen v. Sallinger,* 103 N. C., 14), upon a new action more regular in form, and that his Honor only intended to sign a judgment of nonsuit. If so, the plaintiff's remedy is by a motion below in this cause to correct the judgment into one of nonsuit, if such was the judgment ordered, and which the judge intended to sign. *Brooks v. Stephens,* 100 N. C., 297; and this can be done notwithstanding this appeal to this Court and our affirmation of the judgment as it appears in the record. *Beam v. Bridgers,* 111 N. C., 269.

Affirmed.

Cited: Rhodes v. Rhodes, post, 193; *Griffith v. Richmond,* 126 N. C., 380; *Wilson v. Lumber Co.,* 131 N. C., 164.

(179)

J. C. McCASKILL v. McKAY McKINNON.

(Decided 14 November, 1899.)

Homestead—Reallotment—Act 1893, Ch. 149—Equitable Action, When Proper.

1. If it appears, upon a reallotment of homestead, that the value thereof has increased, it is immaterial in point of law, whether the increase had

come in the market value or in the intrinsic value, the effect is the same—the homestead is not to exceed in value the sum of $1,000.

2. If the increase is 50 per cent or more, the statute of 1893, ch. 149, enables the creditor to have a reallotment in a proceeding before the clerk, in aid of an execution in the sheriff's hands. If the increase is less than 50 per cent the judgment creditor can proceed by suit in the nature of an equitable action, to subject the excess to his debt. *Vanstory v. Thornton*, 110 N. C., 10.

3. Where a portion of the land included in the allotment was subject to a mortgage prior thereto, and has since been sold thereunder, in making the reallotment it must clearly appear that this portion was not included in the revaluation.

4. The real and only matter before the clerk under the act of 1893, is whether or not the homestead of defendant has appreciated in value as much as 50 per cent since the original allotment.

5. *Semble*, in the allotment of homestead the appraisers properly estimated the value of the interest of the homestead in the land, taking into consideration certain encumbrances upon it, and assigned to him his *interest* in the land, and not the *corpus* itself.

Proceeding for reallotment of homestead of defendant, before the clerk, under act of 1893, ch. 149, upon alleged increase of 50 per cent in value since last allotment, heard upon affidavits, and from his decision in favor of plaintiff there was an appeal by defendant to the Judge, which was tried before *Timberlake, J.*, at September Term, 1899, of the Superior Court of Richmond County, who rendered the following judgment:

(180) This cause coming on to be heard, and being heard by consent of all the parties at September Term, 1899, of the Superior Court of Richmond County, Hon. E. W. Timberlake, Judge presiding, after hearing all the evidence submitted by the parties, and the argument of the counsel, the court doth find and adjudge as follows:

1. That all the findings of facts found by the clerk of the Superior Court be stricken out except that one which declares that the homestead of the defendant, McKay McKinnon, allotted in 1877, has probably appreciated in value 50 per centum or more since the said allotment, and as to that the decision of the clerk is hereby affirmed.

2. That all of the objections and exceptions filed by the defendant are hereby disallowed and set aside.

3. That in the opinion of the court the said homestead of the defendant has probably appreciated in value 50 per centum since the last allotment.

4. That the order of the clerk adjudging a reallotment of the homestead be and the same is hereby affirmed.

5. The court doth further order and adjudge that the sheriff be and he is hereby directed to allot the judgment debtor his homestead in the same manner as if no homestead bad been allotted.

6. That the plaintiff recover of the defendant the costs incurred in this proceeding.

E. W. Timberlake,
Judge Presiding.

Defendant excepts to judge overruling his exceptions to clerk's judgment; also to striking out finding of facts by clerk; also to his finding that the homestead has increased in value 50 per cent, and ordering reallotment. Exceptions overruled.

From this judgment the defendant appeals to the Supreme Court.

John D. Shaw & Son for appellant. (181)
J. H. Cook for appellee.

Montgomery, J. This proceeding was begun under the provisions of chapter 149 of the Laws of 1893, to have a reallotment of defendant's homestead, because of its alleged increase in value of 50 per centum since the last allotment thereof. It would appear from a reading of the original homestead allotment that the appraisers did not allot the homestead in the *corpus* of the land, but that they estimated the value of the interest of the homesteader in the land, taking into consideration certain encumbrances upon it and assigned to him "his interest in" the land. It further appeared that in the partition of the land of Daniel McKinnon, father of the defendant, lot No. 1, the same tract the interest in which the appraisers allotted to the homesteader, the defendant, fell to the share of the defendant, valued at $4,000 and charged with the payment of $2,000 in favor of other shares for equality of partition, and upon 80 acres of which there was at the time of the allotment a mortgage of $900. The appraisers valued the interest of the homesteader at $600. Taking all of these facts together it would seem to be clear, if nothing else appeared, that the land itself was not allotted to the defendant as a homestead, but only his interest in the same, considering the encumbrances. But it is to be seen further, from the affidavits of two of the appraisers, that they allotted the whole 300 acres as a homestead although the same had been valued in the partition proceedings at $4,000. Those inconsistencies produce troublesome complications, and while a statement of them might have been left out, yet they will serve to explain more clearly the matters to be discussed in the consideration of the questions involved in this

(182) case. The application of the plaintiff, a creditor of the defendant by judgment—execution on which had been issued and was in the hands of the sheriff when the proceedings were commenced—was heard by the clerk upon numerous affidavits filed by both plaintiff and defendant as to the value of the homestead. The clerk made numerous findings, nearly all of which the defendant excepted to, and all of which his Honor struck out except the one which declared that the homestead of the defendant had probably appreciated in value 50 per centum or more since the last allotment, and that finding his Honor affirmed.

All of the exceptions and objections filed by the defendant were disallowed and refused, and the order of the clerk ordering a reallotment of the homestead affirmed, the sheriff being instructed to have the allotment made in the same manner as if no homestead had ever been allotted. The defendant excepted to the judgment rendered by his Honor, especially because his Honor struck out the findings by the clerk Nos. 9, 10 and 11, which in substance were (No. 9), that the defendant—homesteader—had done nothing in the way of improving the land or in making additions to the buildings by which the homestead was appreciated in value, but that the homestead was increased in value because the town of Maxton, 2 miles distant, had been built up and improved, and that by the building up and improvement of the town, the surrounding territory, including the homestead, had increased in value 50 per centum; (No. 10), that the homestead had increased in value 50 per centum, and (No. 11), that in estimating the value of the homestead he (the clerk) did not consider the value of the 80-acre tract, upon which there was a mortgage of $900 when the homestead was allotted, and which had been sold before this proceeding was begun.

(183) The real and only matter before the clerk was whether or not the homestead of the defendant had appreciated in value as much as 50 per cent since its allotment in 1877. It appeared on the hearing before the clerk that 80 acres of the homestead lying nearest to the town of Maxton had been sold under a mortgage executed prior to the time of the allotment of the homestead. And it appeared from all the testimony on that point in the affidavits filed by the plaintiffs that the increased value of the homestead was due not to improvements in the quality of the land or upon the buildings, but only because the town of Maxton had been built up and greatly improved after the allotment of the homestead, by means of which the market value of the surrounding lands was increased. To determine, therefore, the value of the homestead at the time of the hearing, it was necessary to find the value of what was left after the sale of 80 acres of it under the mortgage, for a resident debtor at all times, under the Constitution and

laws, is entitled to have exempted from execution a homestead of the value of $1,000.

The clerk made a finding, as we have seen, that he did not consider the value of the 80-acre tract which had been sold under the mortgage in estimating the value of the homestead, but upon a painstaking examination of the whole record it appears that the finding was made without any evidence whatever to support it. We have carefully examined each and all of the affidavits, and there is nothing in either of them which puts directly or indirectly any valuation upon that part of the homestead remaining after the sale of the 80 acres under the mortgage, or upon the value of the 80 acres separately. The affidavits each and all tend to prove the value of the lands allotted as a homestead to the defendant in 1877, that is the value of the whole including the 80 acres. The finding of the clerk on that point having been made without evidence to support it, it follows therefore that his Honor was in error in affirming that finding of the clerk.

All the other findings of the clerk not connected with the al- (184) leged increased value of the original homestead, less 80 acres sold under the mortgage, at the time of its allotment, and at the time of the hearing, was irrelevant in the view of showing the percentage of increase, if any, and there was no error in his Honor's striking them out. Especially was the defendant not prejudiced by the striking out of the finding number 9 by the clerk, for it is totally immaterial if the homestead has been increased in value 50 per cent since the allotment whether that increase had been affected through the money and labor of the defendant by improvements upon the land and buildings, or by improved conditions growing out of the building up of a town in close proximity to the homestead. It is immaterial in point of law whether the increase had come in the market value or in the intrinsic value. In either event the effect is the same. The language and the meaning of the Constitution is perfectly clear that a debtor of this State who takes advantage of the homestead provision can only have the advantage of a homestead of the value of $1,000. If the increase is less than 50 per cent the creditors can proceed in the nature of an equitable action to subject the excess to their debts. *Vanstory v. Thornton,* 110 N. C., 10. If the increase should be 50 per cent or more, the statute of 1893, which we have referred to, enables a creditor to have a reallotment.

There was error in the ruling of his Honor in the particulars set out in the opinion.

Error.

(185)

HIRAM NORTON v. W. H. McLAURIN AND W. H. FITTS.

(Decided 14 November, 1899.)

Motion to Set Aside Judgment—Excusable Neglect—Of Counsel—Of Client—The Code, Sec. 274—Judgment, When Final—Appeal.

1. The findings of fact by the judge are final, unless:
   (a) Upon an exception that there was no evidence as to some fact found.
   (b) Upon failure to find material facts.
   (c) Or, that after a correct finding that there was excusable negligence, the judge grossly abused his discretion in setting aside or refusing to set aside a judgment.
   Cases within these excepted instances, are appealable.

2. The discretion to set aside a judgment is not given by the statute (Code, sec. 274), unless there has been excusable neglect. If the judge finds correctly that the negligence was inexcusable, that ends the motion; if he finds correctly that the negligence was excusable, his discretion to set aside, or not, is irreviewable, unless in case of gross abuse of discretion.

3. The negligence of counsel will not excuse, if the client himself has been neglectful.

4. Before granting an application to set aside a judgment, the court should find, as a material fact, that the defendant has a meritorious defense.

CIVIL ACTION heard before *Robinson, J.*, at May Term, 1899, of RICHMOND Superior Court, upon a motion by defendants to set aside a judgment rendered at April Term, 1899, for excusable neglect, under section 274 of The Code. Motion heard upon affidavits and counter affidavits. His Honor found the following facts, and rendered the following judgment:

This cause coming on to be heard upon motion of defendant to
(186) set aside the judgment rendered at April Term, 1899, on account of the excusable neglect of defendants, the court finds the following facts, viz.:

That summons in said action was issued January 4, 1899, and personally served on the defendants on January 6, 1899; that the complaint was filed on January 23, 1899, during the return term, and John D. Shaw, Jr., had notice of the fact that said complaint would then the filed; that no order was made by the court allowing the defendants time to file answer or bond, the action being an action of ejectment, but the attorneys of defendants supposed, and had reason to suppose, a general order had been made for time to file pleadings in said cause;

that at the April Term, 1899, of said court, on Tuesday of said term, H. F. Seawell, one of the attorneys for the plaintiff, in open court moved for judgment by default for want of answer and for want of a bond; that said Seawell did not know who was the attorney for defendant, or whether any member of the bar appeared for said defendants, no attorney being marked on the record; that at said time J. D. Shaw, Jr., attorney for the defendants, was in the court-room, and if he had been paying any attention would have heard said motion, but said attorney was not advertent to said motion, and the matter was not expressly called to his attention; that on the said next day a general order was entered to allow 30 days to file complaints and 30 days thereafter to file answers; that no order for time to file bond was made; that the judgment herein was regularly entered, and on the 20th day of May, 1899, execution was issued in said cause on said judgment, which was the first actual notice to defendants of the taking of said judgment; that up to said issuance of execution no answer had been filed by either of said defendants and no bond filed; that said John D. Shaw, Jr., is solvent:

Whereupon, the court, in the exercise of its discretion, adjudges (187) that said judgment be set aside on account of the excusable neglect of defendants, and said defendants have 30 days after the adjournment of this court in which to file an answer and bond required by the statute upon these conditions, which the court adjudges to be reasonable and just: i. e., that said defendants execute a bond in the sum of $1,200, payable to the plaintiff, conditional for the faithful payment to said plaintiff of all damages which he may sustain by reason of any trespass upon the lands involved in said action since the 4th day of January, 1899, until the final determination of this action; that said bond be made and justified before, and approved by, the clerk of this court, within 20 days, and unless this part of this judgment is complied with within the time prescribed, then the judgment of April Term, 1899, be not set aside, but the same to remain in full force and effect.

W. S. O'B. ROBINSON,
Judge Presiding.

To the foregoing finding of facts the plaintiff excepted, and from the judgment rendered the plaintiff appealed to the Supreme Court.

Seawell & Burns for appellant.
J. D. Shaw & Son for appellees.

CLARK, J. This is a motion to set aside a judgment for excusable neglect under The Code, section 274. The findings of fact by the judge

are final (*Weil v. Woodard,* 104 N. C., 94; *Albertson v. Terry,* 108 N. C., 75; *Sykes v. Weatherly,* 110 N. C., 231), unless upon an exception that there was no evidence as to some fact found by him, (*Marion v. Tilley,* 119 N. C., 473) or failure to find material facts, *Smith v. Hahn,* 80 N. C., 241. Upon the facts found the judge finds as a conclusion of law whether there has or has not been excusable neg-
(188) lect, and from such conclusion either side may appeal. *Winborne v. Johnson,* 95 N. C., 46; *Weil v. Woodard, supra.* If he finds correctly that the negligence was inexcusable, of course that ends the motion to set aside the judgment. If he finds correctly that the negligence was excusable, then whether he will or will not set the judgment aside is in his irreviewable discretion (*Manning v. R. R.,* 122 N. C., 824; *Stith v. Jones,* 119 N. C., 428; *Sykes v. Weatherly supra; Winborne v. Johnson, supra,* and cases therein cited), unless in case of gross abuse of discretion (*Wyche v. Ross,* 119 N. C., 174), but the discretion to set aside is not given by the statute (Code, 274), unless there has been excusable neglect. This is a summary of the cases on this subject. From this it will be seen that no appeal lies except from the finding of law, upon the facts found, that there was or was not excusable negligence; save in the rare cases when it is excepted that there was no evidence to support a given finding of fact or a failure to find material facts, or that after a correct finding that there was excusable negligence, the judge grossly abused his discretion in setting aside or refusing to set aside a judgment.

In this case the judge found that the summons was duly served on defendants more than ten days before court, and a verified complaint filed within the first three days of the first term, that no order was made extending time to file answer and bond in this case, nor any general order of that kind, but defendants' attorney had reason to believe a general order had been made at that term giving time to file pleadings; that at the second term of court no attorney having yet appeared or entered his appearance for defendants, no answer or demurrer being filed, nor any bond filed as required by The Code, sec. 237 (this being an action of ejectment), judgment was taken in open court by default final for the land and by default and inquiry as to the
(189) damages, which judgment was regularly taken and entered up, the defendants' counsel being then present court, and "if paying attention would have heard the motion"; that the next day a general order was made allowing 30 days to file pleadings, but no order was made to extend time for filing defense bonds. It is further found as a fact that the defendants' attorney is solvent.

Upon these findings of fact the court adjudged there was excusable negligence, and in his discretion set the judgment aside. The latter action would have been irreviewable if the finding of law had been correct that there was excusable neglect. But the negligence was not excusable. (1) In the late case of *Vick v. Baker,* 122 N. C., 98, it is said: "It does not appear, and it is not averred, that the defendants filed the bond required by section 237 of The Code, or were excused from filing it, and the judgment by default was authorized by The Code, sec. 390 *(Jones v. Best,* 121 N. C., 154), even if there had been excusable neglect in failing to file answer." This case is stronger than either of the two cases just cited, for it appears affirmatively that the defense bond was not filed even at the second term, and that no order either general or special, was made to extend time for filing it. This bond, The Code, sec. 237, requires the defendant, in actions to recover real estate, to file before he can answer or demur. The failure to file this bond was the negligence of the defendant himself, and no excuse whatever is shown relieving him from the judgment authorized by The Code, sec. 390, upon his failure to file it. When a man has business in court, it is his duty to attend to it, and at the proper time.

Besides (2), the neglect of counsel will not excuse if the defendant himself has been neglectful *(Manning v. R. R., supra),* and it is not shown that defendants took any interest in the case, attended court, gave any instructions to their attorney, or asked any from (190) him. The employment of counsel did not relieve them of all attention to the case. It was still their duty to look after the matter and give the case at least "such attention as a man of ordinary prudence usually gives to his important business." *Roberts v. Allman,* 106 N. C., 391; *Whitson v. R. R.,* 95 N. C., 385; *Henry v. Clayton,* 85 N. C., 371; *Sluder v. Rollins,* 76 N. C., 271. The burden was upon the defendants to show this, and they have not shown that they gave the case any attention whatever, and this is inexcusable negligence. *Whitson v. R. R., supra; Cowles v. Cowles,* 121 N. C., 272. It does not appear, except inferentially, that they even had counsel employed at the first term. Further, it is not even found by the Court, nor was he asked to find, that the defendants had a meritorious defense should the judgment be set aside. *LeDuc v. Slocomb,* 124 N. C., 347; *Mauney v. Gidney,* 88 N. C., 200.

Judgment below is reversed.

Cited: Credle v. Ayers, 126 N. C., 15; *Koch v. Porter,* 129 N. C., 137; *Clement v. Ireland, ib.,* 222; *Pepper v. Clegg,* 132 N. C., 313, 316; *Osborn v. Leach,* 133 N. C., 428; *Stockton v. Mining Co.,* 144 N. C., 596.

(191)

LUCRETIA RHODES AND MARY RHODES v. MARTIN RHODES, J. M. McPHERSON, MARY McPHERSON, ISABELLA McPHERSON, T. J. McPHERSON, HUGH McPHERSON.

(Decided 14 November, 1899.)

Partition Proceedings—Publication for Defendant—Defense After Judgment—Section 220 of The Code.

1. The defense intended to be allowed, under section 220 of The Code, to one who has not been actually, but only constructively in court (by publication) is not confined to matters which, if pleaded in apt time would defeat the action.

2. Being a remedial statute, a just construction allows the party against whom a judgment has been taken to set up any exception which would have prevented or modified the judgment, *e grege*, inequality of partition.

MOTION to set aside judgment in proceeding for partition of land, heard on appeal from the clerk of MOORE Superior Court, by *Timberlake, J.*, at Chambers, in Rockingham, N. C., on October 19, 1899. The motion was made before the clerk by defendant Martin Rhodes, a nonresident, brought in by publication, on the ground of inequality in the division. The clerk refused to set aside the judgment, and Martin Rhodes appealed to the judge at chambers, who rendered the following judgment:

This cause comes before [the court] on appeal from the refusal of clerk Superior Court of Moore County to set aside the decree heretofore made in this cause, on motion of Martin [Rhodes]. It is admitted that summons was served by publication as to Martin Rhodes, on December 3, 1896; that a decree appointing commissioners to divide the land was made January 2, 1897; that their report was filed January 9, 1897; that said report was confirmed January 30, 1897, no
(192) exceptions having been filed by any of the parties; that a petition to set aside decree was filed October 6, 1897, by Martin Rhodes.

The Court finds as a fact, that one of the commissioners to make the division was related to the parties, but was not aware of same at the time of so acting, and that the partition as made is unjust, and the share allotted to Martin Rhodes is of less value than the share allotted to the other tenants in common. Therefore, it is ordered that the decree hereinbefore made be set aside, and that Martin Rhodes be allowed to answer and defend this action.

E. W. TIMBERLAKE,
Judge Holding Courts 7th District.

To the foregoing judgment the plaintiffs excepted, and appealed to the Supreme Court.

Black & Adams for appellant.
Seawell & Burns for appellee.

CLARK, J. This is a motion under The Code, sec. 220, made in the prescribed time by a nonresident who had been made a party by publication to come in after judgment in a partition proceeding. The Court found as a fact (*Utley v. Peters,* 72 N. C., 525), that the partition as made is unjust, and the share allotted to the petitioner is of less value than that allotted to the other tenants in common, ordered the decree heretofore made set aside, and that the petitioner be allowed to answer and defend in this action. There is no contention that any of the property has been sold to a purchaser in good faith, nor on the other hand, of irregularity in the order of publication, as in *Bacon v. Johnson,* 110 N. C., 114.

The appellants contend that the right given by section 220 to (193) come in and defend after judgment, extends only to defenses upon the merits, i. e., as to the allegations as to tenancy in common, or the number of shares, or the right to partition under the circumstances, and does not extend to exceptions to the report of commissioners on the ground of inequality, and the like. But we do not think the word "defend" in this section has the restricted meaning contended for by the appellants. The object of this section is to enable a nonresident who has not been personally served with summons, to come in within the prescribed time after judgment and assert his rights as fully in every respect as he could have done before judgment had he been personally served, saving as the section provides the rights of any one who has bought the property in good faith under the decree of sale in the cause. The defense intended to be allowed one who has not been actually but only constructively in court, is not confined to those matters which if pleaded in apt time, would defeat the action. Being a remedial statute, a just construction is, that it allows the party against whom a judgment has been taken to set up also any exception which would have prevented or modified the judgment.

This proceeding is under The Code, sec. 220, and is not to impeach the former judgment for fraud and irregularity, though in partition proceedings even that could be done by petition in the cause (Code, sec. 1896), which is an exception to the general rule that a judgment can be attacked for fraud only by an independent action. *Murray v. Southerland,* at this term.

No error.

(194)

STATE ON THE RELATION OF THEOPHILUS WHITE, CHIEF INSPECTOR, v. GEORGE H. HILL AND OTHERS.

(Decided 21 November, 1899.)

Quo Warranto—Statute Repealing, or Amendatory—Title to Office—Chief Inspector Under Act 1897, Ch. 13, to Promote the Oyster Industry of the State.

1. It is well settled that an office is property; the Legislature may abolish an office of its own creation, but can not, as long as the office remains deprive the officer of the material part of his duties and emoluments. *Abbott v. Beddingfield*, post 256, and *McCall v. Webb*, at this term.

2. The provisions of the act of 1899, ch. 19, establishing the Shell Fish Commission, are in substance the same as those in the act of 1897, ch. 13, promoting the oyster industry in North Carolina.

CIVIL ACTION in the nature of *quo warranto,* heard upon the pleadings by *Bowman, J.,* at May Term, 1899, of PAMLICO County, for the recovery of the office of Chief Inspector, under act 1897, ch. 13, to promote the oyster industry in North Carolina.

The complaint alleges that by virtue of said act the plaintiff was appointed to his said office by the Governor on 22d February, 1897, for a term of four years from that day, but that he has been illegally ousted from his office by defendants, who claim to hold the office of Shell Fish Commissioners, under act of 1899, ch. 19.

The answers allege that by virtue of said act of 1899, ch. 19, and proceedings held in compliance therewith, they are rightfully in possession of their office of Shell Fish Commissioners, and that the office claimed by the plaintiff was abolished by the legislation of 1899.

(195) His Honor, upon the hearing, rendered judgment in favor of plaintiff. Defendants appealed.

Simmons, Pou & Ward, W. B. Rodman and David L. Ward for defendants (appellants).

W. H. Day and J. C. L. Harris for appellee.

FAIRCLOTH, C. J., writes the opinion of the Court.

CLARK, J., writes dissenting opinion.

FAIRCLOTH, C. J. The plaintiff was duly appointed by the Governor "Chief Inspector" in February, 1897, for a term of four years, under

an act 1897, ch. 13, sec. 12, to provide for and promote the oyster industry of North Carolina. The defendants claim that plaintiff's office was abolished by the act of 1899, ch. 18, sec. 3, and that he is entitled to the office as a Shell Fish Commissioner under and by virtue of the act of 1899, ch. 19, passed at the same session of the Legislature.

The above statement presents the question so frequently presented to this Court in recent years, that is, whether the act relied upon by the new claimant is amendatory of a previous act, under which the other claimant (the plaintiff in this case) asserts title, or whether it is an absolute repeal and the substitution of a new system or scheme for the government and regulation of the same subject matter. As the argument and reasons have been so often stated by this Court, we deem it quite unnecessary to repeat them. We may say, however, that it is well settled that an office is property; that the Legislature may abolish an office of its own creation; that it may, when not in conflict with the organic law, increase or diminish the duties of an officer; but it can not, as long as the office remains, deprive the officer of the material part of his duties and emoluments, and that the oath and salary are the incidents of an office, but no part of its duties. (196) Many of the decided cases for the above propositions and the general doctrine, are cited in *Abbott v. Beddingfield,* at this term, as well as in *McCall v. Webb,* at this term.

Are the provisions of the act of 1899, ch. 19, establishing the Shell Fish Commission the same in substance as those in the act of 1897, ch. 13, promoting the oyster industry in North Carolina? A careful reading shows that they are. The name, the methods and details are different, but the same general object is found in both acts. The act of 1899, ch. 18, expressly provides for the amendment of certain sections of the act of 1897, and by section 3 repeals section 12, under which the plaintiff was appointed, and the same act, ch. 19, provides for the general supervision of the shell fish industry in North Carolina, and then prescribes in detail how the Commission shall perform the duties assigned to it. The reading of a few sections of each act will show the truth of the matter:

1897.	Sec. 12 compared with	sec. 2.	1899.
1897.	Sec. 12 compared with	sec. 4.	1899.
1897.	Sec. 12 compared with	sec. 5.	1899.
1897.	Sec. 12 compared with	sec. 8.	1899.

These refer to material matters and will do for illustration.

In the argument it was said that the act of 1897, ch. 13, had for its object "catching and inspecting oysters," whereas, the act of 1899, ch. 19, had in view the "general supervision of shell fish," and that, therefore, the subject matter of the two acts was not substantially the same. There was no attempt by counsel to mark the distinction, and we have no disposition to undertake the task, but will let our opinion rest upon the ground already stated.

(197) We have thought it not improper to look back and see if the Legislature has had in mind any distinction in that respect. The Code, vol. 2, p. 424, contains all the legislation prior to 1883, under the general head of "oysters and other fish." The act of 1885, ch. 84, forbids the Superior Court clerks of Onslow and Pender counties to license any person to stake off oyster gardens in certain limits within those counties. The act of 1887, ch. 90, sec. 1, authorizes the justices of the peace of Onslow County to appoint three citizens interested in the oyster industry as a "Board of Shell Fish Commissioners," with jurisdiction over "all the grounds and shell fisheries relating to the oyster culture" in their county. Sec. 8: The county treasurer "shall keep the shell fish funds separate . . . . . and pay out of the oyster fund all verified orders drawn on him by the Board of Shell Fish Commissioners," and pay over any balance of the oyster fund, and he and his bond are made liable for all moneys coming to him "from such shell fisheries." The act of 1889, ch. 298, to promote the "cultivation of shell fish in Onslow County" provides for the Board of Shell Fish Commissioners to be paid from "taxes laid upon oyster grounds," and other accounts to be paid upon the order of the said board. It further provides how any person "may raise or cultivate oysters or other shell fish on any ground in the county. The act of 1891, ch. 419, provides that all applications for oyster grounds must be made to the "Board of Shell Fish Commissioners," etc. The act of 1891, ch. 200, entitled "An act to perpetuate the landmarks of oyster grounds in Onslow County and to facilitate the catching of *migratory* fish," puts the oyster lands under the control of the Shell Fish Commission. Webster's International Dictionary definies shell fish thus: "Any aquatic animal whose external covering consists of a shell, either testaceous, as in oysters, clams (198) and other mollusks or crustaceous as in lobsters or crabs." Worcester also describes shell fish as follows: "The term is chiefly applied, in commerce, to crabs, lobsters and croyfish, oysters, mussels, periwinkles and whelks."

Upon the above review, we are not prepared to say that the Legislature has declared or drawn any distinction between oysters, shell fish and "migratory fish."

It was also urged that, in order to sustain the plaintiff's contention, this Court must overrule *Ward v. Elizabeth City,* 121 N. C., 1. That contention was discussed and decided adversely in *Abbott v. Beddingfield,* at this term, and the fallacy of the argument made apparent.

We are, therefore, of opinion that no error was committed in the Superior Court in trying this case.

Affirmed.

CLARK, J., dissents for the reasons given in the dissenting opinion in *Abbott v. Beddingfield,* at this term; and for the further reason that chapter 19, Laws 1899, under which the defendants claim, provides an entirely different system from chapter 13, Laws 1897, under which plaintiff claims. The territory covered is changed, the compensation is changed. The old act applied only to oysters, the act of 1899 covers all shell fish, including clams, crabs, etc. The clam industry of the State is a great one, and it is well known that within the last two years the crab industry has become of large proportions. These industries are placed under the protecting care of the board of commissioners. Who now exercises the functions formerly exercised by the chief inspector? Clerks of the Superior Courts of the various counties exercise some, the secretary of the board some, the Secretary of State some, and about the only one exercised by the defendants is the custody of the steamer "Lillie." The whole system and functions are changed. (199) Many of the functions are abolished and new ones added. Many of those continued are now exercised by persons other than the parties to this action. The plaintiff certainly can not recover his lost office (if it has been recreated) from the defendants, because they *do* not have it.

In *Ward v. Elizabeth City,* 121 N. C., 1, it was held that the addition of some territory to the city made the office of city attorney a new office. That decision has never been questioned.

It may be observed that chapter 18, acts 1899, ratified February 28, 1899, amends the act of 1897, by striking out Onslow and inserting Beaufort in line 5 of section 2; that it materially modified section 4; that it strikes out all duties to be done by the chief inspector and deputy inspectors in section 7, and provides that the statement required by section 7 shall be filed with "the clerk of the Superior Court of the county where the said oysters are purchased." It repeals sections 11, 12, 13, 15, 16, 17, 18 and 19, and leaves no law providing for a chief inspector or deputy inspectors. The repealing act went into effect on February 28, 1899. The act under which the defendants claim was ratified and went into effect on the 2d of March, 1899. The words

"deputy inspectors" in the act of 1897 might mislead. They were not, in the ordinary sense of the word, deputies of the chief inspector, but were independent officers created for certain purposes with fixed functions and duties as set out in the act. They are called, in sections 15 and 16, and perhaps elsewhere, "inspectors." Their duties are prescribed by the statute, and are different from those of the chief. Their salary is paid by the State, they give bond to the State, they report to the clerk of the court, and turn over all taxes collected by them to said clerk, etc. Their authority would evidently not terminate
(200) upon the death of the chief, whereas an ordinary deputy is merely the agent of the officer, and can exercise only the functions his principal could exercise, and the officer is responsible for his acts (9 A. & E., 2d Ed., 369), and his authority would cease upon the death of the principal (*Ibid,* 382), and the principal could remove hm at pleasure. *Ibid,* 383; *Pilan v. Taylor,* 113 N. C., 1; *Lane v. Cotton,* 13 Mod. Rep., 477; *Coltrane v. McCain,* 14 N. C., 308. If the Court possessed the veto which our Constitution has denied to the Governor, it might say we will "not give effect to this act."

Besides, chapter 21, Laws 1899, expressly forbids the Treasurer to pay any officers claiming under the abolished act of 1897. This not only puts the "intention" of the legislation beyond the power of legal construction, but the plaintiff, should he recover, obtains at most a barren sceptre. The legislative power is supreme over the public purse. The Constitution, Art. XIV, sec. 3, provides that no money shall be drawn from the treasury but in consequence of appropriations made by law, i. e., by legislative authority. *Garner v. Worth,* 122 N. C., 250. And the Auditor's warrant would be no protection to the Treasurer. *Bank v. Worth,* 117 N. C., 146. Indeed, *Hoke v. Henderson,* 15 N. C. at bottom of page 27, expressly says the General Assembly has the power to withhold or forbid any payment, and as it further says the "emoluments" is the extent of the "property," how can the courts give any relief? As wisely pointed by the opinion in *Hoke v. Henderson,* the remedy, if the salary is wrongfully withheld by legislative action, is to wait for the people to correct the wrong in the election of new representatives.

The power of the purse is essentially the supreme power, and by it alone in England and in this country the power of the sword has
(201) been subordinated to the civil power. Legislative bodies may act wrongly, but the remedy is with their master, the people, whose mere agent they are. The Legislature may act beyond its just limits, and so may the courts. There is no imputation of superior wisdom, power

or patriotism in the courts. Each department should stay within its own limits. *Suum Cuique.*

Cited: White v. Auditor, 126 N. C., 575, 588, 600.

Note—Overruled by *Mial v. Ellington,* 134 N. C., 131.

A. L. WEBB & SONS AND OTHERS v. R. W. HICKS AND OTHERS.

(Decided 21 November, 1899.)

Petition of Defendants to Rehear Case Reported in 123 N. C., 244.

The opinion and judgment of the Court must at least be presumed to be correct—the burden of showing otherwise is upon the petitioners—that some fact, found and relied on by the Court, was incorrectly found. The petitioners are the moving parties and they must show error.

PETITION to rehear dismissed.

H. McD. Robinson, S. H. MacRae and McNeill & Bryan for petitioners.

N. A. Sinclair and Shepherd & Busbee, contra.

FURCHES, J. This is a petition by defendant to rehear a case heard at the September Term, 1898, of this Court, and reported in 123 N. C., 244; and by the order of the Justice granting the petition, the rehearing is restricted to the statute of limitations.

The same case, or a case between the same parties, and for the (202) recovery of the same claim, had been before this Court at February Term, 1895 (116 N. C., 598). That appeal was brought to this Court by the plaintiff from a judgment dismissing the action; and, upon the hearing in this Court, the judgment of the court below dismissing the plaintiff's action was affirmed. So it would seem that it could hardly be disputed that this action falls within the provisions of section 166 of The Code. *Straus v. Beardsley,* 79 N. C., 59; *Wharton v. Comrs.,* 82 N. C., 11.

But the defendants in their argument and brief, for the purpose of availing themselves of the plea of the statute of limitations, contend that this action was not brought within one year from the termination of the former action. And that if it was brought within one year

from that time, it will not benefit the plaintiff, for the reason that the complaint in the first case did not state a cause of action. This last reason seems to be the only ground relied upon in the petition, as it is not alleged by the defendants that this action was not commenced within one year from the termination of the former action.

The learned counsel who certified to the manifest error of the Court (in the opinion 123 N. C., 244) says, "The Court seems to have overlooked the real nature of the plea set up by defendants in the second action. They pleaded the three years statute of limitations, and did not contend that the second action was not brought within one year after the termination of the first, but that the first action had no legal effect in the case, as no cause of action had been stated in it."

The learned counsel do not cite any authority for this position, and it seems to be in conflict with *Straus v. Beardsley, supra,* in which it is held that section 166 applied where the first action was dismissed because the court in which it was brought had no jurisdiction. In that case it appeared that the *cause of action in the first action* was
(203) the same as that in the second, and that the statute, Code, sec. 166, applied. In this case the cause of action is identically the same as that attempted to be set up in the former action—the recovery of $895.36 for goods sold and money furnished to M. McD. Williams, agent of the defendants. And it seems to us that it falls directly within the principle decided in *Straus v. Beardsley.*

We therefore hold that this action is for the same cause of action as that in the former action, and falls within the provisions of section 166 of The Code, and is not barred by the statute of limitations if commenced within one year from the termination of the first action.

This question, which seems not to have been relied upon in the petition to rehear—that this was not commenced within one year—seems to be principally relied on in the argument here. It seems to have been conceded by agreement of counsel and the statements in the petition, that this action was brought within a year from the termination of the former action. But defendants contend that the record does not show that it was commenced within one year, and that they have the right here to take that position; that they are not bound by what is said in the petition or by what is stated in the certificate of counsel in pointing out the error of the Court. It therefore becomes our duty to pass upon this question.

It appears that this action was commenced on the 30th of April, 1896, returnable to May Term of Cumberland Superior Court. It is admitted that the first action terminated by final judgment at May Term, 1895, and if that is the time to be counted from, that this action

was brought within one year from the termination of the first action. The record does not show when the opinion of this Court was filed (for the reason, as we suppose, that that question was not (204) contemplated when the record was made of the trial below.) But it was stated in the argument that the opinion of this Court in the first case was filed in April, 1895, before the 30th day of that month. And the defendants contend that that was the date from which time should be counted. While we are not furnished with any direct authority upon this, and not having been able to find any ourselves, we are of the opinion that the time should be counted from the rendition of the final judgment in the Superior Court dismissing the action. This seems to be in harmony with the spirit of this enabling statute, which should receive a liberal construction. This leaves no uncertainty as to time, as the filing of the opinion in this Court would do. Besides, this Court entered no judgment in the case, except for costs. The opinion had to be certified to Cumberland Superior Court, where the action was still pending and awaiting the decision of this Court on the questions of law presented by the appeal. No termination of the action could be had by the Superior Court until the opinion of this Court was certified to that Court.

But the defendants say that if this be so, they were not served with process returnable to May Term, 1896, and the plaintiff sued out no alias from that term, and none was asked for or ordered until July Term. The defendants contend that this was a discontinuance as to them, and that the alias issued after July Term was in law the commencement of this action against them; and that this was more than one year from the date of the judgment of Cumberland Superior Court (at May Term, 1895), dismissing the plaintiffs' first action. This would certainly be so if nothing else appeared. *Etheridge v. Woodsley,* 83 N. C., 11.

But it appears that defendants' counsel, at the return term entered a general appearance for the defendants, which remained so until July Term when the counsel came into court and stated that he (205) only intended to enter an appearance for those who had been served with process, and asked permission of the Court to be allowed, then, to change the entry on the docket so as to make it show that he only appeared for those who had been served with process. The Court allowed this to be done, and in the same order allowing counsel to change the entry on the docket from a general appearance, ordered an alias for the defendants, which was issued returnable to the next term. By this appearance, the defendants were in court, and it needed no further process to bring them in. *Etheridge v. Woodsley, supra; Moore v. R. R.,* 67 N. C., 209; Middleton v. Duffy, 73 N. C., 72. After this, if the de-

fendants were allowed to amend themselves out of court (and it seems to us that this order of the Court was proper) it would be unconscionable to allow the defendants to take advantage of the fact that the plaintiff had not taken an alias from the May Term, when the defendants by their attorney, had put themselves in court.

We again note the fact that, while the counsel for defendants do not deny but what the entry of a general appearance was made at May Term, they say that it is not stated in the order of the Court allowing them to change the entry from a general appearance, and ordering an alias summons when this entry of appearance was made. We do not agree with the defendants' counsel in this contention. We think that sufficient appears, outside of the verbal admission, to show that it was made at May Term. A part of the defendants had been served with process returnable to May Term, and the plaintiff would have been entitled to judgment against them at that term if no appearance had been made for them; and it is reasonable to presume that it was made for them, as no judgment was taken. And it seems to us that defendants would hardly have asked the court for leave to change
(206) the general entry of appearance at July Term if it had not been made before that term.

But whether we are correct in our finding of this fact from the record that counsel entered an appearance for these defendants at May Term or not, we must remember that this is a petition by defendants to rehear upon the ground that the Court committed error in its former opinion. The defendants are the moving parties, and the burden is upon them to show the error. The opinion and judgment of the Court must at least be presumed to be correct; and unless the defendants show that it is not—that some fact found and relied on by the Court was incorrectly found—it seems to us that the judgment should be sustained. This burden is upon the petitioners. And the most they claim to be able to show from the record is that it "don't show" when they came into court and entered a general appearance.

In asking us to reverse our former judgment, the defendants should be willing to shoulder the burden the law has put upon them, and to show us the error of which they complain. This they have not done, and the petition must be dismissed.

Cited: Woodcock v. Bostic, 128 N. C., 248.

C. F. BRUTON, EXECUTOR OF FREDERICK MCRAE, v. LUCINDA MCRAE, WIDOW OF FREDERICK MCRAE, AND GUARDIAN *ad litem* OF WALTER MCRAE, INFANT CHILD, DEVISEE AND HEIR AT LAW, AND OTHERS.

(Decided 21 November, 1899.)

Sale of Land for Assets—Homestead—Minor Child, Heir and Devisee.

In a proceeding to sell land for assets, the executor can not sell the homestead interest of a minor child and devisee of the testator, *durante minoritate.*

SPECIAL PROCEEDING to sell land for assets, heard before (207) *McIver, J.*, at Superior Court of MONTGOMERY County, Spring Term, 1898. His Honor rendered judgment against the plaintiff, who excepted and appealed.

Case on Appeal.

This was an action begun before the clerk by the plaintiff, executor, to subject the lands devised in the will to a sale for assets to pay debts, and resisted by the guardian *ad litem* upon the grounds that the infant defendant was entitled to a homestead in the lands, and was transferred to this Court for trial upon issues of law and facts.

Upon the hearing before his Honor, Judge McIver, the following facts were agreed to:

That the lands described in the petition were devised by the testator, Frederick McRae, in separate and distinct parcels, to the several defendants, nine in number, in the manner set out in the petition.

That the will was properly probated, and the plaintiff duly qualified as executor, and that there was not sufficient personal assets to pay the debts.

That the defendant Walter McRae was a devisee in the will, taking thereunder a specific parcel of the lands described in the petition. That he was also a son and heir-at-law of the testator, and a minor under the age of twenty-one.

Upon the facts agreed to, his Honor, Judge McIver, gave the following judgment:

"This cause coming on to be heard before the undersigned judge, upon the petition of plaintiff, before the clerk of the Superior Court of Montgomery County, praying for an order to sell land, the land described in this petition, to make assets, and the same being transferred to this court upon issues of law and facts, and it appearing to

(208) the Court that one of the defendants, Walter McRae, is the son and heir-at-law of plaintiff's testator, Frederick McRae; also that said Walter McRae is a devisee in the last will and testament of said Frederick McRae, and is a minor under the age of twenty-one years, and entitled to a homestead in the lands described in said petition: Upon motion, it is considered and adjudged by the Court that the plaintiff is entitled to sell under the order of the Superior Court during the minority of the said Walter McRae only so much of the lands described in his petition as shall be in excess of the homestead exemptions of Walter McRae, of the value of $1,000, to be appraised and set apart by said plaintiff to said minor, as provided by law, before the sale of any lands described in said petition. That the costs of this action be paid by the plaintiff out of any funds in his hands belonging to the estate of his testator. That this cause be remanded to the clerk of the Superior Court of Montgomery County for such further proceeding as shall become necessary herein, in accordance with the judgment of this Court.

JAMES D. MCIVER,
Judge Superior Court.

To which judgment the plaintiff excepted and appealed, assigning as error:

1. That he finds as a matter of law that the infant defendant Walter McRae is entitled to homestead in lands devised by Frederick McRae.

2. That he finds as a matter of law that the infant defendant Walter McRae is entitled to homestead in the lands devised specially, and by fixed and specific boundaries, to the other defendants.

FRY & RUSH,
Attorneys for Appellant.

Plaintiff appellant not represented in this Court.
Douglass & Simms for appellee.

(209) MONTGOMERY, J. Frederick McRae died in Montgomery County leaving a last will and testament in which the plaintiff, C. F. Bruton, was named executor. Upon qualification, the executor found that the personal property was not sufficient to pay the debts of the testator, and he filed a petition to make real estate assets for the payment of the debts. The testator devised to the defendants specific parcels of the land described in the petition. Among the devisees was a son, Walter, who is under twenty-one years of age. Walter's mother, acting as his next friend, filed an answer to the petition admitting the facts set out therein, but averring that he was entitled to a homestead to

the value of $1,000 in the lands described in the petition, generally, and without reference to the interest specifically devised to him. When the matter came on for hearing upon the questions of law raised by the pleadings before his Honor, Judge McIver, he held that the infant defendant, Walter, the son of the testator, was entitled to a homestead in the lands described in the petition, and it was adjudged that the plaintiff should sell under the order of the Superior Court, during the minority of the testator's son Walter, only so much of the land described in the petition as would be in excess of the homestead exemption of its value of $1,000. The correctness of this judgment is the only question presented for our consideration.

We are of the opinion that the conclusion of the court below was the correct one, and that the judgment was in conformity thereto. This is the first time this question has been brought to this Court, but we think its settlement is without practical difficulty. Sec. 3, Art. X, of the Constitution, ordains that "the homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children or any one of them."

It is perfectly clear that the debt referred to in that section and (210) in that article of the Constitution means the debt of the owner of the homestead; in the case before us, of the testator. In the petition of the executor, the request to sell the land of the testator alleges, of course, that the debts for the payment of which the property is prayed to be sold is declared to be the debt of the testator. It is not the debt of the infant son Walter, which is the foundation for the application to sell the real estate described in the petition. The executor, for the creditors in an adverse proceeding against the devisees, ignores the disposition of the land under the will, and proceeds as if the testator died intestate in that respect. The specific devises of the real estate under the will would control the rights of the devisees, but as to creditors, they do not control. The creditors' rights are paramount and, subject to our exemption laws, can be enforced notwithstanding a devise or will of the decedent. When the creditors took that course through the executor, the creditors can not complain if the homestead exemption is set up by the devisees or any one of them.

In the answer of the infant, Walter, he claimed also the personal property exemption of $500. That question was not passed upon by his Honor below, and no exception appearing in the record in reference to that matter, it is presumed that the claim set up for the personal property exemption was abandoned. In any event he was not entitled to it.

Affirmed.

CLARK, J., dissenting in part. The testator left only one minor child, and to him he devised no realty except the remainder in ten acres after the life estate therein devised to the widow. It seems to me that a homestead can not be laid off to the minor in other people's property, and which they, not he, are to enjoy. The adults to (211) whom all the realty except the remainder in this ten acres was devised, take it against the minor, and they have no right to a homestead against the testator's creditors. The object of the homestead provision was not the postponement of creditors but the protection of the beneficiaries.

When the Constitution, Art. X, sec. 3, provides that "the homestead after the death of the owner thereof shall be exempt from the payment of any debt during the minority of his children or any one of them," it refers to cases where the homestead descends upon or is devised to such minors, and not to a case like the present in which it is devised to others and when the minor can derive no conceivable benefit from the exemption of the property. This case differs from all former ones in that the homestead is devised away from the minor, as the homesteader had a right to do.

A reasonable construction is that exemption "during minority" is for the sole benefit of the minor. To construe the language literally and give the adult devisees of the homestead protection from the creditors of the testator during the minority of a minor who can not enjoy a foot of the homestead, savors of the literalness which an ancient writer tells us sentenced to death a surgeon for reviving by the use of a lancet one stricken with sudden illness, because the statute punished with death any one who should draw blood in the streets. If the Constitution had provided that the homestead should remain a homestead during the minority of any one of the children, and good alike against adult heirs and devisees, then the contention of the defendant would be valid. The homestead exemption in favor of a minor can not be more extensive than the minor's interest in the homestead.

I concur that there is no continuation of the personal property exemption after the death of the debtor.

(212)

STATE ON RELATION OF E. L. GREENE, J. M. NIFONG AND HENRY SHEETS v. W. S. OWEN, L. M. KIRSCHNER AND J. A. STONE.

(Decided 21 November, 1899.)

Quo Warranto—Title to Office—County Board of Education, Act 1897, Ch. 108—County Board of School Directors, Act 1899, Ch. 732, also Chapter 3.

1. An officer has a right of property in his office, of which he can be deprived only in accordance with the law of the land; and while the Legislature may abolish the office, it can not continue it and transfer its duties and emoluments to another against the will of the vested incumbent. *Hoke v. Henderson*, 15 N. C., 1.

2. An office is a contract between the officer and the State, by which he is entitled to the emoluments upon performance of the duties, as long as the office continues. *Ward v. Elizabeth City*, 121 N. C., 3.

3. While the County Board of Education, established by act of 1897, ch. 108, was abolished by act of 1899, ch. 374, it was practically reëstablished by act 1899, ch. 732.

4. The county commissioners, clerk of Superior Court, and the register of deeds being constituted under the act of 1897, ch. 108, the appointing body to elect the board of education, are appropriately the proper body to fill vacancies therein, until the ensuing election.

CIVIL ACTION in the nature of *quo warranto* to try the title to the office of County Board of School Directors of Davidson County, heard upon the pleadings by *Robinson, J.*, at Fall Term, 1899, of the Superior Court of DAVIDSON County.

The complaint alleged that the plaintiffs were rightfully entitled to the office under provisions of the act of 1897, ch. 108, and were wrongfully excluded therefrom by defendant claiming under legislation of 1899.

The answer alleges that the defendants are legally in possession (213) and entitled to the office; that the act of 1897, ch. 108, was repealed by the act of 1899, ch. 374, and that they were themselves elected by the Legislature of 1899 as the County Board of School Directors. It also alleges that none of the plaintiffs were original appointees, and that two of them, Greene and Sheets, were appointed after defendants had been elected by the Legislature, and that the appointment of Nifong was void, because the original appointing body had no authority to fill vacancies.

His Honor, upon the pleadings, rendered judgment in favor of defendants. Plaintiffs appealed.

Walser & Walser for appellants.
E. E. Raper for appellees.

DOUGLAS, J., writes the opinion of the Court.
CLARK, J., writes dissenting opinion as to Nifong.

DOUGLAS, J. This is an action in the nature of *quo warranto* brought to test the title to the office of County Board of School Directors. On the first Monday in June, 1897, under the provisions of section 6, chapter 108, of the Public Laws of 1897, G. W. Holmes, T. H. Strohecker and R. S. Greene, Jr., were elected as members of the County Board of Education for the term of three years by the joint action of the county commissioners, the clerk of the Superior Court, and the register of deeds. On the 6th day of September, 1897, R. S. Green, Jr., resigned as a member of said board and John R. Miller was elected to fill the vacancy by the county commissioners, the clerk of the Superior Court, and the register of deeds, the original appointing power. Some time during the year 1898 T. H. Strohecker resigned as a mem-
(214) ber of said board, and J. M. Nifong was elected to fill the vacancy by said commissioners, clerk, and register of deeds. On the 3d day of July, 1899, John R. Miller resigned from said board, which had then become, by virtue of chapter 732, of the Laws of 1899, the County Board of School Directors, and Ed. L. Greene was elected to fill the vacancy by the remaining members of the board. On the 3d day of July, 1899, George W. Holmes resigned as a member of said board, and Henry Sheets was elected by the two remaining members of the board to fill the vacancy. It will thus be seen that J. M. Nifong is the only plaintiff in this case claiming under an election prior to the passage of the act of March 7, 1899, being chapter 732 above mentioned. His case therefore stands upon a different footing from the others, and will be considered first.

Some things must be considered settled law in spite of the volcanic energy of a progressive and expanding age. Among these is the doctrine laid down in *Hoke v. Henderson,* 15 N. C., 1, that an officer has a right of property in his office of which he can be deprived only in accordance with the law of the land; and that while the Legislature may abolish the office, it can not continue the office and transfer its duties and emoluments to another against the will of the vested incumbent. The opinion in that celebrated case was delivered at the December Term, 1833, of this Court, by Chief Justice RUFFIN, and was concurred in by his associates, Judges DANIEL and GASTON, men whose names are the expression of the highest qualities that can adorn the bench. This opinion has never been questioned by this Court, 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. We find it cited with approval upon one point or another in the following cases: *Houston v. Bogle,* 32 N. C., 496; *State v. Moss,* 47 N. C., 66; *Thompson v. Floyd,* 47 N. C., 313; *State v.* (215) *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; *State v. Smith,* 65 N. C., 369; *King v. Hunter,* 65 N. C., 603; *Clark v. Stanly,* 66 N. C., 59; *Brown v. Turner,* 70 N. C., 93; *Bunting v. Gales,* 77 N. C., 382; *Vann v. Pipkin,* 77 N. C., 408; *Prairie v. Worth,* 78 N. C., 169; *Lyon v. Aiken,* 78 N. C., 258; *McNamee v. Alexander,* 109 N. C., 246; *State v. Cutshall,* 110 N. C., 545; *Board of Education v. Kenan,* 112 N. C., 568; *State 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; *Day's* case, 124 N. C., 362, 366; *Wilson v. Jordan,* 124 N. C., 683, 694; *Bryan v. Patrick,* 124 N. C., 651, 666.

In *Ward v. Elizabeth City, supra,* this Court 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 can not run 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 v. Bellamy, supra,* though this State is the only one of the 45 States of the Union which sustains that doctrine."

In the above list, we have included only those cases where it is directly cited by name in the opinion of the Court, omitting all those merely tending to sustain it.

In reviewing the list of the judges who wrote the above (216) opinions or concurring therein we find the name of every Chief Justice who has since presided over this Court, and of all the Associate Justices before whom the question was raised.

An examination of the constitutional history of the State, we think, will show conclusively that the principles so clearly enunciated in *Hoke v. Henderson* have not only received the practically unanimous approval of succeeding judges, but have by direct implication been repeatedly ratified by the people themselves. The first "Constitution of North Carolina" as a State was framed by a "Congress" elected and chosen for that particular purpose, which assembled at Halifax on the

12th day of November, 1776, and remained unchanged until the amendments of 1835. It was this Constitution whose provisions were construed in *Hoke v. Henderson.* Since this decision was rendered there have been five separate and distinct constitutional conventions, *all* of which might, but *none* of which *have* abrogated or modified the principle of that opinion. In 1835, a constitutional convention met on June 4th, and framed amendments to the Constitution of 1776, which were ratified by the people. In 1861 a convention met and on May 20th passed the ordinance of secession, with some other amendments, none of which were submitted to the people. In 1865 a convention met on October 9th, 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 Act of Congress, assembled on January 14, 1868, and framed the "Constitution of 1868," which was ratified by the people on April 24, 1868,
(217) and approved by Congress on June 25, 1868. In 1875, a convention assembled on September 6th, and amended the Constitution in several particulars, its 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 others unnecessary to mention.

The constitutional history of this State is more fully set forth in the concurring opinion of DOUGLAS, J., in *Wilson v. Jordan,* 124 N. C., 707.

The various amendments made many changes of far-reaching results, including the successive repudiation of the governments of the United States and the Confederate States, but the underlying principle of *Hoke v. Henderson* remained unchanged. It survived the wreck of Southern institutions, weathered the storm of civil war, escaped the iconoclasm of reconstruction, and stands before us hoary with age, but apparently fresh from the fountain of perpetual youth. Any one of these conventions might have adopted an ordinance or constitutional amendment, certainly valid in its future operation, that all offices should be merely public agencies, held at the will of the creative prin-

cipal, at the will of the Legislature if of legislative creation, or at the will or the people if of constitutional provision.

The convention of 1835 assembled within less than eighteen months after the rendition of the opinion, and were reminded of it by the presence of DANIEL and GASTON as delegates from their respective counties. So far from expressing any disapproval, they completed the absolute independence of the judiciary by providing that "the salaries of the judges of the Supreme Court, or of the Superior Courts, shall not be diminished during their continuance in (218) office."

In *Caldwell v. Wilson,* 121 N. C., 425, this Court says: "The statute now under consideration is not retrospective and does not interfere with any vested right. Being a part of the act originally creating the office of Railroad Commissioner, it *prescribes* a rule of property in said office, and modifies the extent of interest and tenure therein *'prospectively.'* The defendant, taking under the act, holds subject to the act, and, relying upon his contract, is bound by all its provisions. One of its express provisions was the reserved right of the Legislature to remove, and the power and duty of the Governor to suspend under a given state of facts. This power of suspension, together with the necessary method of its enforcement, was assented to by the defendant in his acceptance of the office." And again on page 472, we say: "The only property he could have in the office was that given to him by the statute, which must be construed in all its parts. His commission, which is his title deed, appears to us with the fateful words of the creative act written across its face by the hand of the law."

With this decision before them, the Legislature in bringing forward into the Corporation Commission Act the substantial provisions of the Railroad Commission Act *omitted* all sections providing for the suspension or removal of a commissioner, thus leaving the principle of *Hoke v. Henderson* in full force and effect. In fact, among all the offices created or recreated by the recent Legislature, not one seems in any manner to have been withdrawn from the protection of that doctrine.

In *R. R. v. Baugh,* 149 U. S., 368, the Supreme Court of the United States says: "Notwithstanding the interpretation placed by this decision upon the 34th section of the Judiciary Act of 1789, (219) Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government." May we not say the same of *Hoke v. Henderson?*

That the members of the County Board of Education are public officers is expressly held in *Barnhill v. Thompson,* 122 N. C., 493. It is contended by the defendants that the County Board of Education was abolished by chapter 374 of the Laws of 1899, ratified on March 4, 1899. This is true; but we are compelled to hold that it is practically reëstablished by chapter 732, ratified on March 7, 1899. The new County Board of School Directors, created for the same general purposes and charged with the same general duties, is in effect but a continuation of the old board under a new name. A careful examination of the two acts will show this to be so, and the few changes in name and other nonessentials do not materially affect the question. The identity of the chrysalis is not changed even by the gorgeous wings of the butterfly, as the same individual life runs through all its forms. It is well settled that statutes *in pari materia* are to be construed together, certainly when passed at the same session of the Legislature, and, under certain circumstances, even when passed at different sessions. *State v. Bell,* 25 N. C., 506, 508; *State v. Woodside,* 31 N. C., 496, 501; *State v. Melton,* 44 N. C., 49; *Simonton v. Lanier,* 71 N. C., 498, 503; *Rhodes v. Lewis,* 80 N. C., 136, 139; *Wilson v. Jordan, supra,* p. 687; Black Interpretation of Laws, sec. 86; Endlich Interpretation of Statutes, sec. 45; Potter's Dwarris on Statutes, 190. Many cases from other jurisdictions are cited in the above authorities.

(220) It is also contended by the defendants that under the act of 1897 the county commissioners, the clerk, and register of deeds had no authority to fill vacancies. We think they had such power necessarily and by direct implication. As the County Board of Education was charged with continuing duties and responsibilities, it was evidently the intention of the Legislature that it should be a continuing body, at all times qualified to perform the responsible duties imposed upon it. To fulfill this intention, it is evident the power to fill vacancies must reside somewhere, and we can see no place more appropriate than in the body possessing the original power of appointment. This is clearly the logical deduction by analogy, and has been so held in other jurisdictions. 19 Am. & Eng. Enc. of Law, 430; Throop on Public Officers, sec. 436.

It is further urged by the defendants that this is only an $8 office and therefore beneath the notice of a court of justice. For this somewhat novel position, the only authority to which we are cited is the maxim *"de minimis non curat lex."* It may be an $8 office, but does it involve only an $8 principle? Where would the learned counsel draw the line? Eight dollars with board is equal to the monthly wages of many a farm hand, and can we say that his month's labor

is beneath our notice? Such a proposition commends itself neither to our judgment nor our conscience. We must stand by the *principle* as we have laid it down, and give to all alike its equal protection. Moreover, why should the defendants complain? Is the office any greater to them than to the plaintiffs? They found the plaintiffs in possession and promptly ousted them, and have resisted with the utmost vigor all attempts at repossession. The records of other cases show the heroic efforts made to obtain possession of similar offices by those who unite in saying that it would be beneath the dignity of this Court to reinstate the rightful owner.

We are, therefore, compelled to hold that J. M. Nifong (221) is lawfully a member of the County Board of School Directors of Davidson County, and is entitled to the immediate possession of the office with all its duties, privileges and emoluments, to hold the same until the first Monday in June, 1900. It makes no difference whom he dispossesses, as his claim is superior to any of the new board, and they all must stand out of his way.

The principles enunciated above equally require us to hold that the remaining plaintiffs, Greene and Sheets, are not entitled to be members of the County Board of School Directors, as they were not elected until after the passage of the Act of 1899, and therefore had no vested rights that could be affected by the passage of said act or any election held thereunder. In fact, they never were members of the Board, as at the time of their assumed election there were no vacancies to be filled. The vacancies caused by the resignations of Miller and Holmes were filled *eo instanti* by the appointees of the Legislature, who were somewhat in the nature of remaindermen waiting for the determination of the particular estate.

It is urged that there are three legislative appointees and only two eligible places, but this does not concern the plaintiffs, and the defendants are not asking us to adjudicate their respective rights as between themselves. It may be that the two who first qualified filled and exhausted the vacancies. If so, the third man must await the determination of Nifong's estate in the office.

In all the similar cases that have been brought before us, we have never held the act to be unconstitutional except in so far as it interfered with the vested rights of the incumbent. The Legislature had ample authority to pass chapter 732 of the Laws of 1899, and also had authority to elect, as they did by chapter 3 of said laws, subject only to the rights of the incumbents. Of course where the vacancy was already filled by the continuation of the term of the former incumbent, there was no room in that particular office for (222)

any one else until a vacancy occurred by expiration of the term, resignation, death or disqualification.

Every act of the Legislature carries with it the presumption of constitutionality, and, where it becomes our duty to declare any part of such act unconstitutional, it is equally our duty to give full force and effect to the remainder of such act, provided it remains capable of operation. In other words, we should give effect to the expression of the legislative will so far as it does not conflict with the organic law, and should declare it utterly void only when its unconstitutionality so far permeates its essential features as to destroy its practical operation. *Berry v. Haines,* 4 N. C., 428; *McCubbins v. Barringer,* 61 N. C., 554, 556; *Johnson v. Winslow,* 63 N. C., 552, 553; *Gamble v. McCrady,* 75 N. C., 509, 512; *State v. Joyner,* 81 N. C., 534, 537; *Riggsbee v. Durham,* 94 N. C., 800, 805; *State v. Barringer,* 110 N. C., 525, 529; *McCless v. Meekins,* 117 N. C., 34, 39; *Russell v. Ayer,* 120 N. C., 180, 189; *Rodman v. Washington,* 122 N. C., 39, 42; *Packet Co. v. Keokuk,* 95 U. S., 80; Cooley's Const. Lim., 178, 215.

The judgment of the court below must be reversed as to the plaintiff J. M. Nifong in accordance with this opinion, and affirmed as to the other appellants.

The costs in this Court must be divided between appellants and appellees.

Modified and affirmed.

CLARK, J., dissenting, as to Nifong. In addition to the reasons given in dissenting opinion in *Abbott v. Beddingfield,* at this term, it would seem that *Hoke v. Henderson* is expressly against the plaintiff Nifong's claim.

The allowance to the plaintiff his traveling expenses and $2
(223) per day for time in session, the regular sessions being four times a year, with same allowance for any special session if ordered. This per diem of $8 per year is evidently to cover only actual expenses, and it is going far to hold that this is a lucrative office; yet only lucrative offices were taken by *Hoke v. Henderson* out of legislative control. The proposition which I advance, however, can not possibly be better stated than by Brother MONTGOMERY in *R. R. v. Dortch,* 124 N. C., 663, 667. This position is not so much an office itself as an electoral body to select officers. It is like the power given to judges to appoint clerks of the courts, which *Hoke v. Henderson,* 15 N. C., at page 22, holds can be taken from them because such power of appointment, the selection of other public agents, was intended to be an honorable, and not a lucrative, appoint-

ment. In like manner, all the justices of the peace in 1868, who up to that time had the election of sundry county officers, were deprived of their life offices, and no one questioned the power to do so, but the convention had no more power to do this than the Legislature, if (as now contended) they held office by contract with the State.

Besides, by the Constitution, Art. IX, the entire matter of the control of public schools is vested in the Legislature, and every one who took office in the school system took with notice that the control and management thereof was in the Legislature *(Caldwell v. Wilson,* 124 N. C., 425), and that it could (if it had such control) remodel and change the system according to its views of the public interest without regard to the incidental benefits to office holders which were in subordination to that of the great end to be served—the interests of the public. The object was not the creation of offices but the public welfare, and to that end the Legislature was placed by the Constitution in full control of the system, to make from time to time such changes as they deemed for the public good.

The most ultra advocates of the power of the courts to declare (224) legislation unconstitutional have always held that it should only be done when there was no reasonable doubt and for grave and weighty reasons. It would seem that $8 per year, $2 per day, if it more than covers the actual board of the incumbent while in session, is too small a consideration to justify the courts in setting aside an act of the Legislature providing for a new system for the benefit of the school children of the State, and annulling the election of officers made by the General Assembly itself to carry that system into effect.

Again the office once held by the plaintiffs is entirely different in title and in substance from that from which they are seeking to oust the defendants.

Laws of 1899, ch. 374, page 741, abolishes the Board of Education, and chapter 732, section 13, page 906, provides School Directors, and by chapter 3, on page 27, the General Assembly itself elected School Directors. The duties of School Directors are different from the duties required of the former Board of Education. Boards of Education, under the Laws of 1897, divided counties into districts and appointed five men as school committee for each township. This committee had full charge of the schools of the township, white and colored. Under Laws 1899, School Directors appoint no committees, but appoint school trustees for each township, who divide the townships into districts, and who appoint committees of three for each district in the township, appointing white committeemen for each white district, and colored committeemen for colored districts, giving to their district com-

mittee the right to employ teachers and control schools. Secs. 16, 23 and 24. Under the Laws 1897, the right to elect county supervisors was given to an electorate composed of the clerk of the
(225) Superior Court, the register of deeds, and the Board of Education. The Laws of 1899 give this power to the School Directors exclusively, sec. 15. The School Directors have power not possessed by the County Board of Education, and the main power (that to appoint committeemen) which the old board had, has been abolished and conferred upon township trustees. About the only powers and duty common to both boards were to meet four times a year and to draw the same pay. The school money was to be appropriated to the townships per capita under both laws, which is only a matter of calculation and purely clerical. In *Day's* case, 124 N. C., 362, the Court puts its decision upon the ground that the committee appointed by the Legislature performed just the same duties required of the superintendent, and that the office was the same, only to be performed by several instead of one. In no case heretofore has the Court held, when the duties of the office are different, the old officer can perform them.

Whatever views may be entertained as to *Hoke v. Henderson*, it certainly ought not to be extended. There has long been a feeling that it has been construed far beyond the intention of the Court which delivered it. This feeling is tersely expressed by Justice DOUGLAS, speaking for the Court, in delivering the opinion in *Caldwell v. Wilson*, in December, 1897. He said, 121 N. C., page 468: "The varied and extraordinary claims made thereunder *(Hoke v. Henderson)* and the fact that we are the only State in the Union recognizing that doctrine may well cause us to pause and consider if we have not carried it to its fullest legitimate extent. It may be doubted if the great Chief Justice himself ever contemplated the extent to which it would be carried." This solemn and timely warning was uttered nearly two years ago. In *Hoke v. Henderson*, 15 N. C., 1, the Legislature did
(226) not attempt to abolish an office. In *Cotton v. Ellis*, 52 N. C., 545, the office the Legislature attempted to abolish was a Federal office over which it had no power of abolition. In *Wood v. Bellamy*, 120 N. C., 212, the act on its face purported to be only an amendment, and this Court held that the act was an amendment, and that there was no change except in name. Not until the last term of this Court was there any decision in North Carolina that an office, not provided for in the Constitution, but one created by the Legislature, could not at any time be abolished, and the duties transferred to another officer.

It had not theretofore been supposed that the doctrine in *Hoke v. Henderson* was so comprehensive.

In the present case, the new office has different duties and functions from the old one, and under all the decisions, prior to the present term, the plaintiff Nifong can not recover.

I concur in the result as to the other parties.

Cited: Dalby v. Hancock, post 328; *Gattis v. Griffin, post* 334; *White v. Auditor,* 126 N. C., 585; *Taylor v. Vann,* 127 N. C., 245; *Cotton Mills v. Waxhaw,* 130 N. C., 295.

Overruled: Mial v. Ellington, 134 N. C., 159.

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WILLIAM WRIGHT JONES v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Decided 21 November, 1899.)

Malicious Prosecution—Probable Cause—Malice—Conduct of Officer —Waiver of Preliminary Examination.

1. In actions for malicious prosecution, whether there was probable cause for the conduct of the prosecutor is a question of law, but the jury must find the facts which constitute it. After the evidence has been given, if in the opinion of the court the testimony satisfies the court that the prosecutor commenced the prosecution upon the honest and reasonable belief that the accused was guilty, it would be its duty to submit the matter to the jury, with an instruction to the effect that if they believed the witnesses, probable cause had been shown. If, on the other hand, the court should be of opinion that even taking the evidence as true, it did not constitute probable cause, then it should instruct the jury, that in its opinion, taking all the facts and circumstances testified to by the witnesses to be true, there was not a probable cause for the prosecution against the plaintiff.

2. If the officer who makes the arrest abuses his official authority, the defendant not being present and not having given any instructions in that respect, while such conduct may give the plaintiff a remedy against the officer, it does not tend to show malice in the defendant—there being no natural connection between the original procuring of the warrant, and the manner in which the arrest was made.

3. The voluntary waiving of the preliminary examination before the justice of the peace is *prima facie* evidence of probable cause.

CIVIL ACTION for malicious prosecution, tried before *Robinson, J.*, and a jury at March Term, 1899, of CUMBERLAND Superior Court.

The plaintiff, William Wright Jones, was arrested upon a
(228) State warrant sworn out by a detective of the defendant, upon a charge of breaking the insulators and rocking the railroad train of defendant. The plaintiff was arrested by a constable at his home near Dunn, was handcuffed in presence of his mother and family, bail offered and refused, and was taken to Fayetteville and lodged in jail. The next day he was admitted to bail by the justice, waived a preliminary examination, the State not being ready, and was bound over to court. The grand jury failed to find a true bill, the plaintiff was discharged and prosecution ended.

The plaintiff testified that he was not guilty of the charge imputed to him.

Henry Smith, upon whose information the detective testified he had acted in swearing out the warrant, was sworn and testified that he gave the detective no such information, and had never seen the plaintiff break the insulators or rock the train.

The exceptions of the defendant to the instructions given and refused by His Honor are noted in the opinion.

There was a verdict, and judgment in favor of plaintiff for $2,500. Defendant excepted, and appealed.

George M. Rose for appellant.
Robinson & Shaw, and S. M. Wetmore for appellee.

MONTGOMERY, J. The plaintiff was arrested under a warrant sworn out at the instance of the defendant, in which he was charged with unlawfully injuring the telegraph poles of the defendant, and also with unlawfully and maliciously throwing stones at their trains. The plaintiff waived a preliminary examination before the justice of the peace, and gave bond for his appearance at the next term of
(229) the Superior Court. A bill of indictment was sent to the grand jury, but it was ignored, and the plaintiff discharged, and soon thereafter this action was commenced by the plaintiff against the defendant for malicious prosecution.

At the request of the plaintiff the Court instructed the jury, "That what amounts to probable cause is a matter for the jury, and in this case the plaintiff must show by the weight of the evidence that the defendant company acted in taking out the warrant without probable cause, and, where there is a total want of probable cause, the jury

may infer malice almost as a necessity, as a prosecution totally groundless can not be accounted for in any other way." The defendant excepted.

Leaving out any discussion as to whether the latter part of the instruction had any proper connection with the former part, it is clear that the former part is erroneous.

In actions for malicious prosecution, whether there was probable cause for the conduct of the prosecutor is a question of law, but the jury must find the facts which constitute it. In such actions after the evidence has been given, if in the opinion of the court the testimony of the witnesses satisfies the court that the prosecutor commenced the prosecution upon the honest and reasonable belief that the accused was guilty, it would be its duty to submit the matter to the jury with an instruction to the effect that if they believed the witnesses probable cause had been shown. If, on the other hand, the court should be of the opinion that even taking the evidence as true, it did not constitute probable cause, then the court should instruct the jury that in its opinion taking all the facts and circumstances testified to by the witnesses to be true, there was not a probable cause for the prosecution against the plaintiff. *Leggett v. Blount,* 4 N. C., 560; *Plummer v. Gheen,* 10 N. C., 66; *Beal v. Robinson,* 29 N. C., 280; (230) *Swain v. Stafford,* 26 N. C., 398; *Viccars v. Logan,* 44 N. C., 394. In the case of *Swain v. Stafford, supra,* his Honor instructed the jury that in the opinion of the Court, taking all the facts and circumstances proved by the witnesses, Hartman, Harris, Swain and Alspaugh, to be true, there was not a probable cause for the prosecution against the plaintiff, and this Court affirmed the judgment pronounced on the verdict of the jury.

In the case of *Viccars v. Logan, supra,* after the testimony was closed, his Honor was requested by plaintiff's counsel to instruct the jury that there was no probable cause for suing out the State's warrant against the plaintiff. The court "refused to give the instruction prayed for, but defined to the jury what in law constituted probable cause, and submitted the case to them." There was a verdict for the defendants, and a judgment thereon. This Court, in considering the correctness of the charge in that case, said: "We may say here what this Court said in the case of *Beale v. Robinson,* 7 Ired., 280, that 'this case brings up again the question whether probable cause is matter of law, so as to make it the duty of the court to direct the jury that if they find certain facts upon the evidence or draw from them certain other inferences of fact, there is or is not probable

cause; thus leaving the questions of fact to the jury, and keeping their effect in point of reason for the decision of the Court as a matter of law. Upon that question the opinion of all the Court is in the affirmative, and therefore this judgement must be reversed.'" It is further said in the opinion in that case, after discussion and extended investigation into the principle and the authorities: "It would seem, then, that making a question on this subject must be regarded as an attempt to move fixed things, and can not be successful either in England or here."

(231) His Honor further instructed the jury, at the request of the plaintiff, "That the circumstances of the arrest, of the handcuffing of the plaintiff, he not offering resistance, in the presence of his mother and family, the handcuffing of the plaintiff and his brother at their home, and leaving them there handcuffed while the officer went to arrest another, the refusal of the officer to take bail, the offense charged being only a misdemeanor, the failure to prosecute and bring to trial the plaintiff, and the circumstances of the arrest and imprisonment are to be considered by the jury in determining whether there was malice and want of probable cause."

Defendant excepted.

No representative of the defendant was present at the time of the arrest, and there was no evidence that the defendant gave any instructions about how the arrest should be made. The officer who made the arrest was a constable, whose duty it was to serve such process. The evidence of the alleged abuse of his official authority by the constable was objected to by the defendant, and the exception to its being received by the court can be considered along with that part of the charge now under consideration.

There is no natural connection between the manner in which the arrest was made, the defendant not having given any instructions in that respect and not being present, and the original procuring of the warrant by the defendant. If the officer abused his official authority and put upon the plaintiff when he arrested him or while he had him in charge unnecessary restraint or unnecessary humiliation, the plaintiff has his remedy against the officer. If the defendant had instructed the officer to make the arrest in an unnecessary offensive and insulting manner, that could have been shown as evidence of malice. Whether or not the evidence was competent to show

(232) mental anguish, it is unnecessary to discuss. His Honor charged that the testimony was evidence of malice, and we are of the opinion that there was error in the instruction. *Vancickle v. Brown,* 68 Mo., 627.

For the erroneous instructions pointed out there must be a new trial.

There is another exception, however, which we think was well taken by the defendant, and is fatal to the plaintiff's cause of action. His Honor refused to instruct unqualifiedly the jury, at the defendant's request, that the waiving of the preliminary examination before the justice of the peace was *prima facie* evidence of probable cause. He told the jury that the waiving of the examination was *prima facie* evidence of probable cause unless satisfactorily explained. The evidence of the plaintiff himself is without qualification or explanation, that he waived the preliminary examination, and gave bond in the sum of $50. The evidence of L. J. Best, the attorney of the plaintiff, on that point, is: "We demanded trial as soon as we reached Fayetteville, and the attorney for the defendant stated he was not ready, as his witness was not here at that time, and we waived an examination, to have an opportunity to give bail." Overby, the justice of the peace, testified: "The next day on arrival of the train, Mr. Best, their attorney, came. I had the boys brought before me, and their attorney entered a plea of not guilty, and waived preliminary examination, and I required them to give bond in the sum of $50 for appearance at court, and the bond was accepted. I do not think that the State asked for a continuance. So far as I know the waiver of examination was voluntary. I can not say that the prosecution had any witness at the time the examination was made, because no evidence was called for."

From the whole of the testimony, it appears that the waiver (233) of the preliminary examination was voluntary. The most that can be said for the plaintiff is that he made the waiver in order to give bond. He could do that with little prejudice to his rights in the criminal prosecution, because, in the trial upon the plea of not guilty, the State would have to prove his guilt. The waiver of the preliminary examination was only an admission that the defendant had probable cause for the accusation, and not an admission that he was guilty. But when the plaintiff waived the preliminary examination in order that he might gain his liberty by the execution of the bond for his appearance at the next term of the court, he by that act confessed probable cause so far as the action of the defendant in procuring the warrant for his arrest was concerned. The justice of the peace, he not having jurisdiction to try and to determine the offense charged in the warrant, could only bind the accused over to the Superior Court, on the ground that probable cause had been shown that an offense had been committed. The course of the justice of

the peace could be founded only on an investigation of the facts by the witnesses, or by the admission of the accused, and we are of the opinion that so far as this action is concerned the waiver by the plaintiff of the preliminary examination was an admission that the defendant reasonably and honestly believed that the plaintiff was guilty of the offense with which he was charged in the indictment.

Error.

Cited: Jones v. R. R., 127 N. C., 189; *S. c.* 131 N. C., 134; *Moore v. Bank,* 140 N. C., 134; *Morgan v. Stewart,* 144 N. C., 425.

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(234)

W. A. WALKER AND ANNA B. WALKER, ADMINISTRATRIX OF M. A. WALKER, v. J. W. BOWLES AND WIFE, AMANDA.

(Decided 21 November, 1899.)

Agency—Husband and Wife—Note Due Wife, Release by Husband—Evidence.

Where the cause of action is a note given by defendants to secure, in part, the price of land sold by plaintiff and his deceased wife, and the defendants offer to prove that the husband, W. A. Walker, conducted the original transaction of sale to defendants, and also conducted an arrangement with a mortgage creditor of his wife, by which the mortgage was canceled upon the relinquishment on her part of balance due on note in suit, and that this was done without objection from her. *Held,* that the proposed proof of agency amounted to more than a *scintilla,* and was competent.

CIVIL ACTION upon a note under seal, executed by defendants to M. A. Walker, deceased wife of W. A. Walker, tried before *Shaw, J.,* at May Term, 1899, of the Superior Court of IREDELL County.

The execution of the note was admitted, also partial payments thereon. The defendants allege that the balance of the note was adjusted by them with the husband, acting as agent of his wife, in her lifetime.

The proposed evidence of agency, upon objection by plaintiff, was excluded by the court.

Defendants excepted. The excluded evidence is fully adverted to in the opinion.

There was a verdict for plaintiff for balance due on note. Judgment accordingly, and appeal by defendants.

Armfield & Turner for appellants.
W. G. Lewis and B. F. Long for appellees.

MONTGOMERY, J. The real question which the case on ap- (235) peal presents for our present consideration, is whether there was offered by the defendants any sufficient evidence in a reasonable view of it to warrant the jury to find an issue in their favor. The action was brought upon a sealed promissory note executed by the defendants to Mary A. Walker, the plaintiff, for $506.53, the consideration expressed being a part of the purchase money for a tract of land conveyed by the plaintiff and her husband, W. A. Walker, to defendants. The execution of the note was admitted by the defendants, but they aver in their answer that it has been settled and paid. The manner of settlement, as it is set out in the answer, is, in substance, as follows: That after the note was executed, the defendants became insolvent; that W. A. Walker, the husband of the plaintiff, and the defendant J. W. Bowles were debtors of Stimpson & Steele, and those creditors pressing for their debts agreed to take in payment the tract of land which the defendants had purchased from the plaintiff and her husband, and for which, in part, the note in suit was executed; that (in the language of the answer) "the defendants had paid to plaintiff a great amount upon said land, but nevertheless when payment was demanded by the firm of Stimpson & Steele from defendants and from the husband of the plaintiff these defendants went to the plaintiff and her husband and informed them that they were unable to make payment, but that said firm would take the land for which the note was executed, at a much less price than that contracted for by defendants, if defendants and plaintiff would allow the debts respectively due by defendants and plaintiffs to be taken into the purchase price by said firm"; that after a full conference between plaintiff and her husband and the defendants, an agreement was reached that the note in controversy should be considered paid and that the defendants should convey to Stimpson & Steele (236) the land for which the note was in part executed; and that the possession of the property was surrendered and the deed executed according to the agreement.

In the reply, the plaintiff denied the matter set out in the answer.

Since the pleadings were filed, the original plaintiff has died, and her administrator, and also her husband, W. A. Walker, have been made parties-plaintiff.

The question then, as we have said, is, did W. A. Walker have authority from his wife to remit any part of the note due by the defendants to her? We have carefully read the evidence which the defendants offered, and which was rejected by the court, and we have arrived at the conclusion that on the question of agency it would have amounted to more than a scintilla if it had been received, and that it was competent. The defendants offered to show that the defendants made the original trade for the land with W. A. Walker, the husband, and that he made the negotiations between his wife and the defendants and Stimpson & Steele, by which the defendants were to convey the tract of land, which they had purchased from the plaintiff, to Stimpson & Steele, by which arrangement the defendants and the plaintiff were to have their debts, due to Stimpson & Steele, discharged in full; that J. W. Bowles and his attorney, Mr. Caldwell, the clerk of the court, and W. A. Walker, met in the clerk's office for the purpose of carrying out the last-mentioned agreement, and that at that time and at that place W. A. Walker had the note of his wife in his possession and signed a receipt entered thereon for $174.73; that the amount of the payment on the note was not received in cash, but was entered as a credit on the mortgage and note of Walker and wife to
(237) Stimpson & Steele. That witness also testified to numerous business transactions which Walker had done for his wife, and that he (Walker) attended to her business in general.

M. K. Steele testified as follows: "I purchased this land, and Bowles and wife made me the deed, and Bowles negotiated the trade. I held the mortgage on Mr. and Mrs. Walker upon their land. The mortgage due us by Walker and wife was a part of the consideration paid by us for the Bowles land. We bought the land, and in the transaction all the debts that Bowles and Walker owed me were to be included in the settlement for the land. The mortgage was on the Luck land and we gave up the mortgage to Bowles and to W. A. Walker."

It appears from the whole evidence that, through the agreement made with Stimpson & Steele, the plaintiff had her debt to them which was secured by mortgage, canceled and discharged; that she paid nothing for the discharge herself, and that the consideration of the discharge of her debt was the conveyance by the defendants of their land to the plaintiff's mortgage creditor.

It is unnecessary to discuss the other matter connected with the case, for the reason that there must be a new trial, and it is probable that, in that trial, such matter will not arise.

Error.

(238)

STATE ON THE RELATION OF R. S. McCALL v. G. E. GARDNER, G. G. EAVES, I. T. AVERY, E. A. GRIFFITH.

(Decided 21 November, 1899.)

Quo Warranto—Title to Office—Solicitor—Criminal Courts, McDowell, Yancey, Forsyth and Burke Counties.

1. The Criminal Court of McDowell, established by act of 1897, ch. 7, was put into the Criminal Circuit Court, of which plaintiff was solicitor, and there being no provision for a solicitor, the plaintiff performed the functions, discharged the duties, and received the fees and emoluments thereof.

2. It has always been the practice and considered the law that when a new county is added to a judicial district, the solicitor took charge, performed the duties and received the fees and certificate appertaining thereto. There is no reason why the same rule should not prevail in reference to the Criminal Court of McDowell County.

3. The counties of Yancey, Forsyth and Burke stand upon a different footing. Criminal courts were established for them by acts 1899, chs. 371 and 594, and provision made for appointment of solicitor by the Judge; they never constituted part of the plaintiff's circuit, but were incorporated into the Western Criminal District Court.

CIVIL ACTION in the nature of *quo warranto,* tried before *Coble, J.,* at August Term, 1899, of the Superior Court of BUNCOMBE County, and heard upon the pleadings.

The complaint alleged that he was duly elected Solicitor of the Criminal Circuit Court of Buncombe, Madison, Haywood and Henderson counties, in November, 1896, and that there was added thereto the county of McDowell by the act of 1897, ch. 7, and that by the acts 1899, chs. 371 and 594, his circuit was enlarged by the addition of Yancey, Forsyth and Burke, and that by said amendments he became rightfully solicitor for all said counties, but was ousted by the defendants claiming to be entitled under the legislation of (239) 1899, and the appointment of the judge, respectively, as follows: G. G. Eaves, claims to be solicitor of McDowell County; G. E. Gardner, for Yancey County; E. A. Griffith, for Forsyth County, and I. T. Avery, for Burke County.

The answers of defendants claim that they are entitled to the office of Solicitor of the Western Criminal District Court, each in his own county, by virtue of acts of 1899, chs. 371 and 594, and by appointment of the judge, made in accordance therewith.

His Honor, upon the pleadings, rendered judgment in favor of plaintiff against each of the defendants, respectively, and they appealed.

Simmons, Pou & Ward, A. C. Avery, Glenn & Manly and S. J. Ervin for various appellants.

V. S. Lusk and Frank Carter for appellee.

FURCHES, J., writes the opinion of the Court.

CLARK, J., concurs in the result as to defendants Gardner, Griffith and Avery, and dissents from the result as to defendant Eaves.

FURCHES, J. This action involves the right to the office of solicitor of the criminal courts of McDowell, Yancey, Forsyth and Burke counties.

Plaintiff claims that by virtue of his election to the office of solicitor of the criminal courts for the circuit then composed of the counties of Buncombe, Madison, Haywood and Henderson (as stated in the case of *McCall v. Webb,* at this term) he became solicitor for the counties of McDowell, Burke, Yancey and Forsyth, by reason of the fact that the criminal circuit for which he was elected has been since extended by the acts of 1897 and 1899, so as to include the criminal courts of these counties.

(240) The Criminal Court of McDowell was established by the Legislature of 1897, ch. 7, and, when established, was put in the criminal circuit of which the plaintiff, McCall, was solicitor. The act establishing the court in McDowell made no provision for a solicitor; this being so, and the plaintiff being solicitor of the criminal circuit in which it was placed, entered into, took possession of, and has exercised ever since, the functions of said office, and discharged its duties, and received the fees and emoluments thereof, until the defendant Eaves, with the recognition of the judge of said court, wrongfully and unlawfully ousted him from his said office.

The defendant admits that plaintiff was duly elected, qualified and inducted into the office of solicitor of the criminal circuit, composed of Buncombe, Haywood, Madison and Henderson counties, for the term of four years from the first of January, 1897.

But the defendant Eaves denies that the plaintiff was elected solicitor of McDowell County, or that he ever rightfully held said office.

The plaintiff's right to recover, as we have said at this term in *McCall v. Webb,* depends upon his right to the office.

It has always been the practice, and considered the law, that when a new county is added to a district, the solicitor of the judicial district

to which it is added entered upon the discharge of the duties of solicitor for such county so added, and took the fees attached to said office, and the certificate of the clerk which entitled him to $20 for each court from the State. The correctness of such action on the part of such solicitor has never been disputed so far as we have any knowledge. This has been the universal and undisputed practice and conceded rights of such solicitors, and it is not seen why the same rule should not prevail here. We are therefore, of the opinion that the (241) plaintiff was rightfully in possession of the office of solicitor of McDowell County Criminal Court, and rightfully entitled to the fees and emoluments of said office at the time the defendant wrongfully entered into the same and ousted the plaintiff therefrom.

The other grounds of defense are fully discussed in *McCall v. Webb* at this term, and they will not be repeated here.

The facts presented as to the other defendants, Gardner, Griffith and Avery, present other questions which in our opinion distinguish them from *McCall v. Webb, McCall v. Zachary* and *McCall v. Eaves.* They differ from the case of *McCall v. Eaves* in this: The act of 1897 which established the criminal court of McDowell, and put it into the circuit where the plaintiff, McCall, was solicitor, made no provision for a solicitor of that court. So the general rule applied, and the plaintiff, McCall, took possession, and became the rightful occupant and holder thereof.

This is not so as to the solicitorships of the criminal courts of Yancey, Forsyth and Burke. The same legislation that created these courts provided a solicitor, or means for the appointment of a solicitor for each of these new courts. This was in effect to exclude the plaintiff, McCall, from becoming solicitor of these newly constituted courts, by virtue of the fact that he was the solicitor of the criminal circuit into which they were placed, and therefore became solicitor of these new counties by presumption of law. This being so, we are of the opinion that the plaintiff was not entitled to enter upon and hold the solicitorship of these three counties, by reason of the fact that they were put into the criminal circuit of which he was solicitor. In this respect, it is probable that these inferior courts, over which the Legislature has entire control, differ from the circuits or districts of the Superior Courts of the State, for the reason that the Constitu- (242) tion provides for *one* solicitor for each district, to be elected by the people. But there are no such constitutional restrictions as to solicitors of inferior courts.

The plaintiff, never having occupied these offices, and having no right to do so, can not recover against the defendants Gardner, Griffith and Avery.

It is therefore the opinion of the Court that the plaintiff is entitled to the solicitorship of McDowell County, and the fees and emoluments thereof, and that the defendant Eaves is not entitled thereto.

But the Court is of the opinion that the plaintiff is not entitled to hold and claim the fees and emoluments of the office of solicitor of the criminal courts of Yancey, Forsyth and Burke counties; that the plaintiff have judgment against the defendant Eaves for the solicitorship of the Criminal Court of McDowell County; and that judgment be entered allowing the defendants Gardner, Griffith and Avery to go without further day, and for their costs.

Affirmed as to defendant Eaves, and reversed as to the other defendants.

CLARK, J., concurs in the result of the defendants Gardner, Griffith and Avery, and dissents from the result as to the defendant Eaves, for reasons given in the dissenting opinions in *McCall v. Webb* and *Abbott v. Beddingfield,* at this term.

NOTE.—See *Mial v. Ellington,* 134 N. C., 131.

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(243)

STATE EX REL. R. S. McCALL v. CHARLES A. WEBB.

(Decided 21 November, 1899.)

Quo Warranto—Solicitor—Title to Office—Buncombe County.

1. The Criminal Court of Buncombe County was not abolished by the legislation of 1899, and the right of the solicitor to his office was unaffected by it. *Wilson v. Jordan,* 124 N. C., 686.

2. Title to office rests upon legal right, and not upon estoppel.

3. The Constitution, Art. IV, sec. 12, provides for the establishment of inferior courts by the Legislature; the acts passed for such purpose must not interfere with vested rights, or the constitutional rights of other parties.

4. The holder of a public office to which is attached a salary, or fees, has a property, a vested right in the office. *Hoke v. Henderson,* 15 N. C., 1; *Abbott v. Beddingfield,* at present term.

CIVIL ACTION in the nature of *quo warranto,* heard upon the pleadings by *Coble, J.,* at August Term, 1899, of the Superior Court of BUN-

COMBE County, for the recovery of the office of solicitor of the Criminal Court of Buncombe County.

The plaintiff in his complaint alleged, that under and by virtue of an act of 1895, ch. 75, to establish a criminal circuit to be composed of the counties of Buncombe, Madison, Haywood and Henderson, an election was held in November, 1896, at which he was duly elected solicitor of said criminal courts, and qualified accordingly, on January 1, 1897, for the term of four years. The county of McDowell was subsequently added, by the act of 1897, ch. 7.

That the defendant, claiming to be authorized by various acts of the Legislature of 1899, viz., act 27th February, act 3d March, act 6th March, and under the appointment of the judge, had unlawfully entered upon and deprived him of his office.

The defendant, in his answer, alleges that he is rightfully in (244) possession of the office of solicitor by virtue of the acts of 1899, referred to in complaint, and by appointment of the judge made in pursuance thereof.

Both parties moved for judgment upon the pleadings. Judgment was rendered in favor of plaintiff. Defendant appealed.

F. A. Sondley, T. N. Cobb and Charles A. Moore for appellant.
V. S. Lusk and Frank Carter for appellee.

FURCHES, J., writes the opinion of the Court.
CLARK, J., writes dissenting opinion.

FURCHES, J. This is an action in the nature of *quo warranto* by the plaintiff against the defendant for the office of solicitor of the Criminal Court of Buncombe County. It is admitted that plaintiff was duly elected to the office of solicitor of this court in November, 1896, "for a term of four years and until his successor was elected and qualified." That he was duly commissioned, qualified and inducted into said office of solicitor of Buncombe County on the first of January, 1897, for a term of four years, thence next ensuing, which term has not expired.

Notwithstanding these facts, plaintiff alleges that the defendant, Webb, has unlawfully obtruded himself into said office and by and with the recognition of the judge of said court, has ousted the plaintiff of his said office; and that defendant now unlawfully holds and exercises the duties of said office, and is unlawfully receiving the fees and emoluments thereof.

The defendant admits that he has entered upon and holds the (245) office of solicitor of the Criminal Court of Buncombe County, but he denies that he unlawfully entered into said office, or that

he ousted the relator from the office he holds, or that he now unlawfully holds the same. But on the contrary, the defendant alleges that the General Assembly of 1899, by chapters 293, 371 and 520, "abolished" the Criminal Court of Buncombe County, established by the act of 1895, ch. 75, to which the relator of the plaintiff was so elected, qualified and inducted into. And by these acts of 1899, the Legislature established the Criminal Court of Buncombe County, of which he is solicitor; that said acts provide that the judge of said court shall appoint a solicitor thereof, and that the judge, exercising the power so vested in him, appointed the defendant solicitor thereof; that he was duly inducted into said office under and by virtue of said appointment, and that he now holds and exercises the duties and functions thereof, receiving the fees and emoluments of said office, as he of right may do.

This presents the question as to whether or not the office the defendant holds is the same as that the plaintiff held, as solicitor of the Criminal Court of Buncombe County. If it is, the plaintiff is entitled to the relief he demands; if it is not, he is not entitled to this relief, and the defendant will hold the office.

This question, as to whether it is the same office or not, depends upon the question as to whether the Criminal Court of Buncombe was "abolished" by the Legislature of 1899 (acts above referred to).

This very question has been so recently and so fully considered by this Court, that we do not feel called on to enter upon a discussion of this matter again in this case. *Wilson v. Jordan,* 124 N. C., 686. According to the decision in that case, the Criminal Court of Buncombe County was not "abolished," and the office the defendant admits (246) he is in possession of and holding, is the same office that the plaintiff was elected to, and was holding before the defendant wrongfully took possession thereof. This entitles the plaintiff to the relief demanded in his complaint, unless the defendant has shown other reasons why he is not entitled to judgment. This the defendant undertakes to do by showing that the act of 1895 is unconstitutional *in toto, and* absolutely null and void; and that as the act is void *in toto,* there is no office for the plaintiff to hold. And of course if the act of 1895 is void, for the same reason the act of 1899 is also void. The defendant further alleges that the plaintiff must recover, if recover he does, on the strength of his own title and not on the weakness or want of title in the defendant.

The plaintiff says that it would be unconscionable in the defendant to set up such a defense as this, when he is in possession of the very office he says does not exist, and is receiving fees and emoluments of the same; and that he is thereby estopped to set up this defense.

But however inconsistent it may seem for the defendant to claim and hold, and receive the fees and emoluments of an office that he claims does not in law exist, we are of the opinion that there is no *legal* reason why he many not if he chooses to do so. But we see no ground or reason for the application of the doctrine of estoppel in this case. The plaintiff's right to the office does not depend upon the doctrine of estoppel, nor does it enter into the defense of the defendant.

The plaintiff claims the office upon the facts agreed and the law arising thereon, as declared in a great number of cases by this Court.

The defendant's contention would be correct if the act of 1895 and the acts of 1899 were, as he contends they are, absolutely void, because as he contends, there would be no such office as that of solicitor of the Criminal Court of Buncombe County. And while these (247) acts are unconstitutional in many respects, some of which were pointed out in the opinion in *Wilson v. Jordan, supra,* we are not prepared to say that the whole of these acts are unconstitutional and *void.* These unconstitutional provisions can not be enforced, if the parties affected by them make proper and timely objection to their enforcement. It is to be presumed that the officers, entrusted with the enforcement of the law and who have taken oaths to observe and support the Constitution of the State, will not attempt to enforce the unconstitutional provisions of these acts after they have been pointed out by the Supreme Court of the State. But, if they should attempt to do so, such action can only be corrected in the manner we have pointed out.

While courts of the style of this criminal court are not favorites of this Court, as shown in the opinion of *Rhyne v. Lipscombe,* 122 N. C., 655, yet the Constitution of the State, Art. IV, sec. 12, provides for the establishment of inferior courts by the Legislature. This being so, the acts passed by the Legislature establishing these inferior courts only become unconstitutional when they interfere with vested rights, or come in conflict with the constitutional rights of other parties, or other constitutional jurisdictions.

In this case they are unconstitutional because they interfere with the vested rights of the plaintiff. They undertake to take from him his property and to give it to the defendant. If the plaintiff had no vested right of property in the office of solicitor, the act authorizing the appointment of the defendant to the office of solicitor of the Criminal Court of Buncombe County would not be unconstitutional.

If the law remains unrepealed until the term of the plaintiff expires, it will then not be unconstitutional for the judge of the Criminal Court of Buncombe County to appoint the defendant or (248)

some one else solicitor of that court. The Legislature has the constitutional authority to establish inferior courts, and we do not feel authorized to declare the whole act unconstitutional because it is unconstitutional as affecting the plaintiff's constitutional rights, and as it may affect the constitutional rights of others, in its enforcement.

It has been held from *Hoke v. Henderson,* 15 N. C., 1, down to *Wood v. Bellamy, Day v. State's Prison,* and *Abbott v. Beddingfield,* at this term, that the holder of a public office, to which there are salaries or fees attached, has a property, a vested right, to the office. And it is admitted that the office of solicitor of the Criminal Court of Buncombe County is a public office with fees and emoluments attached or incident thereto.

It is therefore our opinion that the plaintiff is entitled to the relief demanded in this complaint, and that he is entitled to hold and to exercise the functions of this office and to receive the fees and emoluments of the same, and that the defendant, Webb, is not entitled thereto. Let the writ issue.

Affirmed.

CLARK, J., dissenting. In addition to the reasons given in the dissenting opinion in *Abbott v. Beddingfield,* at this term, there is a precedent in respect to this new court. In 1895, the Legislature enlarged the two criminal court districts, and, during the term of the judges of those districts, elected others in their stead. The new judgeships were the same, unless the enlargement of the districts made them new offices. If they were the same offices, then under *Hoke v. Henderson,* 15 N. C., 1, Judge Meares and Judge Jones were entitled to serve out their terms in the new district. So well settled, however, was the doctrine that an enlargement was a novation *(Ward v. Elizabeth City,* 121 N. C., 1), that no such claim was made.

(249) This court ousted Judge Jones and seated Judge Ewart long before Judge Jones's term had expired. *Ewart v. Jones,* 116 N. C., 570. And the Court decided for Judge Meares, not on this ground, but because Mr. Cook had been elected prematurely; that such an election was void; that there was a vacancy, and that the Governor had filled this vacancy by the appointment of Judge Meares to hold until the next election. *Cook v. Meares,* 116 N. C., 582.

In fact, unless an enlargement is a novation, both Judge Battle and Judge Stevens are now holding offices which of right are the property of Judges Jones and Meares. And Judge Sutton and Judge Ewart never had any right to the offices they held for years.

It has been urged that this point was not made in those cases. That is itself a strong argument for the defendant. If two judges, both able lawyers, represented by able lawyers, endeavoring to hold their judgeships, never thought to have made this argument, there is a strong presumption against the validity of the argument. If the defendants and their counsel had forgotten to make the argument, this Court could nevertheless have held *ex mero motu* that the judges of the old were the judges of the new districts.

Overruled: Mial v. Ellington, 134 N. C., 131.

STATE ON THE RELATION OF R. S. McCALL v. W. W. ZACHARY.

(Decided 21 November, 1899.)

Quo Warranto—Solicitor—Title to Office—Madison County.

THE plaintiff sues for the office of solicitor of Criminal Court (250) of Madison County, and at July Term, 1899, of the Superior Court of MADISON County, judgment was rendered in his favor by *Coble, J.* Defendant appealed.

The decision of this cause, according to the opinion, is governed by the judgment in *McCall v. Webb,* at this term.

CLARK, J., dissents.

George A. Shuford for appellant.
V. S. Lusk and Frank Carter for appellee.

FURCHES, J. We have carefully examined the facts of this case and find them to be substantially the same as those in *McCall v. Webb,* at this term. This being so, the opinion of the Court in that case must govern our judgment in this case.

The plaintiff is therefore entitled to the office sued for, it being the solicitorship of the Criminal Court of Madison County, and to the fees and emoluments thereof; and the defendant, Zachary, is not entitled to the same, nor to the fees and emoluments of said office. Let the writ issue as prayed for.

Affirmed.

CLARK, J., dissents for reason given in the dissenting opinions in *McCall v. Webb* and *Abbott v. Beddingfield,* at this term.

Overruled: Mial v. Ellington, 134 N. C., 131.

(251)

ALEXANDER HOGAN v. R. A. BROWN.

(Decided 21 November, 1899.)

Stock Law—Impounding Stock—Sale.

1. Statutes giving the right to impound stock and sell the same for damages committed and costs of impounding have stood the test of the courts, when attacked as unconstitutional.

2. It is a proceeding *in rem.*

CIVIL ACTION for the value of a horse, tried before *Robinson, J.,* at October Term, 1899, of the Superior Court of MONTGOMERY County.

By consent, his Honor found the facts, leaving it to the jury to ascertain the value of the animal, which they did, at the sum of $66.66⅔.

Facts found by the Court.

1. That the horse mentioned in the complaint was taken from the possession of the plaintiff in Moore County, which is not a stock-law county, without his knowledge or consent.

2. That said horse was afterwards taken up and impounded in Anson County, which is a stock-law county; that said horse was advertised and sold by the impounder, at which sale one E. J. Lilly became the purchaser, and the balance of the proceeds of sale turned over to the register of deeds of Anson County, as required by law.

3. That afterwards the defendant purchased said horse from the said E. J. Lilly.

4. That the plaintiff had no knowledge of where his said horse was from the time of its taking until it became into the possession of the defendant, Brown, in Cabarrus County; that he then, at once
(252) sent to the defendant, in Cabarrus County, and demanded possession of said horse, or its value, with which demand the defendant refused to comply.

5. After demand as aforesaid, and before the bringing of this suit, the defendant sold said horse, and is not now in possession of the same.

Upon these findings of facts the court gave judgment that the plaintiff was entitled to recover of the defendant the value of the property sued for. From which judgment the defendant appealed.

Adams & Jerome for appellant.
Plaintiff, appellee, not represented.

MONTGOMERY, J. The horse described in the complaint was taken (the case does not show in what manner he was taken) from the owner in Moore County, and was afterwards taken up and impounded in Anson County, a stock-law county. The animal was advertised and sold by the impounder, and at the sale one E. J. Lilly became the purchaser. The balance of the proceeds of the sale, after the impounder's fees had been paid, was turned over to the proper authorities of Anson County, as required by law. Lilly sold the horse to the defendant, Brown, and after the demand and before the commencement of this action, the defendant had sold it to some other person. The plaintiff had no knowledge of where the horse was from the time it was taken from him in Moore County, until he had heard that it was in the possession of the defendant, when he made a demand for the possession of his property. The demand was refused.

Upon the facts which the judge found upon agreement, there was a judgment that the plaintiff was entitled to recover the value of the horse, and an issue was submitted to the jury for that pur- (253) pose. The jury assessed the value of the animal to be $66\frac{2}{3}$, and judgment was entered against the defendant for that amount.

We think the judgment was erroneous. The proceedings by the impounder under which the horse was sold were proceedings *in rem.* The animal itself was condemned for the payment of the fees due by law to the impounder, and no notice was necessary to be given to the owner other than that which was given by the advertisement, required by law in such cases, and which was in fact given.

Statute laws giving the right to impound stock and to sell the same for damages committed upon property while astray, and cost for impounding, have been enacted in many of the States, and they have stood the test of the courts when they have been attacked as unconstitutional on the ground that they deprive one of his property without due process of law. ..... *v.* ....., 7 Watts Penn., 482; 10 Am. & Eng. Enc. of Law, pp. 187, 190, 38 *ibid.*, p. 1149.

This is a hard case, but the Court is unable to relieve the plaintiff.

Error.

(254)

STATE ON THE RELATION OF P. L. LEDFORD v. R. S. GREENE.

(Decided 21 November, 1899.)

Quo Warranto—Title to Office—County Superintendent of Schools—Davidson County—County Board of Education, Act 1897, Ch. 180—County Board of School Directors, Act 1899, Ch. 732; Also Chapter 3—Vacancies.

1. Two vacancies having occurred, by resignation, upon the board of school directors since the passage of the act 1899, ch. 732, two of the persons elected by act 1899, ch. 3, take their places to act in conjunction with the remaining member, and, constituting a majority of the board, their action in electing a superintendent of schools is valid.

2. *Semble.* There being three legislative appointees and only two vacancies, the two first qualified are entitled to act upon the board of school directors.

CIVIL ACTION in the nature of *quo warranto* for the office of County Superintendent of Schools of Davidson County, heard before *Robinson, J.*, at Fall Term, 1899, upon the pleadings. Judgment for plaintiff. Appeal by defendant. The facts appear in the opinion.

Walser & Walser for appellant.
E. E. Raper for appellee.

DOUGLAS, J. This is an action in the nature of *quo warranto* to test the title to the office of County Superintendent of Schools for Davidson County. The plaintiff relator claims by virtue of an election on the second Monday in July, 1899, by W. S. Owen, L. N. Kirshner and P. L. Ledford, persons claiming to be the County Board of
(255) School Directors for Davidson County by virtue of their appointment by the Legislature, in chapter 3 of the Public Laws of 1899.

The defendant claims the same office by virtue of his election on the second Monday in July, 1899, by J. N. Nifong and Ed. L. Greene, claiming to be members of the County Board of School Directors under chapter 108 of the Public Laws of 1897.

In other words, the plaintiff and defendant were both elected to the same office on the same day by two different sets of men, both claiming to be the rightful board of school directors. This case, therefore, depends upon our judgment which we have just rendered in the case

of *Greene v. Owen,* at this term. We have there held that, upon the resignation of John R. Miller and George W. Holmes upon the 3d day of July, 1899, these vacancies were filled *eo instanti* by the legislative appointees under chapters 3 and 732 of the Laws of 1899. Therefore, on the 10th day of July, 1899, (being the second Monday in said month) the board lawfully consisted of J. N. Nifong and two of the legislative appointees. Which two of the legislative appointees, out of the three, were lawfully in office we can not now determine, as that point is not before us; nor have we the necessary facts for its adjudication. We are, however, inclined to think that the two who first qualified are the lawful members. When the two vacancies occurred, there were three appointees waiting to fill them, and as the Legislature had made no distinction between the three, it appears that each had as much right to qualify as the others; and yet it is evident that after two had qualified, if they did so rightfully, there was no room for a third. If they had no right to qualify, then the third appointee had no better right, and none would be in office. It seems to us that the rule suggested is the only one that would carry out the legislative will as far as consistent with constitutional guarantees.

It appears that all three of the legislative appointees met (256) together and voted for the plaintiff, and he therefore, necessarily received the votes of the two who were rightfully members. These two would have constituted a majority of the Board, even if Nifong had been present and voting, as was his undoubted right, then and now.

We are therefore of the opinion that the plaintiff, P. L. Ledford, was lawfully elected County Superintendent of Schools for Davidson County, and is entitled to the possession of said office.

For the reasons stated in this opinion, the judgment of the court below is affirmed.

Affirmed.

CLARK, J., concurs in the result.

Cited: Baker v. Hobgood, 126 N. C., 150.

STATE ON THE RELATION OF D. H. ABBOTT v. E. C. BEDDINGFIELD.

(Decided 21 November, 1899.)

Quo Warranto—Tenure of Office—Statutes in Pari Materia—Railroad Commissioners.

1. Contemporaneous legislation about the same subject matter is *in pari materia*, and may be read and construed together. *Wilson v. Jordan*, 124 N. C., 683.

2. A public office to which there is attached a salary is a vested interest. *Hoke v. Henderson*, 15 N. C., 1.

3. A change of name from Railroad Commission to that of Corporation Commission does not deprive the relator of his office. *Day's case*, 124 N. C., 362. Neither does the addition of some new duty to the office have that effect; neither does a statute professing to repeal the former act, but which in reality is merely amendatory thereof, have such effect.

(257) CIVIL ACTION in the nature of *quo warranto*, instituted in WAKE Superior Court, at July Term, 1899, befoore *Moore, J.*, and a jury being waived, was by consent heard upon the pleadings.

The plaintiff alleges in his complaint, that by the act of 1891, ch. 320, a railroad commission was established, and that in March, 1897, he was duly elected a commissioner, his term of office commencing April 1, 1897, to continue six years, and that he entered upon his office and discharged its duties up to April 4, 1899. That the defendant, claiming to be authorized under act of 6th March, 1899, entitled "An act to repeal the Railroad Commission," also an act of the same date, entitled "An act to establish the North Carolina Corporation Commission," unlawfully intruded upon and usurped his office, and still holds the same.

The defendant, answering the complaint, relies upon the authority of the acts of 1899 for his right to the office now held by him.

Upon the pleadings and admissions his Honor rendered judgment in favor of defendant and against the relator. The relator excepted and appealed.

MacRae & Day, Argo & Snow and J. C. L. Harris for plaintiff (appellant).

Simmons, Pou & Ward, J. N. Holding and J. H. Fleming for appellee.

FURCHES, J., writes the opinion of the Court.
MONTGOMERY, J., writes opinion concurring in the result.
CLARK, J., writes dissenting opinion.

FURCHES, J. The General Assembly of 1891, ch. 320, passed and ratified an act established a railroad commission, to consist of three commissioners. Under the provisions of this act the rela- (258) tor, Abbott, on the .....day of March, 1897, was duly elected one of the three commissioners, provided for in the act, for a term of six years thence next ensuing. Under this election he was, on the 1st day of April, 1897, duly qualified and inducted into said office, and continued therein and performed the duties thereof and exercised the powers and privileges pertaining to said office until the 1st of April, 1899, when the defendant, Beddingfield, as the relator alleges (with the aid and connivance of the other two members of said commission), unlawfully entered into, took possession of, and ousted the relator of his said office; and that the said Beddingfield continues to unlawfully hold said office, and to prevent the relator from entering into the same or to exercise the duties and functions thereof.

The defendant admits that he entered into the office and ousted the relator therefrom. But he says he did so with authority of law, and that he is now, and has been, lawfully holding and performing the duties and exercising the functions of said office, ever since he so lawfully entered into the same.

The defendant says the General Assembly, on the 6th day of March, 1899, passed an act (ch. 506) which repealed the act of 1891 (ch. 320), under which the relator was elected; and that on the 6th of March, 1899, said General Assembly passed another act (ch. 164) which established a "Corporation Commission" to consist of three commissioners, and that he was duly elected, qualified and inducted into said office under said act of the 6th of March, 1899, and rightfully holds the same and exercises the duties and functions of said office under said act and said election.

We note the fact that the defendant alleges in his answer that chapter 506 was passed and ratified on the 4th day of March, 1899. But there is no finding of the court as to this allegation, the bur- (259) den of which was on the defendant. And as it appears from the printed volume of the Laws of 1899 that it was ratified on the 6th day of March, 1899, we will so treat it (although it is probable that it is not very material whether it was passed on the 4th or the 6th).

This brings us to the consideration of the question presented and ably argued on both sides, as to whether the legislation of 1899, ch. 506, and ch. 164, repealed the act of 1891, ch. 320, and the acts amendatory thereof or supplementary thereto. As important as this question

is, to our minds, it has in principle, been decided by this Court in a number of cases, and it is only necessary that we should refer to some of these cases and apply the principles announced in them to the present case.

It seems to us that no one can read the Acts of 1899, chs. 506 and 164, without coming to the conclusion that it was not the purpose of the Legislature to abolish the Railroad Commission—the duties and functions of that institution or commission, but to abolish—to change—the officers holding and exercising the duties and functions of the commission. And in saying this we must not be understood as criticising the action of the Legislature or impugning its motives in passing these acts. We have no doubt but what those voting for these acts thought they had the right to do this, and to put the office the relator held in the hands of a party in harmony with the political sentiment of that party which controlled the Legislature; that they thought this legislation constitutional, or that they were at the time inadvertent to the question of its constitutionality. *King v. Hunter,* 65 N. C., 603. But it presents this question for our determination so far as it affects the rights of the relator. This is the question before us, and we consider it with a view to this single question. If it is unconstitutional as to him—if it does not affect his vested right of property in this office he was holding—then we see no constitutional objection to this legislation. But, on the other hand, if it does affect his vested rights and takes from him his office with its emoluments, before the expiration of the term for which he was elected, then, to that extent, it is unconstitutional and void.

(260)

Chapter 506, and chapter 164, both passed and ratified on the 6th day of March, 1899, are *in pari materia* and must be read and considered together for the purpose of ascertaining their meaning. *Wilson v. Jordan,* 124 N. C., 687; *Rhodes v. Lewis,* 80 N. C., 136. When these acts are read together, it is seen that, on the same day (March 6, 1899), the Legislature, professing to repeal the act of March, 1891, under which the relator, Abbott, claims to hold, reënacted the act of 1891, in almost the very words in which it was originally enacted, and which was a part of the statute law of the State on the 6th of March, 1899. Indeed, it does more than this: The Legislature of 1897 passed an amendment to the act of 1891 (ch. 206), extending very greatly its jurisdiction and powers. This amendatory act of 1897 (ch. 206), gave the Railroad Commission jurisdiction over street railways, express and telegraph companies, and power to require telegraph companies to extend their lines and establish new agencies, to make rules for receiving, forwarding and delivering messages, and makes a violation of

these rules a penalty. None of these powers did the Railroad Commission have under the original act of 1891.

The 42d section, chapter 169, of the Acts of 1897, by express terms, made the Railroad Commission a board of appraisers of railroad property in these words: "Shall constitute a board of appraisers and assessors for railroad, telegraph, canal and steamboat companies."

The act of 1899, chapter 164, which was passed the same day of (261) the repealing act, in declaring the powers of the commission, reenacts the statute claimed by the defendant to be repealed, in section 23, on page 295, in the following words: "To perform all the duties and exercise all the powers imposed or conferred by chapter three hundred and twenty (320) of the Public Laws of eighteen hundred and ninety-one and the acts amendatory thereto."

Here we have an act professing to repeal chapter 320, Acts 1891, and in an act passed the same day, and under which the defendant claims to hold his office, it is reënacted with all amendments thereto. Thus we see that the act of 1891 (ch. 320) is expressly reënacted and continued in force by the act of 1899, ch. 164. *State v. Williams,* 117 N. C., 753; *Wood v. Bellamy,* 120 N. C., 224; *Wilson v. Jordan, supra.*

The act of 1899, ch. 164, does not constitute the Corporation Commission a board of appraisers of railroads, etc., and it seems to be at least doubtful whether chapter 11, section 41, or any other section of that act constitutes the "Corporation Commission" a board of appraisers and assessors for railroads, telegraphs, canals and steamboat companies, as the act of 1897, ch. 169, sec. 42, did. And if the Corporation Commission is considered a thing separate and distinct from the Railroad Commission, and the act of 1891, establishing the Railroad Commission, and the acts amendatory thereof, are repealed—dead, and of no validity—it is at least doubtful whether the Corporation Commission has jurisdiction to assess the taxes on railroads, etc., which constitutes the principal powers and duties of the commission. But if the legislation of 1899, chs. 506 and 164, are construed to be amendments to the act of 1891, establishing the Railroad Commission, and to the act of 1897, which amended the act of 1891, then the powers of the commission to assess the taxes on railroads, etc., it would (262) seem, are ample and undisputed.

Why is this not the proper construction to put upon this legislation? We see by an examination of the act of 1891, establishing the Railroad Commission, and the act 1899, which the defendant claims established the Corporation Commission, that they are in *substance* the same. This will fully appear by reading the two acts together, observing the following order of sections:

ACT OF 1891.	ACT OF 1899.
Section 1 becomes	section 1 embodying Act of April 1, 1891, making court of record.
Section 2 becomes	sections 31, 30 and 29.
Section 3 becomes	section 12.
Section 4 becomes	section 13.
Section 5 becomes	section 2, in part.
Section 6 becomes	section 14.
Section 7 becomes	section 7.
Section 8 becomes	last part of section 1.
Section 9 becomes	section 6.
Section 10 becomes	section 15.
Section 11 becomes	section 16.
Section 12 becomes	section 26 and section 33.
Section 14 becomes	section 17.
Section 15 becomes	section 27.
Section 16 becomes	section 9.
Section 17 becomes	section 18.
Section 19 becomes	section 8.
Section 20 becomes	section 2, subsections 13 and 14.
Section 21 becomes	section 19.
Section 22 becomes	section 20.
Section 23 becomes	section 11.
Section 24 becomes	section 21.
Section 25 becomes	section 22.
Section 26 becomes	section 2, subsections 8 to 11.
Section 27 becomes	section 10.
Section 28 becomes	section 32.
Section 29 becomes	section 28.
Section 30 becomes	section 24.
Section 31 becomes	section 25.

(263) This reference is made to show how completely the act of 1891 is incorporated in the act of 1899; while to our minds it was hardly necessary to be referred to for the purpose of showing their identity, after it had been shown that the Legislature of 1899, in the very act under which the defendant claims to hold, had in so many words reënacted the Act of 1891, and the amendments thereto.

It is established to be the law of this State by *Wood v. Bellamy,* 120 N. C., 221; *Day v. State Prison,* 124 N. C., 362; *Wilson v. Jordan,* 124 N. C., 683, that an act is not repealed by the Legislature's saying

it is repealed, when the same act or contemporaneous acts show that it is not repealed. And it is established to be the law of this State by *Wilson v. Jordan, supra,* and the authorities there cited, and by *Arendell v. Worth,* at this term, that contemporaneous legislation about the same subject matter is *in pari materia,* and may be read and construed together.

It is established law in this State by *Hoke v. Henderson,* 15 N. C., 1, which has been approved in as many as forty cases decided by this Court, as shown in the concurring opinion of Justice DOUGLAS in *Wilson v. Jordan,* by *Wood v. Bellamy,* and *Day v. State Prison, supra,* that a public office, to which there is attached a salary, is a vested interest—a property in the holder, and as such property (264) holder, he is protected by the law and Constitution of this State and the laws and the Constitution of the United States.

It is the settled law of this State, *Wood v. Bellamy, Day v. State Prison,* and *Wilson v. Jordan, supra,* that the change of the name from Railroad Commission to that of Corporation Commission does not deprive the relator of his office—his legal and constitutional rights to hold said office.

If we consider the two Acts of 1899 *in pari materia,* and read them together, as we are bound to do, unless we disregard all the former decisions of this Court, we find that the two acts of 1899 did not repeal the act of 1891 or the act of 1897, but are amendatory thereof; that the reënactment of the act of 1891 and the act of 1897, amendatory thereof, in the same legislation that it is contended by defendant repealed them, had the effect to continue in force the acts of 1891 and 1897. *State v. Williams, supra.*

So it seems to us that every material point in this case has been passed upon and decided by the cases we have cited, and that the relator is entitled to recover of the defendant the office sued for, unless it shall appear that there is something—some fact—shown by the defendant that distinguishes this case from the principles decided in the cases cited.

We now propose to consider those facts and the law arising thereon called to our attention, and claimed by defendant to distinguish this case from those cited, or at least to those that seemed most relied upon in the argument. We would consider them all if we thought it material to the defendant to do so.

And it is interesting to see how many things can be suggested, and how many reasons can be assigned by able and ingenious counsel on the argument of an important case like this.

(265) The first ground taken by defendant was an attack on *Hoke v. Henderson.* This we will not notice further than to say that if any doctrine can be firmly settled in this Court, it is that of *Hoke v. Henderson,* which in our opinion is able to stand alone. But it certainly should be considered by the profession to be settled, when it appears that it has been cited with approval in more than forty cases, and not a single *decision* of this Court to the contrary.

Next, the cases of *Ewart v. Jones* and *Cook v. Meares,* are relied on as authority for defendant—when these cases show that no such doctrine as *Hoke v. Henderson* was presented in either of these cases; nor is *Hoke v. Henderson* referred to, nor the doctrine involved in that case; it was not invoked, considered or passed upon in either of them.

Next, the cases of *Wood v. Bellamy, Day v. State Prison,* and *Wilson v. Jordan,* are relied on as authority for the defendant. This may seem strange, when these cases were expressly decided on the doctrine of *Hoke v. Henderson.* It is thought by the learned counsel for defendant that they can see some *shade of distinction* between some expressions used in writing the opinions in those cases and the present case. They say that it is said the "offices are identically the same." It is also said they are *substantially* the same. But suppose the term "substantially the same" had not been used by the Court in writing those opinions: could that make the authority for the defendant in this case? If he had other authorities sustaining the contention of the defendant, this criticism, it seems to us, might have been made to distinguish the cases of *Wood v. Bellamy, Day v. State Prison* and *Wilson v. Jordan* from this case, and to weaken it as authority for the plaintiff. And we can only see how the defendant may use it in this way, in this argument—not as authority for his position, but only, if possible, to weaken it as authority for the plaintiff.

(266) But the practice of the learned counsel for the defendant has no doubt caused him to observe that it is rarely ever the case that a case cited as a precedent—as authority—is *identical* with the case under discussion, to sustain which it is cited. But it is where the principle involved in the case cited is the same or *substantially* the same as in the case under discussion. That is why the cases of *Hoke v. Henderson, Wood v. Bellamy* and *Wilson v. Jordan* were cited by the plaintiff—because they decide the *principle* that the relator of the plaintiff had an interest, a property, in the office sued for that could not be taken from him and given to the defendant. If it be true, as contended by the defendant, that the addition of a few more powers and duties in the act of 1899 repealed the old act and created a new

institution—a new board—why is it that the act of 1897 (ch. 206) which increased the powers and jurisdiction of the old board more than the act of 1899 increases the powers and jurisdiction of the Corporation Commission over those of the old board, did not have the effect of destroying the old board? Yet this was never contended or even thought of so far as we know; while it would seem that if this contention of the defendant be true, it would have had that effect.

If this contention of defendant be true, why does not the extension of the powers and duties of sheriffs and clerks have the effect of abolishing their offices and turning them out? If this were so, we would have no more trouble with *Hoke v. Henderson* and *Wood v. Bellamy.* All that would be necessary to do would be for the Legislature to add some new duty to the office, and out the incumbent would go.

The next and last stand the learned counsel for defendant makes is that this Court has, in effect, repudiated the doctrine of *Hoke v. Henderson* and *Wood v. Bellamy* in the case of *Ward v. Elizabeth City,* 121 N. C., 1, and defendant contends that the Court can (267) not decide this case for the plaintiff without overruling *Ward v. Elizabeth City.* The learned counsel must have overlooked the fact that *Hoke v. Henderson* and *Wood v. Bellamy* are both cited with approval in *Ward v. Elizabeth City,* and it is distinguished from those cases in the following language: "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. 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 can not 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 v. Bellamy.*" It would therefore seem that *Ward v. Elizabeth City* is not in conflict with *Hoke v. Henderson* and *Wood v. Bellamy,* and does not overrule or repudiate the doctrine announced in those cases, but it expressly adopts and approves of the doctrine announced in those cases. And instead of sustaining the defendant's contention, it is authority for the plaintiff's contention. So we see nothing in the facts of this case, nor in the authorities cited by the defendant, that distinguishes this case from *Hoke v. Henderson, Wood v. Bellamy, Day v. State Prison*

and *Wilson v. Jordan.* This being so, those cases must control our judgment in deciding this case.

There is error in the judgment appealed from, and the re-
(268) lator is entitled to the relief demanded in his complaint—to enter upon and to exercise the rights and functions of his said office and to discharge the duties of said office and to receive the emoluments thereof. The defendant, Beddingfield, is not entitled to have and to hold said office, nor to the emoluments thereof. Let judgment be entered here and the writ to issue from this Court.

Error.

MONTGOMERY, J., concurring. I concur in the result, but I do not wish to be bound by that part of the opinion in which is discussed the motives of the members of the General Assembly in the enactment of chapter 164 of the Laws of 1899; nor do I think it is my part, in a judicial opinion, to make any explanations for them.

CLARK, J., dissenting. The Bill of Rights of the freemen of North Carolina (Constitution, Art. I, sec. 9), reads: "All power of suspending laws, or the execution of laws, by *any authority* without the consent of the representatives of the people is injurious to their rights and ought not to be exercised." This is copied *verbatim* from the great Bill of Rights of 1688, and sums up in four and a half lines the result of two great struggles carried on by our ancestors in England to maintain the right of the people to place their will on the statute book and have it executed without hindrance by, or permission of, *any authority* whatever. In those great struggles the people triumphed; one King lost his head, and his son not profiting by his experience, lost his kingdom, and his descendants to the latest generation were wanderers and aliens in the earth. The result summed up by Lord Somers in the above terse lines was placed in the people's Magna Charta, and has been retained by us, as a memorial like the twelve stones set up by the twelve
(269) tribes at the crossing of Jordan, of the sufferings in the terrible wilderness through which our fathers passed, that the people should enjoy the privilege of making their own laws and managing their own affairs in their own way. It is also a warning to all in any authority that the will of a free people is the supreme law and that none shall interfere with the execution thereof. It would be too small advantage that the power to nullify and suspend or set aside the execution of the laws "without the consent of the representatives of the people" was taken at such cost from the king with the judges to aid him, if the judiciary can now construe that they possess that power

which was expressly denied when attempted to be exercised by them in conjunction with the executive. The heart still beats with emotion at the memory of the trial of the seven bishops, when the judges conspired with the king to punish the defendants for having protested against the suspension by him of the execution of laws passed by the representatives of the people—we still feel a glow of pride over that sturdy English jury who by their verdict rebuked king and judges, and saved to the English-speaking race the right to make their own laws, and to have them executed.

That the people of North Carolina never intended to give this power to the judges, which our ancestors had denied to the king and his judges, is further evidenced by the eighth section of the Bill of Rights: "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other." A more complete inhibition upon the courts against their interfering with acts of the legislative department, by annulling them or setting aside their execution, could not be penned.

Nor is this all. So jealous were the people of their hard-won right to govern themselves through their own representatives freely elected, that the second section of the Bill of Rights reads, "All (270) political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted wholly for the good of the whole"; and sec. 3 reads, "The people of this State have the *inherent, sole and exclusive* right of regulating the *internal* government and police thereof, and of ordering and abolishing their Constitution and form of government whenever it may be necessary for their safety and happiness; but every such right should be exercised in pursuance of law, and consistently with the Constitution of the United States."

In the nature of things "regulation of internal government" and the expression of the people's will can only be made by legislation, and what that legislation shall be depends upon the Legislature. No power is anywhere conferred upon any authority to stay such legislation, but there is an express prohibition. There are limitations in the Constitution upon the power of the Legislature, but none as to abolishing offices or changing the incumbents, except as to officers named expressly in the Constitution. That such should be named and the Legislature forbidden to interfere with them is a recognition that, as to all other officers, the Legislature, representing the untrammeled will of the people, could, from time to time, abolish such offices or change the incumbents. Every person who has taken an office not named in and protected by the Constitution has taken it with a knowledge that by the above con-

stitutional provisions the people were left free to act from time to time as they saw fit in regard to such offices.

In the present case, the Legislature has seen fit to abolish the Railroad Commission, in which the plaintiff was a commissioner, and to create a Corporation Commission, to whom were given the powers
(271) of the former Railroad Commission, the powers formerly exercised by the Bank Examiner (whose office, like that of Railroad Commissioner, is abolished), and sundry other important duties and powers formerly exercised by the State Treasurer and State Auditor. The commissioners of this new Corporation Commission (of whom the defendant is one) were elected temporarily by the Legislature till the next general election, when the people themselves are to fill those positions at the ballot box.

The plaintiff asks the Court to declare that this "regulation of the internal government" of the State is null and void, though guaranteed by the Bill of Rights, sec. 3; that though "all government originates from the people only, and is founded upon their will only" (Bill of Rights, sec. 2), they can not exercise that will by abolishing the Railroad Commission and creating a Corporation Commission; that though "the legislative, executive and supreme judicial powers are forever separate and distinct" (Bill of Rights, sec. 3), the judicial department can, in this respect, invade the legislative department and set aside their legislation because the Court can divine that "the purpose of the Legislature was not to abolish one commission and create another with different powers," as the Legislature declared, but that it was in truth to "displace the plaintiff and put in the defendant"; that though the blood-bought hereditament of a free people handed down from the destruction by our ancestors of the Stuart power and dynasty forbids "any authority" to "suspend the laws or the execution of the laws, *without the consent of the representatives of the people,*" yet this Court can say that the action of those representatives in placing the election to the office of Corporation Commissioners in the people at the ballot box, shall be suspended till the expiration of the term which the plaintiff claims in the abolished office of Railroad Commissioner.

(272) The claim of such high prerogative in this Court, a power of which the Court is to be sole judge, and which is subject to no review by any body whatever, a power which originates in and is to be declared at the will of a majority of this Court, a power which makes that majority and not the will of the people the supreme power in the State, must be clearly and unmistakably expressed in the Constitution. But an examination of that instrument shows not a line, not a hint that any power is conferred upon the Court to set aside any act of the Legis-

lature, in any case, as unconstitutional. It rests upon "the imperturbable perpendicularity of assertion" on the part of the plaintiff.

The learned Chief Justice who wrote the decision in *Hoke v. Henderson,* when in maturer age and with ripened wisdom he had returned to the bench as Associate Justice, thus wrote, with more justice and discernment of the powers of the Legislature: "When, therefore, the Constitution vests the legislative power in the General Assembly, it must be understood to mean that power as it has been exercised by our forefathers before and after their migration to this continent." *Caldwell v. Justices,* 57 N. C., 324.

But the plaintiff's counsel insists that for a hundred years the courts have been declaring acts of legislation unconstitutional. Such authority has never been exercised by any judge in England or in any of her world-wide colonies, and yet they have preserved constitutional liberty without paternal guardianship exercised by the courts over the Legislature. It has been asserted in this country, by judicial assumption, without a line in any Constitution to confer it, or to recognize it since its assumption; yet no court outside of North Carolina has ever claimed that the alleged power to set aside legislative action ever went so far as to declare unconstitutional legislation abolishing or changing officials in offices created by the Legislature; on the contrary, every court to which the question has been presented has strongly denied such (273) power to be in the courts, and so has every text-writer. And none more strongly than Chief Justice Marshall in the celebrated Dartmouth College case when holding that the Legislature could not impair the provisions of a charter, he expressly says that the decision does not restrict the right, which legislatures unqestionably have, to change or abolish officers, since they are governmental agencies, and that they hold by virtue of no contract.

In reply to the express provisions of the State Constitution which prohibit the courts to interfere with legislation in any respect and the uniform decisions of all other courts that the power to declare legislation unconstitutional does not extend to legislation affecting offices not created by the Constitution, since such legislation is purely governmental and rests solely with the legislative department, there is but one reply offered us: "It was otherwise decided by *Hoke v. Henderson.*" That this decision upon a question of constitutional law, common to all the States and to the Federal Government also, should stand out in contradiction to all the decisions of all the courts of the other states, would alone suffice to make us doubt its soundness and reconsider its foundation. Without questioning the conceded ability of the Court which rendered it, the three lawyers then filling that bench can not be asserted to have

possessed attainments and abilities overmatching the vast array of eminent men on the benches of like tribunals in the other States, and upon the Supreme Federal Bench, who with absolute unanimity hold that the doctrine asserted in *Hoke v. Henderson* is itself unconstitutional.

Let us examine it with unbiased minds. In *Hoke v. Henderson,* the Court says that property in public office is acquired by contract.
(274) As to future earnings there is no "law of the land" to prohibit the Legislature impairing that which has not yet been earned, except the contract clause of the United States Constitution. The impairment of contracts is prohibited (not by any provision of the State Constitution, but), only by the provision of the United States Constitution, Art. I, sec. 10, clause 1, that "no State shall pass any law impairing the obligation of contracts." It is thus the Federal Constitution that is invoked to nullify State legislation. It is a rule that the construction placed by the State Supreme Court upon the Constitution of its own State will be adopted without question by the United States Courts; and for a stronger reason, the construction placed by the United States Supreme Court upon the Constitution of the United States is binding upon the State courts, else we might have as many constructions of it as there are States. Now, this very clause of the United States Constitution has been several times before the United States Supreme Court, and that high tribunal has held uniformly, notwithstanding its changes of personnel, from the decision of Chief Justice Marshall down to the present, that the clause in the United States Constitution prohibiting any State from passing any law "impairing the obligation of contracts" does not prohibit State Legislatures from abolishing public offices or changing their incumbents without abolishing the offices, for that within the meaning of that clause "public office is not a contract." This should surely be final and conclusive—the uniform construction by the United States Supreme Court of the meaning of a clause in the United States Constitution. It will be sufficient to cite a few cases:

In *Butler v. Pennsylvania,* 10 Howard (51 U. S.), 402, the Court says: "The contracts designed to be protected by the 10th section of the first article of that instrument are contracts by which *perfect*
(275) *rights, certain, definite, private rights* (italics in original) of property are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State Government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. . . . It follows then upon principle that in every perfect and competent government there must

exist a general power to enact and to repeal laws, and to *create and change* or discontinue the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic and for the safety of the individuals of the community. It is true that this power or the extent of its exercise may be controlled by the organic law or Constitution of the State, as is the case in some instances in the State Constitutions . . . but where no such restriction is imposed, the power must rest in the discretion of the government alone. The Constitution of Pennsylvania contains no limit upon the discretion of the Legislature, either in the augmentation or diminution of salaries, with the exception of those of the governor, the judges of the Supreme Court, and the presidents of the several courts of common pleas. The salaries of those officers can not under that Constitution be diminished during their continuance in office. Those of all other officers are dependent upon legislative discretion. We have already shown that the appointment to and *tenure* of an office created for the public use and the regulation of the salary affixed to such an office do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term *contracts* (italics in original) or in other words the vested, private, personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations, by which govern- (276) ments are enabled and are called upon to foster and promote the general good; *functions therefore which governments can not be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them.*" Then the Court goes on, after saying "this doctrine is in strict accordance with the rulings of this Court in many instances," (citing cases), and expressing "surprise" that it should be again presented, to quote with approval the following from *Commonwealth v. Bacon,* 6 S. & R., 322: "The services rendered by public officers do not, in this particular, partake of the nature of contracts, *nor have they the remotest affinity thereto*"; and also quotes with approval the following extract from *Commonwealth v. Mann,* 5 W. & S., 418: "If the salaries of judges and their title to office could be put on the ground of contract, then a most grievous wrong has been done them by the people, by the reduction from a tenure during good behavior to a tenure for a term of years. The point that it is a contract or partakes of a nature of a contract will not bear the test of examination"; and further points out that the constitutional provision, protecting terms and salaries of governor, judges and other constitutional officers, is a sure indication that they were not protected by being contracts, and

that officers not so protected by the Constitution are left to be changed at legislative will.

This decision of the United States Supreme Court was rendered in 1850—seventeen years after *Hoke v. Henderson.* If the eminent Court that rendered the latter decision had had the benefit of this construction by the United States Supreme Court of the "contract" clause of the United States Constitution, as we have, we may feel sure they would have rendered a different decision—as we should do.

In 1879 the same point was before the United States Supreme
(277) Court in *Newton v. Comrs.,* 100 U. S., 548, in which the Court says: "The principle laid down in the Dartmouth College case, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a *public law* relating to a *public subject* within the domain of the general legislation of the State and involving the *public rights* and *public welfare* (all these italicized as in original) of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the Court by the argument in the Dartmouth College case, by Mr. Chief Justice Marshall." (Here the Court quotes at length from that decision which draws the line between private contracts which are protected and "other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice,") and adds: "The judgment of the Court in that case proceeded upon the ground that the college was (quoting Marshall), 'a private eleemosynary institution, endowed with a capacity to take property for purposes *unconnected with the government* (italics in original) whose funds are bestowed by individuals on the faith of the charter.'"

In the same case, 100 U. S., at p. 559, it is said: "The legislative power of a state, except so far as restrained by its own Constitution, is *at all times absolute with respect to all offices within its reach.* It may at pleasure create, or abolish them, or modify their duties. *It may also shorten or lengthen the term of service.* And it may increase or diminish the salary or change the mode of compensation." *Butler v. Pennsylvania,* 10 Howard, 402. "The police power of the States, and that with respect to municipal corporations, and to many other
things that might be named, are of the same absolute character.
(278) Cooley Const. Lim., 232, 342; *The Regents v. Williams,* 4 Gill. & J., (Md.), 321.

"In all these cases, there can be no contract and no irrepealable law, because they are 'governmental subjects' and hence within the category before stated."

In *Crenshaw v. United States,* 134 U. S., 99, (1889), the point was again before the Court, and Mr. Justice LAMAR, speaking for a unanimous Court, quotes from and approves the two cases above cited (*Butler v. Pennsylvania,* 10 Howard, 402, and *Newton v. Comrs.,* 100 U. S., 548), and holds that "an officer appointed for a definite time or during good behavior has no vested interest or contract right of which he can not be deprived by subsequent legislation," and sums up his able opinion in this emphatic sentence, *"Whatever the form of the statute the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one Legislature can not deprive its successor of the power of revocation."*

Whence then does this Court get any power to declare null and void the statute abolishing the plaintiff's office, or (even if it were true) placing the plaintiff in it? The State Constitution not only does not protect the plaintiff in a legislative office, but forbids the Court to stop the execution of any law. The United States Constitution, as uniformly construed by the highest court, does not protect him; for it says, "No office is a contract," but that all officers whose terms are not fixed by the Constitution may be changed or abolished at the will of the Legislature.

This surely should be conclusive of the controversy. Every other court, and every text-writer holds the above views. See list of cases cited in Throop Public Officers, secs. 19 and 345; Meacham Public Officers, secs. 5 and 465; Black Constitutional Law, 530; Black Constitutional Prohibitions, 114; 19 A. & E., 562 C.; Cooley (279) Const. Lim., 336 (star page 276), in which that eminent jurist sums up the authorities as above, and quotes from Chief Justice Marshall, in the Dartmouth College case, 4 Wheaton, 629: "The framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government."

With the legal ability of the entire world arrayed against the plaintiff's contention, his counsel simply says, "we rely upon *Hoke v. Henderson.*" It is but justice to the Court which rendered that decision to again say that they did not have the benefit of the full light which has been shed upon us. Few state courts had then passed upon the question, and none of the decisions of the United States Supreme Court which have since so clearly and unmistakably held that an office is not a contract within the meaning of the Federal Constitution. There is no dogma of "judical infallibility," and if there had been, that Court did not believe they possessed it, for they overruled several of their own decisions, and there is a long list of other decisions of theirs which have been overruled by their successors.

But it is said that the decision in *Hoke v. Henderson* has been quoted some forty times. It has been often cited, but many times incidentally or to show it did not apply. An examination will show that it has been quoted as direct authority, prior to the present year, less than a dozen times. But forty times zero is zero still, and the decision being based entirely upon an erroneous construction of the United States Constitution, as shown by the subsequent decisions of the United States Supreme Court, the repetition of the error leaves it an error still.

In matters of practice, mere routine of the courts, a line of de-
(280) cisions once established is followed till changed by statute or rule of court that the change may be prospective. The same is true of decisions affecting contracts and private rights generally. They become rules of property; men act upon them and contract with reference to them. But in constitutional questions, the Constitution itself is the guide, not the glosses of the courts. We can not "make the word of none effect by our traditions." The decisions of the courts are the "traditions of the elders." The Constitution itself is the higher authority. Just as the Scriptures still speak for themselves and are not to be held changed by erroneous constructions which from time to time have been placed upon them by men of unquestioned ability and sanctity; or, as President Lincoln said in his inaugural address, speaking of constructions placed by the court upon the Constitution: "Such matters are never settled, till they are settled right"; or, as Chief Justice Chase and Justices Miller and Field said, in *Washington v. Rouse,* 8 Wallace, 441, when protesting against a decision which restricted the powers of the Legislature: "With as full respect for the authority of former decisions as belongs, from teachings and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the power of legislative bodies which can never be closed by the decisions of the court, and that the one we have here considered is of this character."

The decision in *Hoke v. Henderson* being contrary to the subsequent construction placed upon the "contract" clause of the Federal Constitution by the United States Supreme Court, it would be impossible for any court to hold with *Hoke v. Henderson* if it were a new question today. The same reason requires it to be overruled that the "word" not the traditions of men should control. But aside from that, the decision itself is illogical and incoherent and can not be sustained by any
(281) process except that of saying *ipse dixit.* It is true that a most respectable Court wrote it. No one doubts their ability or their respectability. Even Homer sometimes nodded. That Court was able, but they wrote some decisions which they themselves held incorrect, and

many others their successors have held incorrect. The decision must stand or fall upon its own merits or demerits. It can have no vicarious righteousness imputed to it. What is this much-talked-of decision which is invoked to stay the hand of the people equally when they would change their management of the penitentiary, their court system, the management of the railroads owned by the State, the educational system of the State, the supervision of the shell-fish industry of the State, or the supervision and regulation of railroads, telegraphs, telephones and express companies, and their charges and their assessment for taxation? From the expenditure of hundreds of thousands of dollars of tax money upon convicts and courts, and the management of the property of the State, down to offices paying $6 and $8 salaries per year, whenever the people have put forth their hand to change the management, this Court is invoked to stop the execution of the people's will; not by virtue of a provision of the State Constitution, for, admittedly, there is none; not by virtue of any provision of the Constitution of the United States, for the United States Supreme Court says there is none that confers that power; but by virtue of a decision of a Court two-thirds of a century ago. Thus, the imposition of the dead hand of the past is invoked to deny the constitutional rights of the living.

But take the decision as an original proposition; ought it to stand or should it be overruled as so many others, rendered by the same Court, have been? It holds that a public office is a private contract, and therefore property of the office holder. With strange inconsistency, it holds that the office can be abolished, but that, if another (282) is put in the office, the first holder can claim the emoluments. Can that be sustained? If the office is a contract, if it is property, the rights of the holder surely are as much violated by the destruction of the office and the loss of the property as when it is transferred to another. Again, if it is a contract, it is a contract for employment, and every one knows that the remedy for a breach of such contract is not a decree of court to put out the new employee and to put in the old one, but a judgment for damages, and no judgment for damages can be given against the State, which is besides not a party to the action though the treasury is ordered (by this indirect method) to pay the salary of a public agent whom the State has discharged. Besides, if public office is private property (or as the current phrase goes "if public office is a private snap") surely it can be bought and sold, for what property a man has, he has an inalienable right to dispose of, yet if it were attempted, the recreant officeholder would find himself indicted. It says the salary may be reduced, but if it is a contract how is that possible? If it were property, then surely upon the death of the in-

cumbent it would go to his executor or administrator. Indeed, the decision is logical in this respect, for the Court which had strongly expressed the opinion that public offices should be held for life, says (15 N. C., bottom of page 23): "For an absolute term of years it could not be granted; as upon the death of the officer, it would in that case go to his executor, which would be inadmissible since the office concerns the administration of justice and an incompetent person might be introduced into it." The provision in the statute which the Court there condemned was that "the duly elected clerk of the court shall continue in office for the term of four years next after qualification," without adding, "determinable upon death," yet every office holder in (283) North Carolina who holds a term today has it prescribed in the words the Court condemns in *Hoke v. Henderson*. Will any court follow that decision in holding that on the death of any incumbent his office goes to his executor or administrator? In *London v. Headen*, 76 N. C., 72, it was held that one who had been elected constable was liable to a penalty for refusing to accept and qualify. This recognized the true ground that public office is an agency, a duty or privilege to serve the State, and the salary is the compensation the State allows, for certainly no one could be punished for refusing to enter into a contract with the State. There are other inconsistencies in the decision, but is it such a perfect specimen of infallibility that by virtue of it, this Court, contrary to the prohibitions in the State Constitution, contrary to the construction since placed by the Supreme Court of the United States upon the Federal Constitution, can invade the legislative department, suspend the execution of the laws passed by it, and prohibit the penal institutions of the State, its educational system, the control of State property, the administration of justice, passing into the hands of those whom the people through their representatives have selected for the performance of public service in regard to them?

But it is said that *Hoke v. Henderson* is a precedent as to construction of the Constitution. There can be no judicial precedent that can avail against the express letter of the Constitution. Besides, that argument can not be addressed to this Court. In 1866, legislation was adopted (Code, secs. 38 and 3448) whereby to save taxpayers the punishment of paying fines, costs and orders of maintenance for insolvent convicts, the courts were empowered to order that if those adjudged to pay should fail or be unable to pay in money, they should work out the amount on the public roads. This legislation was held consti- (284) tutional in *State v. Palin*, 63 N. C., 471, (in 1869), and has been uniformly so held ever since, by unanimous courts, down to and including *State v. Nelson*, 119 N. C., 797. This constitutional prece-

dent has been overruled at this term in *State v. White,* though in doing so the Court has disregarded the reasonable doubt as to the unconstitutionality of the statute, which must exist when the courts have held it valid for a third of a century; whereas, to overrule *Hoke v. Henderson,* would not do violence to that canon of construction, for, on the contrary, it would be holding constitutional legislation which *Hoke v. Henderson* held unconstitutional—and the presumption is always in favor of the constitutionality of legislation.

But it is further urged that the legislative department has acquiesced in *Hoke v. Henderson.* The repeated cases in which counsel claim that that case has been followed show by the constant litigation arising from that ill-starred decision, that there has been a continuous struggle between the people acting through their Legislature and the courts. In this very year, the numerous cases which have come before us show that the Legislature has not yet acquiesced or have thought they had avoided the restrictions of that decision. In neither case can it be said there was legislative acquiescence in the correctness of the decision. But in truth there has been an open disavowal of the principle of *Hoke v. Henderson* by the judiciary of this State and by the people themselves, to which, by some oversight, no one has yet called attention. If the tenure of office is protected only by being fixed in the Constitution, that is a prohibition against legislation in regard to it, but is no prohibition upon a Convention abolishing such office in forming a new Constitution, or changing its occupants. But if, on the other hand, under the ruling in *Hoke v. Henderson,* public office is also a contract, then it is protected by the contract clause of the United States Constitution, and a State can no more impair its obligation by an ordi- (285) nance of a Convention than by an act of the Legislature. *Louisiana v. Taylor,* 105 U. S., 445; *White v. Hart,* 13 Wall., 646; *Clay Co. v. Society,* 104 U. S., 519. "No *State* shall pass any law impairing the obligation of a contract." Now in 1865, by authority of the President of the United States, a Convention was called in North Carolina to establish a State Government. Among other things, it elected for life terms three Supreme Court judges, and eight Superior Court judges. That government remained in force till abrogated by the Convention of 1868. All the acts of the executive and legislative departments of the State, and all the decisions of the courts from 1865 to 1868 have ever been held valid and binding. All contracts of the State during those years are valid. If public office is a contract, then the judges and other officers were protected against these contracts being impaired by the Convention of 1868. In the matter of *Hughes,* 61 N. C., 57, PEARSON, C. J., held that the Convention of 1865 was "a

rightful Convention of the people," and the officers chosen by it were not merely *de facto* but *de jure*. On page 74, he calls attention to the fact that Congress as well as the President had recognized and confirmed the action of the Convention, and on page 75, closes the opinion by saying that if the Convention was rightfully convened (as he has just held) "It is certain it had power to adopt all measures necessary and proper for filling the offices of the State, which is the only question now under consideration." If public office was a contract then the attempt of the Convention of 1868 to provide new Supreme Court and Superior Court judges, and other public functionaries, with exactly the same titles, exactly the same duties and powers and compensation, in the place of those elected in 1865, was a nullity, and we must either hold that
(286) the occupants of the Supreme and Superior Court bench, who went into office by virtue of the authority of the Convention of 1868, were conscious usurpers of other men's property, or they repudiated the *Hoke v. Henderson* doctrine that public office was private property.

But it may be said by those who do not recollect, or have not examined, that the action of the Convention of 1868 in vacating these and other offices was by the *vis major* of an act of Congress. If Congress had so enacted, it had no power to authorize a State to pass an act impairing the obligation of a contract. But in fact no act of Congress required the vacation of any office by the Convention of 1868. The sole requirement in the Act of Congress (ch. 153, sec. 5, ratified March 2, 1867, and ch. 6, ratified March 23, 1867), was that the new Constitution should be framed by a Convention elected by voters, without regard to color, and the Act of Congress admitting the State to representation in Congress, ch. 70, ratified June 25, 1868, contains only one "fundamental condition," which is thus expressed: "That the Constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the Constitution thereof, herein recognized, except as punishment for crime, etc." The requirement of Congress was solely directed to the right of suffrage, with no exaction as to vacation of offices. In removing, therefore, the life judges, Supreme and Superior, who had been elected in 1865, and had taken their seats, the new judiciary declared most unequivocally that the *Hoke v. Henderson* doctrine that public office was held by contract was overruled.

It is matter of astonishment that, after that date, any one could be found to urge before the courts that *Hoke v. Henderson* was an
(287) authority in North Carolina.

If *Hoke v. Henderson,* for any one of the above reasons, should not be regarded as law, then the whole of the frail scaffolding upon which the plaintiff's case rests goes down.

But even if it were possible for it to stand, still the plaintiff could not recover, for *Hoke v. Henderson* only held that an officer, whose office had been transferred to another, was still entitled to receive its emoluments, for it says (15 N. C., bottom of page 21), that the "property" in the office is the right to receive its compensation. Clearly that, in no aspect, would oust the defendant whom the State could also pay; nor would it deny to the people their right to elect a corporation commissioner at the next general election.

In *Day's* case, 124 N. C., 362, the doctrine of *Hoke v. Henderson* received a sudden and vast expansion, for it was then held for the first time that the dismissed officeholder was entitled, if his "duties" were continued in any guise, no matter among how many it was divided. As the duties of almost any office which is abolished (whether for economy or any other reason), must necessarily be devolved upon some one, this made it almost impossible for the Legislature to abolish any office during the term of the incumbent, though *Hoke v. Henderson* had expressly held that any office, not created by the Constitution, could be abolished at the will of the Legislature.

The doctrine of *Hoke v. Henderson* received a still further expansion in *Wilson v. Jordan,* 124 N. C., 683, in which the doctrine of *in pari materia* was held to apply, and hence if an office was abolished, yet if the Legislature, at that or a subsequent term, legislated upon the same subject matter, the act abolishing the office would be held null, and the officer reinstated, not merely in the receipt of his salary, but in the performance of the duties of the similar office under the (288) new statute.

But as far as these two cases expanded the doctrine of *Hoke v. Henderson,* they still fall short of being sufficient to sustain the plaintiff's claim, unless there is another expansion. The Railroad Commission was abolished, afterwards a Corporation Commission was created, to which were entrusted the duties formerly discharged by the Railroad Commission plus the duties of the former Bank Examiner (whose office is abolished), plus certain duties formerly discharged by the State Treasurer, plus certain duties formerly discharged by the State Auditor, plus some entirely new duties. If the plaintiff can claim the office of Corporation Commissioner because all his duties are performed by the new Commissioner, the Bank Examiner, with equal force, may claim that he also is entitled to the defendant's office because all his duties are embraced in those entrusted to the Corporation Commis-

sion; and the State Treasurer and the State Auditor might also make like claim because certain of their duties have likewise been transferred and swallowed up.

If, when the whale swallowed Jonah, he was in law merely a continuation of Jonah, how shall we decide when this whale has swallowed two Jonahs and parts of two others? Which one is he?

In a late case in the United States Circuit Court it was held that the Railroad Commission and the Corporation Commission were not the same body, and that was given as a reason why the State Treasury should lose the assessed taxation upon twelve millions of railroad property, that is, that other taxpayers should make it good, while now, this Court is asked to hold that the two commissions are one and the same body, and therefore the plaintiff is entitled to the office of Corporation Commissioner to which the Legislature elected the defendant. The people have been "lost in the shuffle."

(289) To ask the Court to hold that the plaintiff is entitled to the title, powers and pay of Corporation Commissioner because he was a member of the Railroad Commission, which was abolished and its duties transferred, among others, to the Corporation Commission, is to ask it not only to deny the Legislature the right to legislate in matters purely governmental, but is asking the Court to legislate by giving to the plaintiff the powers of a former Bank Examiner and the duties transferred from the Treasurer and Auditor and the new duties, for as to none of thes is there now or has ever been a shadow of legislative authority given the plaintiff to discharge them. If such expansion can be given to the incorrect but moderate doctrine of *Hoke v. Henderson,* then legislation will not depend upon the will of the people at the ballot box in electing their representatives in a legislative body, but upon what the majority of this Court may let the Legislature enact—or in the striking language of some recent opinions "what effect we will give to the statute." The statute should get its effect from its passage and ratification by those elected to pass legislation. The courts are given no power to interfere—are expressly prohibited from so doing. When the Federal Constitution is invoked as giving the Court, notwithstanding, power to interfere, we find the United States Supreme Court saying that the section invoked confers no power on the courts in respect to legislation as to public offices, or other "governmental" legislation.

If this Court has the power claimed by the plaintiff, then, already power has passed "from the many to the few." The supreme power is not in the people to be enacted into law by their representatives, but in the irreviewable action of a majority of the Supreme Court of the

State who can declare legislation invalid as rapidly as it is enacted. If this doctrine of public office being a contract, expanded as asked by the plaintiff, is correct, then a party or a machine (290) whose conduct has disgusted the people may fill every office for eight years, for twenty years, or for life (as in *Hoke v. Henderson*), and snap their fingers in the face of the people, for under *Day's* case the office remains as long as the duties survive, and under *Wilson v. Jordan* it remains as long as there is any legislation on the same subject matter, or *in pari materia.*

Nay, more, if some vast trust, some powerful combination of capital, shall elect one Legislature, it can fill the offices for life, and a generation of men must pass away without any voice in, or control of the government they created; for even a constitutional convention can not vacate offices, if office is a contract. Or if the same oppressive combination shall succeed in nominating and electing three members of this bench, it can, through them, for eight years at least, nullify and set aside any act of legislation which they may deem proper to hold unconstitutional. The only safeguard is the Constitution, which confides legislation to the Legislature and makes all legislation repealable. It was this very evil of interference with the right of the people to legislate that caused the historic struggles in England whose result is condensed into section 9 of our Bill of Rights. The whole system of our free government is summed up in section 2 of the Bill of Rights already quoted, i. e.: "All political power is vested in and derived from the people; all government of right originates from the people, is *founded upon their will only,* and is instituted for the good of the whole," that is to say, that the will of the people when expressed through their representatives in the General Assembly, is the law. Legislatures are not always true to their trust, but the remedy provided by the Constitution is not to submit their work for approval and validation to any three men or five men, which would be an oligarchy, but to submit it to the approval (291) and endorsement of the real sovereign, the people, at the next general election, who will elect new representatives, who will set aside, change or approve what has been done. So far from reducing the legislative department to subordination to the will of the judiciary, the newer state constitutions are increasing the control of the people over their legislatures by requiring specified acts to be submitted by a referendum to an immediate vote of the people (as is the case with the pending constitutional amendment in this State), instead of waiting for a general referendum of their action in the election of new representatives. Whatever tends to increase the power of the judiciary over the Legislature diminishes the control of the people over their

government, negatives the free expression of their will, is in conflict with the spirit and the express letter of the organic law and opposed to the manifest movement of the age. 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."

When our State Government was formed at Halifax, in 1776, representative government was new, and property owners fearful to trust the people, and the masses were generally illiterate. As a consequence, by that Constitution the people were given the election of only one officer in the government, i. e., the member of the lower house of the General Assembly, the members of the State Senate being elected by those owning fifty acres of land and over; the Governor and other State
(292) officers, including the judges and solicitors, were elected, at second hand by the Legislature, the judges being chosen for life. The justices of the peace were also elected for life by the General Assembly, and all the county officers were elected by the justices, their election being thus three removes from the then untrusted people. She justices of the peace elected the clerk of the County Court for life, and the judger appointed the clerks of the Superior Courts for the same term. With the increase of education among the people and the experience of their capacity for self-government, there was a movement for a betterment of this condition, though it was retarded by the fear inspired by the excesses of the French revolution. In 1829, the election of sheriffs and constables was given to the people. In 1832, the clerks of the Superior and County courts were made elective by the people for terms of four years. All the judges at that time were elected by the Legislature for life, and the courts were not then, as now, created by the Constitution, but the Supreme Court, itself, was a legislative enactment. The judges, educated under the old system of distrust of the capacity of the people for self-government, looked around for some brake to put upon the radical movement which (as it must have seemed to them) threatened society. They hit upon property in office acquired by contract with the State, and the "contract" clause of the Federal Constitution (which had not then, as now, been distinctly held by the United States Supreme Court not to apply to offices) and rendered the decision in *Hoke v. Henderson,* which has been a clog upon legislation ever since, and a fruitful source of litigation. In that opinion, the judges frankly say that the proper tenure of office is for life. But progress went on. In 1833 constables were

made elective by the people, and in 1835, the election of Governor was given to the people. In 1854, free suffrage was adopted and the 50-acres freehold required as a qualification for electors for the (293) State Senate was abolished. In 1868, the election of the State officers (except that of Governor already conferred in 1835), and of the judges, solicitors and justices of the peace and coroners and county commissioners was given to the people. In 1899, the election of the Commissioners of Agriculture and of Labor, and Corporation Commissioners was given to the people, and the plaintiff is fighting against that—claiming that the abolition of his office and creation of a larger office, the commissioners of which are to be elected by the people is a violation of his rights, and invokes *Hoke v. Henderson.* That decision was erroneous and illogical when made, has since been so demonstrated by the United States Supreme Court, and is inconsistent with itself. But if it were correct, it does not cover the plaintiff's case.

The same progress made in the acquisition of control of the government by the people in the State has taken place in the Federal Government. In the United States Constitution of 1787, only one officer, the member of the lower house of Congress, was made elective by the people. The Senators were chosen at second hand by the State Legislatures, and the President at second hand by electors, while the judges were selected at three removes from popular election, being appointed for life by the President and confirmed by the Senate. The people quickly made the election of President practically direct in themselves by reducing the electors to shadows. An amendment to elect Senators by the people has repeatedly passed the lower house of Congress, and must soon pass the Senate. The election of judges by the people, and for a term of years instead of for life, has been adopted by nearly all the States, and evidently must soon become an issue as to the United States judges.

In other nations, the same movement to pass the control of (294) government in the people has taken place. A late historian (McKenzie), says: "Sixty years ago, Europe was an aggregation of despotic powers, disposing at their pleasure of the lives and property of their subjects. . . . Today, the men of all Europe (outside of Russia and Turkey) govern themselves. Popular suffrage, more or less approaching universal, chooses the governing power, and by methods more or less effective, dictates its policy." In recent years, Brazil, the only monarchy in South America, has become a republic, and even Japan now elects a parliament.

In the face of this well-nigh universal concession of the right of the people to manage their own affairs, the plaintiff calls upon this Court

to declare and use a paternal power of supervising and setting aside the action of the representatives of the people of North Carolina lawfully assembled in legislative session and legislating upon governmental matters, and he does this upon the alleged authority of *Hoke v. Henderson,* which, if it applied to his case, has been discredited and disavowed by the United States Supreme Court, since holding that the clause of the United States Constitution does not apply to offices.

I am not denying the propriety of the Judiciary declaring legislation unconstitutional within the fixed limits that have been always recognized by the courts, but I am protesting against the extension of the claim. Inasmuch as the power is not based upon any express authority in the Constitution, its exercise at all depends upon the acquiescence of the other departments of the government, and its extension to purely governmental matters, such as offices and the like, jeopardizes its extinction. It is a power that can not be enforced when denied by the Legislature.

(295) In holding the act of the Legislature in question unconstitutional, the Court has disavowed any intention thereby to reflect upon the members of the General Assembly. With the same disavowal of any reflection upon my brethren, but with an equal right to my opinion, I think the Legislature has not acted unconstitutionally or beyond its powers, as construed by the highest court in the land, but that, on the contrary, it is this Court which has acted unconstitutionally and exceeded the powers confided to it, and in so doing has violated four separate sections of the guarantees given in the Bill of Rights.

When a court, acting within its jurisdiction, renders an erroneous judgment, it must still be obeyed; but when it acts beyond its jurisdiction and in violation of the limits placed upon it by the Constitution, its decrees are null and void, and are no protection to any one who acts under them. Suppose a court should give a direct judgment against the State for a sum of money, would the Treasurer be safe in paying it? Whether those who have intruded into offices which the Legislature in the exercise of its just powers has confided to others have made themselves liable to removal by impeachment, and whether the Treasurer who shall pay salaries to others than those the Legislature has directed him to pay shall be held liable to account for the money paid out contrary to legislative enactment, is a matter, in my opinion, for the Legislature to determine; for even *Hoke v. Henderson* holds that the Legislature can direct payment of a salary to any one, and can withhold payment at its will.

The rights guaranteed the people by their Bill of Rights were won by our ancestors after long years of suffering and sacrifice. These safe-

guards can not be lightly abandoned. In North Carolina, as in England, it must be settled whether the people can place their will upon the statute book and have it executed, or whether there is "any authority" which can stop the execution of the laws. The ques- (296) tion is a most grave and serious one, reaching in its consequences far beyond the present litigation and the parties to it, for it involves from top to bottom the right of popular self-government. The vast importance of the principle involved, and respect for my oath of office and fidelity to the trust confided to me by the people have compelled me to speak fully and plainly, but I hope not harshly.

Cited: White v. Hill, ante 198; *Green v. Owen, ante* 222; *McCall v. Webb, ante* 248; *McCall v. Gardner, ante* 242; *McCall v. Zachary, ante* 250; *Dalby v. Hancock, post* 328; *Gattis v. Griffin, post* 335; *S. v. R. R., post* 673; *White v. Auditor,* 126 N. C., 577, 607; *Corporation Commission v. R. R.,* 127 N. C., 288.

Overruled: Mial v. Ellington, 134 N. C., 131.

STATE ON THE RELATION OF EMMA B. LAFFERTY AND HER HUSBAND, J. S. LAFFERTY, v. JOSEPH YOUNG, EXECUTOR OF D. G. HOLBROOKS, JOSEPH YOUNG AND R. R. HOLBROOKS.

(Decided 28 November, 1899.)

Proceeds of Land Sale—Realty—Administration Bond—Liability—Statute of Limitations.

1. Money applied for by an administrator and paid to him as such, is received under color of his office, and is covered by his bond.

2. Rents and profits of land, as well as proceeds of sale, the administrator is accountable for, if received by him, although, in fact, personalty, such fund is stamped with the character of realty to indicate the channel in which it shall go.

3. The statute of limitations is not available as a defense when a female plaintiff was a minor at her marriage, and has remained under coverture ever since. The recent statute, act 1899, ch. 78, does not apply to pending suits, and provides that the time elapsing before its passage cannot be counted against a married woman.

4. The party entitled to the fund is the right one to sue for it. *Allison v. Robinson,* 78 N. C., 227.

(297) CIVIL ACTION on the administration bond of D. G. Holbrooks, administrator of Harriet N. Holbrooks, his wife. D. G. Holbrooks having died, his executor, Joseph Young, is made a party-defendant. The cause was heard before *Robinson, J.*, at October Term, 1899, of the Superior Court of CABARRUS County.

The complaint alleged that there was a fund in the office of the Superior Court clerk which belonged to plaintiff's mother, Harriet N. Holbrooks, at the time of her death; that her husband, D. G. Holbrooks, took out letters upon the estate of his wife, and under order of court, the clerk paid to him the money, which he appropriated to his own use, being $1,166.66, less $75 allowed the clerk.

The fund was derived from the sale of land sold by the clerk and master in equity, and turned over to the clerk for investment; the interest to be paid to one Elizabeth J. Allison for life, and the principal at her death, to belong to Silas Young Allison, the first husband of Harriet N. Holbrooks, to whom at his death he devised his interest in the fund. Elizabeth J. Allison is also dead. The plaintiff, Emma B. Lafferty (formerly Holbrooks), is the only child and heir at law of Harriet N. Holbrooks, and her contention is, that the fund being derived from the judicial sale of land is realty, and that as heir of her mother, she is entitled to receive it, and is entitled to hold the administration bond of D. G. Holbrooks responsible for it.

His Honor ruled otherwise, and intimated that in no aspect of the evidence could the plaintiff recover, and in deference to this intimation of the court, the plaintiff excepted, submitted to a nonsuit, and appealed to the Supreme Court.

Osborne, Maxwell & Keerans and M. H. Caldwell for appellant.
Montgomery & Crowell and W. G. Means for appellees.

(298) CLARK, J. The administrator of Harriet N. Holbrooks, D. G. Holbrooks, whose executor, and the sureties upon whose administration bond, are defendants in this action, filed an *ex parte* petition in the Superior Court at the November Term, 1885, asking that a certain fund then in the clerk's office be turned over to him. The judge of said court made a decree that "said fund should go in the proper course of administration or distribution of the estate of said H. N. Holbrooks, deceased," and on motion of the attorney for such administrator it was ordered that the clerk "pay over to D. G. Holbrooks, administrator, as aforesaid, the said fund described in the pleadings," and it was further ordered that the fund "be retained by the administrator until all parties,

who are interested in the fund, shall be notified of this proceeding and no disposition of the fund by the administrator is to be made till this is done." This last order was not complied with, and it now turns out that said fund was in fact real assets and belonged to the plaintiff as heir at law of Harriet N. Holbrooks. Consequently, the order of the court adjudging it to be assets to go in course of administration or distribution, and that the clerk pay the same to the defendant Young's testator, "as administrator," was erroneous. The sureties to the administrator contend that, therefore, they are not responsible for the safekeeping of the same.

The administration was taken out only a few days before the above order was made, the amount of the bond was exactly double this fund, and no other fund ever came into the hands of the administrator. It would seem that the bond was given for the custody of this very fund. But, however that may be, the fund was paid over to the administrator, *as administrator,* and if he had objected to being charged therewith he should have appealed. On the contrary, he asked that the fund be turned over to him as administrator; it was adjudged per- (299) sonal assets, and to be turned over to him, and he became bound by such order, and his sureties are bound with him by virtue of the bond they gave. The Code, sec. 1388, requires such bonds to be conditioned that the administrator shall "faithfully execute the trust reposed in him, and obey all lawful orders of the clerk of court touching the administration of the estate committed to him." The bond actually given does not exactly follow the words of the statute, but is in effect to the same purport. The sureties were responsible by the words of the bond given by them that the administrator "should faithfully execute the trust reposed in him and obey all lawful orders of the clerk of the Superior Court, touching the administration of the estate committed to him."

The administrator did not faithfully execute the trust committed to him but converted the fund to his own use. He made no returns, as required by law, nor did he obey the order to keep the fund till all parties in interest should be notified. Had the fund been turned over to him individually, as a trustee, the sureties would not have been bound. But it was paid to him as administrator; it was adjudged assets to go in administration or distribution; it was applied for by him and received as such. It is too late for his representative or his bondsmen to say that the order was erroneous. "All moneys received under color of official authority are covered by the bond." *Clark v. Fredenburg,* 43 Mich., 263; *Batrell v. Richards,* 83 Tex., 505. In *Jennings v. Copeland,*

90 N. C., 579, it is held that the rents of land during the years in which the administrator has taken it in charge were amounts for which he is accountable, as well as the proceeds of sale, and in *Shuffler v. Turner,* 111 N. C., 297, it is held that the administrator is liable for the rents and profits when he receives them.

(300) The fund, in fact, was personalty, money. Being the proceeds of realty, the law for the purpose of indicating the channel in which it shall go, by a fiction, stamps it with the character of realty. But when the court decreed it to be personalty and the administrator acquiescing therein, received it as such, he and his sureties became liable, by terms of their bond, for the safekeeping of the same, and for obedience to the orders of the court concerning its disposition.

The statute of limitations does not apply, as the plaintiff was a minor at her marriage, and has remained under coverture ever since. The Code, secs. 163, 164. The recent statute, chapter 78, Laws 1899, repealing coverture as one of the bars upon the running of the statute of limitations, provides that the time elapsing before its passage can not be counted against a married woman, in actions of ejectment and in other actions (of which this is one) it shall not apply to actions pending at its passage.

The only other point, whether the plaintiff can bring this action or should be brought by an administrator *d. b. n.,* is settled in favor of the plaintiff. *Allison v. Robinson,* 78 N. C., at pages 227, 228, cited with approval in *Alexander v. Wolfe,* 83 N. C., 273, and *March v. Berrier,* 41 N. C., 524.

Error.

(301)

S. H. LOWE v. J. M. DORSETT AND JOHN MORGAN, ADMINISTRATORS OF JOHN ARNOLD.

(Decided 28 November, 1899.)

Evidence—Comparison of Handwriting—Recording Verdict.

1. Irrelevant questions which do not tend to prove or disprove the issue before the jury, are properly excluded.

2. The alleged signature to a note can be compared with any genuine writing of the maker, and the similarity pointed out by expert or opinion witnesses for the consideration of the jury, but the comparison can go no further; otherwise it might lead to endless inquiry.

3. The jury, after being recharged by the court returned with the issue, as to the genuineness of the signature, answered, "No." Upon being polled, at request of the plaintiff one of the jury said: "I suppose I may say No." The clerk read the issue and answer to the jury, and asked if they agreed that said answer might be recorded as their verdict, to which all responded in the affirmative. The verdict was properly received and recorded.

CIVIL ACTION upon a promissory note, tried before *Shaw, J.*, at Spring Term, 1899, of the Superior Court of RANDOLPH County. A single issue was submitted to the jury.

Did the defendant intestate execute the note set out in the complaint?

To which the jury made answer: "No."

There was judgment in favor of defendants, from which the plaintiff appealed.

The exceptions to the evidence and the reception and recording the verdict, taken and noted for the plaintiff, sufficiently appear in the opinion.

J. A. Barringer for appellant.

J. T. Morehead and B. F. Long for appellee.

FAIRCLOTH, C. J. This action was instituted against the de- (302) fendant administrator of John Arnold on the following instrument: "Twelve months after date I promise to pay to S. H. Lowe the sum of six hundred dollars. This January 11, 1896. (Signed) John Arnold."

Plea, *non est factum*. On the trial several witnesses were examined as to the genuineness of the signature of John Arnold. It was admitted that the body of the instrument was in the plaintiff's handwriting. A witness was introduced by the defendant, not as an expert, to disprove the genuineness of the signature. Upon cross-examination the plaintiff put this question, "Look at the word (meaning letter) O in the word promise in the body of the note, and O in the word Arnold in the signature, and tell the jury the difference." An objection was sustained, the witness not having been qualified as an expert. Exception.

The plaintiff then proposed this question, "State if the o's in this signature are not straighter than the o's made originally in writing." Objection sustained, and exception taken.

Neither of these exceptions can be sustained. It is not necessary in this case to enter into the learning on the subject of "expert evidence" and "opinion evidence," and the reason for the admission of either, in

contravention of the rule that a witness must depose to facts and not express his opinion about the matter. They are exceptions to the general rule. Their evidence is *competent* under certain established rules, but its *weight* is for the jury, and its effect will be guarded by such rules, and the common sense of the jury. An interesting opinion on this subject will be found in *State v. Clark,* 34 N. C., 151.

In the present case, the questions excluded were irrelevant, as they did not tend to prove or disprove the issue before the jury. It (303) being admitted that the plaintiff wrote the body of the note, suppose the witness, without objection, had answered "yes," that would go to show that the plaintiff wrote the alleged signature, a result not intended or desired by the plaintiff. Again, suppose the witness had answered "no," that would tend only to show that the plaintiff did not write the signature, but it would no more show that John Arnold wrote it than John Smith or any other person wrote it. So, in either event, the question and answer could not aid the jury on the issue before them. The alleged signature without doubt could be compared with any genuine writing of John Arnold, and the similarity pointed out by expert or opinion witnesses, subject finally to the finding of the jury, but the comparison can go no further, for otherwise it might lead to an endless inquiry.

Another exception is to the recordation of the verdict. The issue was: "Did the defendant's intestate execute the note set out in the complaint?" which was finally answered "No." After two or three days' conference, the jury reported to the court that they could not agree. The disagreeing juror stated that, as the issue was drawn, "his mind was divided on it." His Honor again instructed the jury that, if they were satisfied by a preponderance of evidence that John Arnold signed the note, they should answer "yes," otherwise "no," and that if they could not be satisfied either way, they should answer the question "no," as the burden was on the plaintiff. The jury retired and soon returned with the issue answered, "no." The plaintiff caused the jury to be polled, when the said doubting juror said, "I suppose I may say 'no.'" The issue and answer were read to the jury by the clerk, and the jury asked if they had agreed that said answer to the issue might be recorded as their verdict, to which all, including the said single juror, responded in the affirmative. Plaintiff excepted. This exception is overruled. The same exception was heard and overruled in *State* (304) *v. Godwin,* 27 N. C., 401, and *State v. Sheets,* 89 N. C., 543.

We have carefully read the other exceptions, and they are overruled. We see nothing in them prejudical to the rights of the plaintiff.

Affirmed.

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

LAURA S. BURNS, ADMINISTRATRIX OF G. M. BURNS, v. THE ASHEBORO AND MONTGOMERY RAILROAD COMPANY.

(Decided 28 November, 1899.)

Negligent Killing—Measure of Damages—Inadequacy of Damages—Evidence—New Trial on Single Issue.

1. While the trial judge could set aside a verdict where it clearly appears that the amount assessed as damages is grossly inadequate, yet his decision is not reviewable. *Benton v. Collins,* at this term.

2. A safe precedent on measure of damages may be found in *Benton v. R. R.,* 122 N. C., 1007.

3. The plaintiff for herself, as witness, having testified that her intestate when he served as engineer received the pay of an engineer, was properly asked what an engineer's pay was at the time he served as such.

4. Evidence concerning the skill of the deceased in a former employment, different from that in which he was engaged at the time of his death, and which was more remunerative is competent, as tending to show his skill in mechanic arts. Such testimony could not fix the rule of damage, and would have to be considered by the jury along with the age of deceased, his habits, character, industry, prospects of life, facilities for making money, and business he was employed in of various kinds, the end of all being to enable the jury to get at the pecuniary worth of the intestate to his family.

5. Evidence as to the board paid by intestate at his father's home was competent, as showing carefulness in personal expenditures, and how much for that part of his living should be taken off his gross income.

CIVIL ACTION for the negligent killing of J. M. Burns, fire- (305) man on defendant's train, tried before *Robinson, J.,* at July Term, 1899, of RANDOLPH Superior Court. The complaint charged negligence; the answer denied negligence, and pleaded contributory negligence on part of plaintiff.

Issues.

1. Was the death of the intestate caused by the negligence of defendant? Answer. "Yes."

2. Did the plaintiff's intestate by his negligence contribute to the injuries causing his death? Answer. "Yes."

3. Could the defendant by the exercise of reasonable care have avoided the injury notwithstanding the contributory negligence of intestate? Answer. "Yes."

4. What damages is plaintiff entitled to recover? Answer, "$1,071."

The plaintiff then moved to set aside the finding of the jury upon the fourth issue, on account of inadequacy of damages, and to grant a new trial on that issue only.

His Honor refused the motion, and plaintiff excepted.

The plaintiff then moved to set aside the verdict upon the fourth issue only, and to grant a new trial on that issue only, on account of alleged errors in excluding evidence of the plaintiff in relation to fourth issue.

Motion refused, and judgment rendered in accordance with the verdict.

Plaintiff appealed.

The exceptions taken and noted to the evidence are adverted to in the opinion.

G. S. Bradshaw and B. F. Long for appellant.
Black & Adams and Douglass & Simms for appellee.

(306) MONTGOMERY, J. This is an action begun by the plaintiff to recover of the defendant company damages for the alleged negligent killing of her husband.

The jury found that the plaintiff contributed to his own injury, but in response to the third issue, "Could the defendant by the exercise of reasonable care have avoided the injury notwithstanding the contributory negligence of the intestate," answered, "Yes"; and for their answer to the fourth issue said that the plaintiff was entitled to recover $1,071.

The case is before us on exceptions by the plaintiff:

1. Because the court did not set aside the verdict on account of an alleged grossly inadequate amount assessed as plaintiff's damages.

2. Because the court refused to give the plaintiff's thirteen prayers for instruction on the second issue—contributory negligence.

3. Because the court refused to instruct the jury, upon the measure of damages, according to number 15 of plaintiff's prayers for instructions, and

4. Because the court refused to receive certain evidence offered by the plaintiff upon the question of damages.

At this term of the Court, in *Benton v. Collins,* it was decided that the trial judge could set aside a verdict where it clearly appears that the amount asessed by the jury as damages is grossly inadequate, but it was also decided, there, that the decision of the trial judge is not reviewable by us; and so when the motion made by the plaintiff to set aside the verdict for grossly inadequate damages was refused by his Honor, the matter was concluded.

The exception to the refusal of the court to give the plaintiff's thirteen prayers for instruction upon the issue No. 2, involving the contributory negligence of the plaintiff, and also the exceptions to its refusal to instruct the jury as requested by plaintiff's counsel on the fourth issue, the measure of damages, we need not dis- (307) cuss any further than to say, in connection with the former, that it is urged here only so far as the evidence and prayers for instructions in reference thereto, which were refused by the court, affect the response of the jury to the fourth issue; and for error in rejecting testimony of the plaintiff on that issue, we have decided that a new trial must be had; and, as to the latter exceptions on the measure of damages, that a safe precedent may be found in the case of *Benton v. R. R.,* 122 N. C., 1007, and the cases there cited. The fourth issue was, "What damage is plaintiff entitled to recover?" and upon that issue the plaintiff's counsel asked Rankin, a witness for the plaintiff, "What is the usual monthly earnings on the railroads for engineer and fireman?" Upon the question being objected to by the defendant, it was ruled out by the Court, and the plaintiff excepted.

It becomes unnecessary for us to pass upon the correctness of the court's ruling, for the witness was permitted to state, in answer to the question by the plaintiff as to what was the *"earning capacity"* of the intestate at the time of his death, that he was worth $50 per month. That answer of the witness was direct upon what he thought was the value of the intestate's services a month in any capacity, whether as engineer or fireman. It was immaterial, after that answer what the witness thought about the worth of the services of other engineers on that road or others. In this connection, however, the plaintiff for herself, as a witness, testified that the intestate, when he served as engineer, received the pay of an engineer. She was then asked what an

engineer's pay was at the time the intestate served as such, and upon objection by defendant, the question was not allowed to be put.

The plaintiff's exception brings up the question, whether or not the intestate's former service as engineer and the value of his serv-
(308) ices as an engineer can be considered as evidence tending to show the *quantum* of damages. "What was the reasonable expectation of pecuniary advantage to the family of the deceased from the continuance of his life," he, the intestate, having been at the time of his death in the employment of defendant company in an inferior and less remunerative service—that of fireman?

It was said in *Burton v. R. R.,* 82 N. C., 509: "As a basis on which to enable the jury to make their calculation or estimate, it is competent to show the age of deceased and his prospect of life, his habits and character, his industry and skill, the means he had to facilitate the making of money, the business he was employed in of various kinds, whether a farmer, lawyer, or administrator on one or more estates, or any or all of them; the end of it all being as expressed by the Court in *Kesler v. Smith,* 66 N. C., 154, to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus get at the pecuniary worth of the intestate to his family." But the question presented in this case is whether evidence, concerning the skill of the deceased in a former employment different from that in which he was engaged at the time of his death, and which was more remunerative, is competent. After careful consideration, we can see no reason why such testimony is not admissible. It certainly tended to show his skill in the mechanic arts. Such testimony could not fix the rule of damages. All the other matters embraced in the quotation from *Burton v. R. R., supra,* would have to be considered by the jury, especially his habits, his character and his industry.

On cross-examination of the witness, as by substantive evidence, the defendant could show, if such were the facts, that the intestate's
(309) last employment was the highest he was capable of; that he had tried other callings, employments or professions, and was found not to be competent to fulfill the duties of the same; or that his habits or character debarred him from more remunerative or more trustworthy positions. In 2 Wood on Railways, it is said: "The age and occupation of the injured person, the value of his services, that is, the wages he has earned in the past, whether he has been employed at a fixed salary or as a professional man, are proper to be considered." That proposition is approved by this Court in the case of *Wallace v. R. R.,* 104 N. C., 442, although the point was not directly presented. The argument of the

defendant's counsel that the testimony of the plaintiff on the point we have been discussing was immaterial, because the question which was asked her had been answered by other witnesses, does not meet the case. The testimony of Page, the superintendent of the road, was indeed, that the defendant paid engineers $40 per month, but surely it can not be contended that an officer of defendant company should be permitted to give testimony on a material point going to the question of damages, and at the same time the testimony of the plaintiff on that point be rejected.

There was error in the rejection of that part of the testimony of the plaintiff.

We will notice the other exceptions of the plaintiff to the evidence offered by her and rejected, notwithstanding a new trial must be had for the error in rejecting a part of the testimony of the plaintiff herself, because in all probability it will be offered again. The plaintiff was asked what other work her husband did when off duty to make money, and she answered, "he bought and traded buggies and horses." That evidence was not competent for any purpose, except possibly to show that the deceased was industrious, and it was no more than a scintilla for that purpose, since there was no further statement (310) that his buying and trading horses and buggies brought him any remuneration or income.

It was competent for the plaintiff to show the amount which he paid for board at his father's home. It tended to show carefulness of his expenditures for his personal support, and also how much for that part of his living should be taken off his gross income.

New trial, on fourth issue alone.

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(311)

W. J. BRADFORD v. JOEL REED.

(Decided 28 November, 1899.)

Injunction—Evidence—Endorsed Payments—Statute of Limitations.

1. Where the plaintiff alleged that he furnished certain articles to the tenants of defendant upon his written orders, he must produce the orders or account for their loss before undertaking to prove the delivery of these articles, otherwise an objection to the proposed evidence will be sustained. These orders were not collateral to the issue being tried, but were the evidence constituting the alleged indebtedness, and so fall within the general rule, that the best evidence must be offered, or its loss accounted for before secondary evidence is admissible.

2. Where there is evidence to support the finding of facts by the trial judge, this Court will not undertake to review his finding.

3. Where five notes were given under seal, dated 6 March, 1883, with interest from date, falling due in one, two, three, four and five years, all for the same debt, and all written on one sheet of paper, with numerous payments endorsed thereon, running from 19 March, 1884, to 21 January, 1898, and it was agreed that no instructions or directions as to the application of said payments were given, and they were not applied to any particular one of the notes, but put on the back of said notes, simply as a memorandum of said payments, the agreed facts put an end to the question of the statute of limitations, the payments being as applicable to one note as another.

CIVIL ACTION to enjoin a foreclosure sale and for a reference and account. The restraining order was issued, reference ordered, and account taken and reported. The cause came up for final hearing, upon exceptions by the plaintiff, before *Shaw, J.*, at January Term, 1899, of the Superor Court of CABARRUS County.

(312) His Honor overruled the exceptions of plaintiff, confirmed the report, dissolved the injunction and rendered judgment in favor of defendant for his debt, secured by mortgage.

Plaintiff excepted, and appealed.

The case is fully stated in the opinion.

Jones & Tillett and M. H. Caldwell for appellant.

H. S. Puryear and Montgomery & Crowell for appellee.

FURCHES, J. In March 1883, the plaintiff bought of defendant a half interest in a tract of land and mills, for which he agreed to pay defendant $2,500; and, to secure the purchase money, he executed five notes of $500 each payable to the defendant with interest from date until paid, and falling due in one, two, three, four and five years from date. To secure the payment of these notes, the plaintiff executed a mortgage on said property, with power of sale upon default of payment. The notes not having been paid (as defendant alleged) he advertised the property for sale, under the power contained in the mortgage, and on the 4th day of March, 1897, the plaintiff commenced this action alleging that said notes had been paid and satisfied, also setting up the statute of limitations as a bar and discharge of said indebtedness and mortgage, asking for an injunction and for an account.

The injunction was granted, an account ordered, taken and reported to February Term, 1899, of Cabarrus Superior Court. The plaintiff filed exceptions to this report, and, from the ruling of the court on said exceptions and the judgment thereon, the plaintiff appealed.

The plaintiff alleged that he furnished grain, flour, meal, etc., to tenants of defendant, upon the defendant's written order. He then, without producing these orders or accounting for their loss, undertook to prove by one Smith, his miller, the delivery of (313) these articles. This was objected to by defendant, objection sustained, and the plaintiff excepted. This exception can not be sustained.

These orders were not collateral to the issue being tried, but the evidence upon which the alleged indebtedness was founded. And we see no reason why they did not fall within the general rule that the best evidence must be offered, or its loss accounted for, before secondary evidence is admissible.

Another exception is as to the finding of facts by the referee and the judge. But none of these exceptions are put upon the ground that there is *no* evidence to support the findings. And it has been so often held by this Court that it will not undertake to pass upon and review the findings of fact by the judge, where there is evidence to support such findings, (though it may be disputed by other evidence in the case) that we do not consider it necessary to cite authority.

The only other question presented by plaintiff's exceptions, necessary to be considered, is the statute of limitations. And it can not be sustained. The five notes, all given for the same debt, were written on a sheet of foolcap paper, and folded up together. There had been quite a number of payments made by the plaintiff on this land-debt, commencing in 1883, soon after the date of the transaction, and continuing down to 1897. These payments were endorsed on the sheet of paper upon which the notes were written; and, upon the trial, it was agreed by the parties, plaintiff and defendant, that the court should find, in addition to the facts found by the referee, the following facts: "That the plaintiff gave no instructions or directions as to the application of said payments, and the defendant did not apply them to any particular one of the notes, but put them on the back of said notes simply as a memorandum of said payments."

It being agreed that the judge should find the facts stated above, (314) it was the same in substance and effect as if it had been stated that these facts were agreed to by the parties. These agreed facts, it seems to us, put an end to the question of the statute of limitations. They admit payment on this indebtedness, down to a short time before the commencement of this action, which payments were as applicable to one note as another. There was no error in overruling this exception. If the notes had been severed and the payments placed on one, or a part of them, the payment would have been held to apply only to such notes as had the endorsed payments upon them.

There are some other exceptions, but, while they have all been examined and considered, none of them can be sustained.

Affirmed.

SARAH BURNEY, SOPHIA D. EVANS, EMELINE F. KING v. EDNA ALLEN, HENRY NATHAN ALLEN AND A. H. McNEILL, EXECUTOR OF HENRY ALLEN.

(Decided 28 November, 1899.)

Issue Devisavit Vel Non—Witnessing the Will—The Code, Sec. 2136.

1. The deceased must actually have seen, or have been in a position to see not only the witnesses, but the paper writing itself at the time the witnesses signed the same; if the jury should believe that he did not see the paper writing at the time the witnesses signed it, they should answer the issue, No. *Graham v. Graham*, 32 N. C., 219.

2. There is nothing in the statute, Code, sec. 2136, which requires that the decedent shall request the witnesses to subscribe; the request may be implied from the testator's conduct, or it may be made by another in the presence of the testator, with his aquiescence and knowledge of what is going on.

(315) IN THE MATTER of the will of Henry Allen. Issue of *devisavit vel non,* tried before *Robinson, J.,* at the Superior Court of BLADEN County, Spring Term, 1899.

The instructions of his Honor, excepted to by propounders are stated in the opinion. The jury found against the will; judgment accordingly; appeal by propounders.

C. C. Lyon and Jones & Stewart for appellant.
R. O. Burton for appellees.

MONTGOMERY, J. Nathan Jones, one of these subscribing witnesses to the script which purports to be the last will and testament of the decedent, Henry Allen, testified that he subscribed it in the presence of the decedent and at his request, and in the presence of W. F. Devane, the other subscribing witness; and that Devane also subscribed it in the presence of the decedent and at his request. Devane testified as follows:

"I was witness to Henry Allen's will; I signed it in the presence of the testator, Nathan Jones, and A. M. McNeill. Emma Jones came for me and I went to Allen's house; Emma Jones is a sister to widow Allen. When I went don't recollect that Henry Allen spoke to me; I don't think

he spoke to me at all. I saw him when he signed the will; he was lying flat on his back when he signed it. Allen made his mark; I don't know what I signed; I asked McNeill to let me read it, but he said it was not necessary. I do not know whether Allen could see me when he signed it or not; he could see me, but don't think he could see the paper; he was on the bed in the east corner of the room, and I was at the west corner of the same room, at a table; I was standing with my side or back to him, I don't know which; I am satisfied that he could not see the paper writing at the time I signed it, but he could see me."

A. M. McNeill testified: "Allen was very sick and suffered (316) greatly; he was on his bed; I wrote his name and he made his mark to the paper writing; I don't know whether his eyes were open or not; I don't know the condition of his mind; he could have seen the parties when they signed the paper as witnesses, but could not see the paper. Allen did not ask any one to sign it. I wrote his will at his dictation."

The following issue was submitted to the jury: "Is the paper writing or any part thereof the last will and testament of Henry Allen?"

An exception was made by the defendants, the propounders, to that part of the charge of the court which is in the following words:

"That the deceased, Allen, must actually have seen, or have been in a position to see, not only the witnesses but the paper writing itself, at the time the witnesses signed the same, and that if the jury should believe that he did not see the paper writing at the time the witnesses signed it, they should answer the issue, 'No.'"

The instruction was in harmony with the decision of this Court made in the case of *Graham v. Graham,* 32 N. C., 219. In that case it appeared that the decedent was very sick and lying in bed at the time the paper writing propounded as the will of the decedent was alleged to have been subscribed by the witness; the witnesses withdrew into another room, and there, at a large chest, signed their names; the testator as he was lying in bed could, by turning his head and looking around the side of the door between the rooms, have seen the backs of the witnesses as they sat at the chest writing, but he could not have seen their faces, arms or hands, or the paper on which they wrote, a view of those being obstructed by the partition wall. After the witnesses had signed, they went back, with the will, into the room where the decedent was and (317) informed him that they had witnessed it, and he asked one of the persons present to take charge of it. Upon that evidence the Court directed the jury that "though the testator could have seen enough of the persons of the witnesses while they were subscribing the will to en-

able him to recognize them, yet if he could not have seen what was going on whilst they were in the act of attestation, the paper was not properly executed and attested." And this Court, RUFFIN, C. J., delivering the opinion, in reviewing that instruction, declared that while it was a rigid construction of the terms "in his presence" which were used in the act, yet that it was in conformity with the cases theretofore decided on that subject, and that it was consonant with the policy and meaning of the statute. In that opinion, the true principle of the statute was settled to be "that a subscribing by the witnesses must be in such a situation, whether within or without the testator's room, as will enable the testator, if he will look, to see that the paper signed by him is the same which is subscribed by the witnesses. . . . The statute meant that he should have evidence of his own senses to the subscribing by the witnesses just as he should to a signing for him by another by his direction and in his presence, so as to exclude almost the possibility of imposition by substituting one paper for another without detection by the testator himself upon his own ocular observations and without exposing him to any risks from undue confidence"; and the opinion concludes in this language: "We believe, indeed, that there is no instance in which a paper has been sustained where the attestation was under such circumstances that the testator could not see what was done so as to protect himself upon his own knowledge against any dishonest substitution by the people whom he is obliged by the law to select and depend upon as subscribing witnesses to his will."

(318) In the next volume of our Reports, 33 N. C., 632, in the case of *Bynum v. Bynum,* the Court, with its personnel unchanged, and the same Judge delivering the opinion, reversed the judgment below because his Honor instructed the jury that "as to the formal execution of the script it was not necessary it should be proved that the party deceased saw the paper at the time it was subscribed by the witnesses; but it was necessary she should be in such a situation that she could see it if she wished; and that, if the jury believed she could not see it at the time, it was not subscribed in her presence within the meaning of the law." In that case, the decedent was raised up in bed and in that position she signed the script and then lay down. The witnesses then subscribed their names in the same room and within two or three feet of the decedent, but the witnesses said that they were not certain whether, from the position in which she was lying, she could see the paper at the time it was being subscribed, and that they thought another paper might have been substituted for the one she signed without her knowing it. In the discussion of that case the Court, without in so

many words overruling the case of *Graham v. Graham, supra,* adopted an entirely different course of reasoning, and arrived at an entirely different conclusion from the principle announced in the last-mentioned case.

In *Bynum v. Bynum, supra,* it is held substantially that, provided the subscribing by the witnesses is done in the same room, "openly and without and clandestine appearance about it," the attestation would be good whether the decedent could actually see the paper or not. So, too, the declaration in *Graham v. Graham, supra,* that the testator should have evidence of his own senses, that is the power to look and see from his present position if he wished to do so, so as to exclude "almost the possibility of imposition by substituting one paper for an- (319) other, without detection by the testator upon his own ocluar observation, and without exposing him to any risks from undue confidence," is substituted in the case of *Bynum v. Bynum* by the declaration, "It is not therefore the feasibility of obtaining another paper which will avoid the attestation when all passes in the same room so that the party has opportunity of watching for him or herself; for under those circumstances the attestation is *prima facie* good."

In *Jones v. Tuck,* 48 N. C., 202, the principle enunciated in *Graham v. Graham, supra,* was followed fully, and that case was cited as authority for the decision in *Jones v. Tuck.*

In *Cornelius v. Cornelius,* 52 N. C., 593, the court instructed the jury that "if they believed that the attestation was made by the subscribing witnesses in the room in which the deceased was lying and in such a situation as by turning his head in the manner described by them he could see the paper writing at the time of the attestation, and that he had the ability to do so, there was an attestation in his presence; it was an attestation in his presence as required by the act of assembly." This Court said, in reviewing that case, that, "after reviewing the authorities upon this point, we think that the strictest interpretation of the law has gone no further than to require that the testator should be in a position and have power without a removal of his person to see what was done. It is not necessary for him, in point of fact to see." The Court also referred to the opinion in *Bynum v. Bynum, supra,* where it was held "that the attestation being done openly and without any clandestine appearance about it, in the same room with the testatrix, and within two or three feet of her when she had her senses and nothing intervened between her and the witnesses, is good under the statute. It was done both literally and substantially in her presence." But the Court, it seems to us, clearly showed a mistrust of that position, (320)

as is shown by the following language: There are authorities going to the extent of holding that the transaction being openly done, there can be no question of *presence* where the parties are all in the same room." Best on Presumptions, 83. But however this may be, it is clear upon authority, if it be affirmatively established that the testator *might* have seen, the attestation is good. Powell on Devises, 96; *Tod v. Earl of Winchelsea,* 12 E. C. L. Rep., 227. And, too, in *Cornelius v. Cornelius, supra,* the doctrine laid down in *Jones v. Tuck, supra,* was not questioned, for the Court said there: "We are not disturbing at all the case of *Jones v. Tuck,* 3 Jones, 202 (48 N. C., 202), to which our attention has been called. In that case it appeared that the testator could not have turned himself so as to have seen the attesting witnesses subscribe without danger, and acting contrary to the advice of the physician. In the case before us the turning of the head would have sufficed to enable the testator to see, and that according to the testimony he could do without pain or difficulty."

Upon a review of these cases, we are of the opinion that there was no error in the instruction of his Honor which we have been considering, and that the principle announced in *Graham v. Graham, supra,* is the correct one. The decedent must be in such a situation—such a position—as will enable him, if he will look, to see the paper writing which he has signed as it is being subscribed by the witnesses; he must have the opportunity through the evidence of ocular observation to see the attestation of the paper from the position or situation in which he is, if he will look, and this so as to exclude the almost impossibility of a substitution of the paper which he has signed with another by some other person.

(321) In the case before us, it does not appear whether the decedent was able to turn his head to one side or not. Two of the witnesses said that if he had turned his head to one side he could have seen the paper. If he could have done so without risk or danger, or not contrary to his physician's advice, and was of testamentary capacity (and there is no proof before us to the contrary), then there was a compliance with the statute in reference to the attestation. *Cornelius v. Cornelius, supra.* But even if he was of testamentary capacity, and there was no fraud or undue influence, yet if he was unable to partly turn his head so that he might look and see the paper writing as it was being subscribed, the attestation was not according to the requirements of the statute.

The court further instructed the jury "that the deceased must have actually requested the witnesses to sign the paper writing as witnesses,

and if the jury should believe from the evidence that he did not so request them or either of them, then the paper writing was not properly executed as a will, and they should answer said issue, 'No.'" We think the instruction was given in language too broad, and that it was, therefore erroneous. There is nothing in the statute, Code, sec. 2136, which requires that the decedent shall ask or request the witnesses to subscribe, and we can see no reason why the draughtsman of the will, or any other person, in the presence of the testator and with his acquiesence and approval and with a clear knowledge of what is going on, should not make the request of the witnesses to sign the script. Nor can we see any good reason why the request should not be implied from the testator's conduct, or well-understood signs. Such implied requests have been frequently held by the courts to be sufficient. Am. & Eng. Enc. of Law, Vol. 29, p. 205, and cases there cited. In New York the statute requires that the witnesses must sign at the request of the testator, but it was held in *Gilbert v. Knox,* 52 N. Y., 125, that the words of request or acknowledgment may proceed from another, and will (322) be regarded as those of the testator where the circumstances show that he adopted them, and that the party using them in his presence was acting for him with his assent. In *Peck v. Carey,* 27 N. Y., 9, the draughtsman of the will in the presence of the testator requested the witnesses to witness the will, and they thereupon signed it, and it was held to have been done at the request of the testator. There was error in the instruction of his Honor, which we have last discussed.

Error.

FURCHES, J., concurring in the judgment of the Court, but not in the conclusion arrived at, in discussing the first proposition:

As the case goes back for a new trial, he will not enter into a discussion of that question now, further than to say that the opinions in *Bynum v. Bynum* and *Cornelius v. Cornelius* carry the doctrine of "being signed in the presence of the testator" as far as he is willing to go.

Something must be left to personal confidence. Were this not so, neither a blind man nor an illiterate man could make a will. Though an illiterate man may see the witnesses sign the paper he has signed with a cross mark, yet he only knows it is his will because he has confidence in the party who wrote it and read it to him.

FAIRCLOTH, C. J. I concur in Justice FURCHES's view.

Cited: In re Snow's Will, 128 N. C., 101.

(323)

AUGUSTUS MILLER v. NAVASSA GUANO COMPANY.

(Decided 28 November, 1899.)

Nonsuit—Act 1897—Contributory Negligence.

Where the plaintiff is provided with a safe place in which to do his work, and is injured in consequence of his own imprudence in exposing himself to danger in spite of warning not to do so, he can not recover.

CIVIL ACTION to recover damages for personal injury alleged to have been sustained through the negligence of defendant, while plaintiff was assisting in unloading one of its vessels; tried before *Robinson, J.,* at Fall Term, 1898, of the Superior Court of NEW HANOVER County.

After the plaintiff had produced his evidence, his own testimony included, and rested his case, the defendant demurred under the act 1897, and moved for judgment as of nonsuit. Demurrer sustained, and motion allowed. Plaintiff excepts and appeals. The facts are succinctly stated in the opinion.

E. A. Johnson for appellant.
Defendant not represented.

MONTGOMERY, J. This action was brought by the plaintiff to recover of the defendant damages for personal injuries sustained while engaged in unloading a vessel of the defendant. After the plaintiff had produced his evidence and rested his case, the defendant moved to dismiss the complaint, and upon the motion being allowed the plaintiff excepted and appealed.

The appeal makes it necessary for us to consider and to decide whether the plaintiff's evidence was sufficient, in a just and reasonable
(324) view of it, to warrant the jury in finding that the plaintiff was injured by the negligence of the defendant.

The plaintiff with others was engaged during the night hours in unloading the defendant's ship. His business was to place bags of tankage in the sling and to fix the loop or rope around them so that the bags could be lifted by machinery out of the hold through the hatchway and over the decks of the ship to the wharf. As one of the turns of bags was being lifted through the hatchway, the loop slipped and one of the bags fell out and struck the plaintiff and broke his leg. The negligence of the defendant, as alleged by the plaintiff, was that the

defendant did not furnish him with safe appliances with which to work, and a safe and suitable place in which to work, as it was in law bound to do, or, that if it did, that under the direct orders of an alleged vice-principal of the defendant the plaintiff was made to so hurry up his work as to prevent his properly looping the bags in the sling. The evidence of the plaintiff, including his own testimony, however, showed that the defendant did furnish a safe place in which the plaintiff was to do his work. He said: "We could see in the hold where we were working, but it was not bright. I could have worked under the deck and got out of the way, or from under the hatchway." Nelson Shaw, a witness for the plaintiff, testified that Jim Davis was foreman of the hands. "I heard him tell the hands that night to be careful and not get hurt, and as the bags were going up to keep out of the hatchway. Our rule in working is to keep out of the hatchway as the bags are going up. We had room enough to stand under the decks of the ship on either side of the hatchway."

The evidence showed that the plaintiff had worked off and on for six years for the defendant in unloading vessels. The evidence also showed that suitable appliances were furnished by the de- (325) fendant and that they were in good condition. Under the evidence it is a matter of no moment that there was no light on the deck, for as the plaintiff had been provided with a safe place in which to do his work, and with proper appliances in good condition, the defendant was not negligent.

No error.

STATE ON THE RELATION OF A. J. DALBY, G. T. SIKES AND J. A. FULLER *v.* F. W. HANCOCK, G. B. ROYSTER AND JAMES H. WEBB.

(Decided 28 November, 1899.)

Quo Warranto—Title to Office—Board of Education—Board of School Directors of Granville County—Change of Residence by Plaintiff. —Laws of 1897, Ch. 108—Laws of 1899, Ch. 3, Ch. 374, Ch. 732.

1. The acts of 1899, chs. 3, 374, 732, relating to public schools and education are *in pari materia*, and in legal effect constitute one act.

2. By comparing the powers and duties relating to the subject, under the act 1897, ch. 108, and existing laws, with those prescribed in the legislation of 1899, it will plainly appear that the two are practically and substantially the same.

3. It follows that the board of education, the office held by the plaintiffs, has not been abolished, and not materially changed, except as to name.

4. A plaintiff who sues for restoration to a county office, but who ceases to be a resident of the county before the trial, loses his eligibility for the office.

CIVIL ACTION in the nature of *quo warranto* to try the title to County Board of School Directors of Granville County, heard upon the
(326) pleadings before *Brown, J.*, as of July Term, 1899, of GRANVILLE Superior Court. The plaintiffs claimed the right to the office under the legislation of 1897, ch. 108, and proceedings had in accordance therewith, and that the defendants had usurped the office under color of legislation of 1899, ch. 374, ch. 732.

The defendants rely upon the legislation of 1899 and their election by the Legislature.

It was conceded that J. A. Fuller, one of the plaintiffs, had ceased to be a citizen or resident of Granville County.

His Honor, upon the pleadings, rendered judgment in favor of defendants. Plaintiffs appealed.

R. W. Dalby and W. A. Devin for appellant.
A. W. Graham and B. S. Royster for appellee.

FAIRCLOTH, C. J. Under an act of Assembly, 1897, ch. 108, the plaintiffs were elected as a "Board of Education" for Granville County, and were qualified and entered on the duties of said office on the first Monday in July, 1897, for a term of three years. By an act of 1899, ch. 374, the said County Board of Education was *in terms* abolished. By an act of 1899, ch. 732, the office of "County Board of School Directors" was established, and by an act of 1899, ch. 3, the defendants were elected as such board of said county.

The plaintiffs insist that said acts of 1899 are only amendatory of the said act of 1897, and other portions of the school law, and that their office is not abolished. The defendants deny that contention.

Thus, the question, so frequently before this Court heretofore, is again presented. Said acts of 1899 are *in pari materia* and in legal effect constitute one act. By comparing the powers and duties of the plaintiffs under the act of 1897 and the existing laws, with
(327) those of the defendants as prescribed in said acts of 1899, it will plainly appear that the two are practically and substantially the same, and in several sections are so *in totidem verbis*. Therefore it follows that the plaintiffs' office has not been abolished, and not materially changed, except in its name.

The reasoning and opinion of this Court on the question here presented have been so frequently and so recently stated that we deem it wholly unnecesary to again repeat them, and will simply refer to a few of the decided cases: *Wood v. Bellamy,* 120 N. C., 212; *Day v. State Prison,* 124 N. C., 362; *Wilson v. Jordan, ibid.,* 683; *Bryan v. Patrick, ibid.,* 651. We think the judgment below is erroneous.

By agreement, the complaint, answer and judgment constitute the record and case on appeal. At the trial in July, 1899, his Honor by consent finds as a fact that the plaintiff Fuller "is not a citizen or resident of Granville County." It does not appear from that finding or from any part of the record whether Fuller was a resident in July, 1897. If it was material to do so on the issue in this action, we should infer, from the fact of his election, qualification, entrance into office in 1897, and continuance therein until 1899, that he was a resident or citizen of the county.

It must be recognized in this country as a fundamental principle that the citizens have established government for their liberty and protection, and that it must be administered and its functions exercised only by themselves and through their agency, so that an alien cannot hold an office; nor can a nonresident do so even in a particular county if his right is successfully controverted in a judicial proceeding.

By *agreement* the court found as a fact that relator Fuller was not a resident and citizen of Granville County at the time of the trial. This agreement, in effect, authorized the court to amend the pleadings, so as to present the same issue, and it also dispenses with the (328) necessity of the forfeiture of his office being tried and found in the usual way. The record then is that Fuller was a resident and citizen when he entered on the duties of his office, but was not such when the issue came to be tried.

We are therefore of opinion that the plaintiffs, except Fuller, are entitled to discharge the duties of the Board of Education which has been held to be a public office. *Barnhill v. Thompson,* 122 N. C., 493.

Reversed.

CLARK, J., dissents as to Dalby and Sykes for reasons given in the dissenting opinions in *Greene v. Owen, Gattis v. Griffin* and *Abbott v. Beddingfield,* at this term.

I concur in the result as to the plaintiff Fuller. It is a fact, found by consent, that the plaintiff Fuller "is not a citizen or resident of Granville County." It is not a question as to the validity of the acts of such a one while in office and until his seat is vacated, and the authorities as to the validity of the acts of a *de facto* officer have no application.

But, here, the plaintiff is out; he is seeking to get in; and it appears without controversy that a state of facts exists which if he were in would *eo instanti* vacate his office. I do not think the court can oust the dedefendant to put him in. Why admit him only to turn him out again? He must recover on the strength of his own title, not on the weakness of the defendant's title, and he has shown he is not entitled.

MONTGOMERY and DOUGLAS, J.J., concur in the result reached by the Court in this case, but do not in the statement of the case in the opinion.

Cited: Gattis v. Griffin, post 333; *Baker v. Hobgood,* 126 N. C., 150; *White v. Auditor,* 126 N. C., 575.

Overruled by Mial v. Ellington, 134 N. C., 131.

(329)

THE SMITHERMAN COTTON MILLS v. THE RANDLEMAN MANUFACTURING COMPANY

(Decided 28 November, 1899.)

Bilateral Contract—Consideration.

1. Where an agreement, signed by both parties, is to be for twelve months from 1 March, 1898, and with the privilege of renewing for three years, it is a bilateral contract, and the privilege of renewal is not confined to either party.

2. Mutual promises are mutual considerations.

CIVIL ACTION for damages for breach of contract, tried upon demurrer, before *Robinson, J.,* at October Term, 1899, of MONTGOMERY Superior Court.

His Honor overruled the demurrer, and defendant appealed.

The contract and pleadings appear in the opinion.

Bynum & Bynum for appellant.

Black & Adams for appellee.

CLARK, J. The plaintiff and defendant entered into the following contract:

RANDLEMAN, N. C., January 27, 1898.

This agreement made and entered into this day, between The Randleman Manufacturing Company, of Randleman, Randolph County, and State of North Carolina, and the Smitherman Cotton Mills, of Troy, Montgomery County, and State of North Carolina, viz.:

The Smitherman Cotton Mills agree to make and furnish The Randleman Manufacturing Company, one thousand pounds of number 14s warps per day, made as per description given the Smith- (330) erman Cotton Mills, and to be made out of good cotton, and at 5½ per pound above middling cotton on the Raleigh market, warps to be delivered at Randelman.

This contract to be for twelve months from March 1, 1898, and with privilege of renewing for three years, the price to be taken from the highest quoted price for middling. Settlement to be made on the 10th of the month for the month previous for all shipments.

JOHN H. FERREE,
Treasurer The Randleman Mfg. Co.
A. W. E. CAPEL,
Treasurer Smitherman Cotton Mills.

Witness:
S. J. SMITHERMAN.
SAML. G. NEWLIN.

The plaintiff alleges compliance with said contract by both parties for the twelve months, after which it elected to exercise the privilege of renewing the same and continued to ship warps until 23d March, 1899, when the defendant gave notice that it denied plaintiff's right to renew the contract, and declined to accept or pay for warps so shipped by plaintiff, who avers that it is ready, able and willing to comply with the provisions of the contract, and sues to recover for damages sustained by reason of defendant's refusal to accept and pay for the warps.

The defendant demurs that upon the face of the complaint there is no contract binding upon the defendant after the expiration of the twelve months; that the election to renew is without consideration, and, indeed, that the contract on its face was unilateral and binding only upon the plaintiff. It is true there are no express words "The Randleman Manufacturing Company doth agree," but if the (331) offer came only from the plaintiff, the signing by the defendant was an acceptance; besides, the use of the words "agreement" and "contract" shows that it was a bilateral agreement. The contract was executory, so much warp to be furnished by the plaintiff at such a

price, to be paid by the defendant, and a promise for a promise is sufficient consideration. 1 Parsons Contracts, 448, and cases cited; Pollock on Cont., 160.

As to the renewal, it certainly was not the intention of the parties to stipulate that the contract could be renewed at the will of both parties. That they knew they could do without any stipulation, and if it had been intended that privilege of renewal should be restricted to one party that party would have been named. As this was not done, the inevitable conclusion is that either party had the privilege to renew, and the plaintiff having notified its election to do so, the defendant is bound thereby, and for damages if it refuses to accept the warps tendered and pay for the same under the terms of the original contract which the plaintiff has exercised its election to continue for the stipulated term.

The cases cited us by the learned counsel for the defendant, *Chicago v. Dane,* 43 N. Y., 240, and others of like purport, were instances of options, in which the defendants agreed to accept at a price named, "so much as may be required by defendant," or "not to exceed" a quantity to be named. They have no application to a case like the present in which the quantity is as fixed and definite as the price, and binding equally on both parties. In overruling the demurrer there was

No error.

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(332)

STATE ON THE RELATION OF F. N. GATTIS AND O. T. EDWARDS v. J. M. GRIFFIN, OSTIA PERRY AND J. M. EDWARDS.

(Decided 28 November, 1899.)

Quo Warranto—Title of Office—County Board of Education, Acts 1879, Ch. 108—County Board of School Directors, Acts 1899, Ch. 732.

1. When an office is abolished, out and out, the officer is left without an official habitation; but when the office is continued, with the same and even additional duties, although under a different name of the office, the original owner is entitled to it as his property.

2. The act of 1897, ch. 108, is not repealed but only amended by the acts of 1899.

CIVIL ACTION in the nature of *quo warranto* to try the title to the office of County Board of School Directors for Chatham County, heard upon the pleadings by *Brown, J.,* at September Term, 1899, of CHATHAM Superior Court.

The complaint alleges that the plaintiffs were legally entitled to the office of County Board of Education of Chatham County, under act 1897, ch. 108, but were wrongfully ousted by the defendants claiming to act as the County Board of School Directors for the county, under Acts of 1899, chs. 374 and 732. That the legislation of 1899 did not repeal the legislation of 1897 upon the subject, but was merely amendatory thereof, and that they are still entitled to their office upon one or the other of the two boards.

The answers relies upon the authority of the Acts of 1899, chs. 374 and 732, and their election thereunder by the Legislature, for their right to the office of County Board of School Directors for Chatham County.

His Honor, upon the pleadings, rendered judgment in favor (333) of defendants. Plaintiffs appealed.

J. A. Giles for appellants.
H. A. London and Womack & Hayes for appellees.

FAIRCLOTH, C. J., writes the opinion of the Court.
CLARK, J., writes dissenting opinion.

FAIRCLOTH, C. J. The facts in this case present the same question as that in *Dalby v. Hancock,* at this term, and this must be governed by the same principle announced in that case. The same legislative acts are relied upon by the defendants.

We were favored with an argument to the effect that the plaintiffs have no property in the office of the Board of Education, because the board is a public corporation, and, therefore, under the control of the Legislature, and *Mills v. Williams,* 33 N. C., 558, was cited in its support. In that case the facts were: That the Legislature in 1846 established a new county by the name of Polk. The county officers were elected and entered on the duties of their respective offices, including the sheriff. Before their terms expired the Legislature repealed the act establishing the county, and, after the repealing act, the sheriff arrested the plaintiff under process, and was sued for an assault, the sheriff insisting that the repeal was unconstitutional and that his office still continued. The Court held that the county was a corporation, established by the Legislature for the benefit of the public, and that there was no feature of a contract in it, as there is in private corporations chartered by the Legislature. It follows as a sequence that when the county was destroyed or abolished by the repealing act, all the county offices went with it, as they were merely incidental provi sions for the public welfare. This is the doctrine of all the cases

(334) from *Hoke v. Henderson* to the present time i. e., when the office is abolished, out and out, the officer is left without an official habitation, but when the office is continued with the same duties and even some additional duties although under a different name of the office, the original owner of the office is entitled to it as his property. In the case before us, the act establishing the office is not repealed but only amended, and therein the analogy fails.

Reversed.

CLARK, J., dissents for reasons given in the dissenting opinions in *Greene v. Owen* and *Abbott v. Beddingfield,* at this term.

The County Board of Education of Chatham County was a *quasi* corporation, or municipal corporation, and the matter of its management and control was a matter fully within the powers of the Legislature, by virtue of the necessities arising from the exercise of sovereignty, by a long line of decisions in this State, and lastly by the express provisions of the Constitution. Article VII, sec. 14 and Art. VIII, sec. 1.

FAIRCLOTH, C. J., in *Barnhill v. Thompson,* 122 N. C., 493, in describing what is a public office and applying his description to the Board of Education of Bladen County, said that it was a delegation of the sovereign power to an individual for the public good, which thereby distinguished it from a mere employment or contract.

In *Harris v. Wright,* 121 N. C., 179, the Chief Justice, in enumerating the powers which the General Assembly possessed over municipalities under Constitution, Art. VII, sec. 14, said: "Thus was placed at the will and discretion of the Assembly, the political branch of the State Government, the election of county officers, the duty of

(335) county commissioners, the division of counties into districts, the corporate powers of districts and townships, the election of township offiers, the assessment of taxable property, the drawing of money from the county or township treasury, the entry of officers on duty, the appointment of justices of the peace, and all charters, ordinances and provisions relating to municipal corporations."

So that the matter of the election and entry on duty of all county and township officers is within the legislative will and discretion. This was the case when the relators assumed their duties, and if there is a contract, they took with notice of this, and it was a part of their contract. *Caldwell v. Wilson,* 121 N. C., 469, and particularly the case of *Head v. University,* 19 Wallace, 526, therein cited with approval.

The Constitution gives the Legislature "full" power; the Court has declared this includes the election and entry into office, and that the

power of removal is incident to the power of appointment, unless the Constitution prescribes some other tribunal for removal.

This can be sustained without reversing *Hoke v. Henderson,* 15 N. C., 1. That case has no more application to the case at bar than it has to the case of *Caldwell v. Wilson.* It was a part of plaintiffs' contract that they "held at the legislative will and discretion." Mr. Justice DOUGLAS said in *Caldwell v. Wilson,* 121 N. C., 467, that the power of removal was incident to the power of appointment, which was an American recognition of the common-law doctrine that the sovereign could suspend an officer at any time, though such officer held by a life tenure; a power which was exercised in this State in 1868, and recognized as valid by all the judges, for they took office under and by virtue of the vacation of the life offices of their predecessors.

In *Crenshaw v. U. S.,* 134 U. S., 99, Mr. Justice LAMAR (336) likens these identical powers over municipal corporations to the legislative control of offices, and cities with approval and liberal quotations the case of *Newton v. Commissioners,* 100 U. S., 548, as an authority that because the Legislature can divide counties, etc., in its discretion, hence, the officers thereunder possess no contractual or vested rights, and he says: "Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one Legislature can not deprive its successor of the power of revocation."

If public office is a contract it is strange that the Court should have held in *London v. Headen,* 76 N. C., 72, from this same county of Chatham, that if one elected constable did not accept and qualify he was liable to a penalty. Is it possible a man can be punished for declining to make a contract with the State?

Cited: Dalby v. Hancock, ante 328; *White v. Auditor,* 126 N. C., 575, 593.

Overruled by Mial v. Ellington, 134 N. C., 131.

(337)

D. G. ROBINSON, TO USE OF A. E. McDOWELL, v. THOMAS D. McDOWELL, JOHN A. McDOWELL, JOHN McDOWELL, JR.

(Decided 28 November, 1899.)

Surety in a Judgment—Injunctive Relief—Motion in the Cause—Independent Action.

Where equitable relief is sought by the administrator of a judgment debtor, alleged to be surety, against an execution upon the judgment, and *issues* of fact as well as *questions* of fact are involved, the remedy must be prosecuted by an independent action, and not by a motion in the original cause.

APPLICATION by motion in the cause, made upon affidavit, by Newton Robinson, administrator of John A. McDowell, for injunctive relief against an execution issued against his intestate, made to *McNeill, J.*, at chambers, who granted order of restraint, and transferred the hearing to *Robinson, J.*, and it was heard before him, as of March Term, 1899, of the Superior Court of BLADEN County, upon affidavits on both sides. The grounds of the application are fully stated in the opinion.

After argument of counsel for both parties, his Honor took the matter under consideration and found the following facts, and reached the following conclusions of law, and rendered the following judgment:

This was a motion, on notice of Newton Robinson, as administrator of John A. McDowell, to have the judgment rendered at Spring Term, 1888, canceled and marked satisfied of record as to the estate of John A. McDowell, heard before *Robinson, J.*, at Spring Term, 1899, of Bladen Superior Court. The hearing not being concluded, the further hearing of the motion was, by consent, continued to be heard at

(338) chambers at Fayetteville, on the 29th March, 1899. After hearing the evidence and the argument of counsel, the court finds the following facts:

1. Thomas D. McDowell, one of the above-named defendants, on the 8th October, 1885, borrowed $1,000 from D. G. Robinson, and gave his note, with John A. and John McDowell as sureties.

2. That at Spring Term, 1888, of Bladen Superior Court, judgment was rendered on said note in favor of D. G. Robinson, and against Thomas D. McDowell and John McDowell for $1,000, with interest on same from the 8th of October, 1885, and for costs.

3. That on the 24th day of August, 1896, John McDowell, Jr., transferred to D. G. Robinson a policy of insurance on the life of Thomas

D. McDowell, and on the same day the said D. G. Robinson transferred and assigned to A. E. McDowell, wife of John McDowell, Jr., for the use and benefit of said John McDowell, Jr., said judgment.

4. That John A. and John McDowell, Jr., were cosureties for T. D. McDowell.

5. That Thomas D. McDowell, the principal debtor, died on the 1st day of May, 1888, leaving a last will and testament, in which he devised and bequeathed to his son, the said John McDowell, Jr., all his real and personal property and estate, and charged the said John McDowell, Jr., with the payment of the said Thomas D. McDowell's debts.

6. That the said John McDowell, Jr., propounded said will and qualified as executor thereto on the 21st day of May, 1898, and took possession of all the estate of the said Thomas D. McDowell, and has since said date used it as his own.

7. That sufficient property belonging to said estate, to wit, the estate of Thomas D. McDowell, went into the hands of John McDowell, Jr., to pay all the debts due and owing by said Thomas D. McDowell.

8. That John A. McDowell died on the 11th day of January, (339) 1899, and Newton Robinson qualified as administrator on his estate on the 13th January, 1899.

9. That the plaintiff, A. E. McDowell caused execution to be issued on said judgment on the 5th of December, 1898.

10. That after the death of John A. McDowell, the sheriff of Bladen County levied said execution on the personal property of said John A. McDowell.

11. That said judgment has been fully paid as to the said John A. McDowell and his representatives.

It is, therefore, ordered and adjudged, that the judgment rendered in the above cause at Spring Term, 1888, be canceled and satisfied of record and that the execution issued on said judgment be set aside. It is further ordered, that the sheriff of Bladen County pay to Newton Robinson, administrator of John A. McDowell, the proceeds of the timber sold by him under said execution (which sale was made by agreement of parties), less the judgment paid by said sheriff by virtue of said agreement.

It is further ordered, that the plaintiff A. E. McDowell pay the cost of this proceeding to be taxed by the clerk.

(Signed) W. S. O'B. ROBINSON,
Judge, etc.

To the above findings and judgment the plaintiff excepts.

W. S. O'B. ROBINSON,
Judge, etc.

Carthage, N. C., 15th April, 1899.

To which findings and conclusions of law and judgment the defendants excepted and appealed, and made the following assignments of errors:

Defendants' Assignment of Errors.

1. That the court erred in granting the restraining order in the above-entitled cause.

(340) 2. That the court erred in holding that a motion in the cause was the proper remedy.

3. That the court erred in holding that this motion involved questions of fact, and not issues of fact.

R. S. White and McNeill & Bryan for appellant.
C. C. Lyon and J. D. Shaw, Jr., for appellee.

FURCHES, J. On the 8th of October, 1885, T. D. McDowell, J. A. McDowell and John McDowell, Jr., borrowed $1,000 from plaintiff for which they executed their promissory note. The plaintiff brought suit on this note and recovered judgment thereon at Spring Term, 1888, of Bladen Superior Court. On the 24th of August, 1896, the plaintiff Robeson transferred and assigned the judgment to A. E. McDowell. Said judgment was revived before the clerk of Bladen Superior Court on the 30th of November, 1896. T. D. McDowell, one of the defendants in the judgment, died on the 1st day of May, 1898, and the defendant John McDowell, Jr., qualified as his executor on the 21st day of May, 1898. John A. McDowell, another one of the defendants in the judgment of 1888, died on the 11th day of January, 1899. Execution had issued on the 5th day of December, 1898, and was levied on the personal property of John A. McDowell on the 13th day of January, 1899. Letters of administration were issued to Newton Robinson on the estate of John A. McDowell, on the 13th day of January, 1899. On the 24th day of January, 1899, the administrator (Robeson) of John A. McDowell, made a motion before Judge McNeill, (as a motion in the original action), in which he alleges in substance:

(341) That Thomas D. McDowell was the principal in the note and judgment of Robinson, and that John A. McDowell, the intestate

of Newton Robinson, was only a surety; that John McDowell, Jr., is the son of Thomas D. McDowell, the principal debtor; that he held a life policy of insurance on his father, T. D. McDowell, with which he purchased the Robeson judgment, and caused it to be assigned to his wife. A. E. McDowell, in trust for his benefit; that since the assignment was made, T. D. McDowell, the principal debtor, and father of John McDowell, Jr., has died, leaving a last will and testament devising and bequeathing a large estate to John McDowell, Jr., but charged with the payment of all his debts; that said John McDowell, Jr., has taken possession of said estate so willed to him by his father, and is now in the enjoyment of the same, and its pernancies; that said administrator of John A. McDowell alleges that, in this way, the said judgment has been paid off and satisfied; and he further alleges that, as his intestate was only a surety and as the judgment was assigned to the said A. E. McDowell in trust for the benefit of John McDowell, Jr., he could not enforce the collection of said judgment out of the property of his intestate by execution.

For these reasons, the administrator of John A. McDowell asked for an injunction against the execution to enforce the payment of the judgment out of the property of his intestate, and to have the judgment declared paid and satisfied, which the court did.

The defendant John McDowell, Jr., denies the material allegations of the administrator of John A. McDowell, and alleges that if they were true, the relief demanded could not be had in this proceeding (a motion in the original action), and that the judgment of the court, granting the injunction and having the entry of payment and satisfaction made on the record, was without authority, and erroneous.

While the matters alleged do not amount to a payment, yet, (342) if they are true, they amount to a satisfaction and discharge of the estate of John A. McDowell from liability on said judgment.

But we do not think the relief demanded can be obtained in this proceeding. The allegations of the administrator of John A. McDowell and the denials of John McDowell, Jr., raise *issues* of fact, which can only be decided by a jury, unless by consent of the parties. Whether Thomas D. McDowell was the principal debtor, and John A. McDowell and John McDowell, Jr., sureties only, is an issue for the jury. Also, whether John McDowell, Jr., purchased the Robeson judgment and had it assigned to his wife in trust, or whether she bought it with her own means, and is the *bona fide* holder and owner of the same, free from any trust, are issues for the jury, and can not be found by the court, except by consent of the parties.

If the allegations of the administrator are true, we are of the opinion that he is entitled to relief, but it must be by an independent action with proper parties.

The case of *Rice v. Herron,* 109 N. C., 150, does not sustain the jurisdiction of the court in this case. It did not present serious controverted *issues* of fact, as are presented in this case. And, in that case, the court thought proper to state that there was no objection made to the court's finding the facts, which seems to mean that, if there had been, the court would probably have taken a different view of the case.

There is error. The court was without jurisdiction. This proceeding must be dismissed, and judgment entered here, that the parties may not be troubled with the question of *lis pendens.*

Proceedings dismissed.

Supplemental opinion upon motions of plaintiff and defendant.

(343) FURCHES, J. Upon application of the defendants, alleging error in the opinion rendered in this proceeding and the judgment of the court, in which the defendant asks this Court to issue what the defendants call a writ of restitution; and upon application of plaintiff, alleging error in said opinion and judgment of the court, and asking the court not to pass upon the defendants' application and motion until he can prepare and file a petition to rehear, and the opinion of the court complained of not having been certified to the Superior Court of Bladen County, we have taken the whole matter under advisement, and have reviewed the opinion and judgment heretofore delivered and rendered.

Treating the motion and application of each party in the *nature* of and application to rehear, and upon a reëxamination of the case, we are unable to see the errors complained of by either party, except as to the matter of costs, which we think the clerk (probably by inadvertence) has taxed against the defendant, when they should have been taxed against the plaintiff.

The plaintiff seems to have misconceived the grounds upon which his motion was dismissed—that of a want of jurisdiction. If the court was correct in this, we can not see how anything could be judicially found and determined; and we see no reason, after reviewing the opinion, to change our opinion as to the matter of jurisdiction.

As we thought, the facts presented by plaintiff, if true, ought to entitle him to relief, if properly presented in a proper forum having jurisdiction to try and determine them. And we are still of that opinion. In such a case, it may be easy for the plaintiff to establish some of the queries we propounded; and if so, it will only be the better for him.

We do not think we can grant the defendant's motion. The defendant asks for what he calls a writ of restitution—to compel the plaintiff to pay over the money in his hands to A. E. McDowell (344) —when the defendant John McDowell alleges that the judgment upon which the execution issued belongs to him. But it seems to us that the defendant is asking to be restored to the possession of property of which he has never been in possession; that neither the defendant John, nor his wife, A. E. McDowell, has ever been in possession of either the personal estate or the land of the deceased, John A. McDowell. So we are asked to *restore* them to something they have never had. This we must decline to do.

The case of *Perry v. Tupper,* 70 N. C., 536, and same case, 71 N. C. 387, and other cases cited as authority for restitution, do not apply. They were actions for land or property of which the defendant was *in possession* and had been turned *out of possession* by the process of the court. At most, the owner of the judgment, whoever it may turn out to be, only had a lien upon this property. This we think the law will preserve until the matter is determined. And the plaintiff will pay out this money at his risk, if he does so before the matter is determined. We can not in advance, when there is no case before us giving us jurisdiction of the matter—upon the affidavits of the parties—undertake to determine and settle these important questions.

We find no error, and leave the matter where it was left by the opinion. But the costs will be taxed against D. G. Robinson.

Both motions are refused.

Cited: S. c., 130 N. C., 250.

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(345)

A. MAX v. BETTIE HARRIS, ADMINISTRATRIX OF H. Y. HARRIS.

(Decided 5 December, 1899.)

Agency for Sale of Goods—Removal of Cause Affecting Land.

1. Where an agent for sale of goods gives a note and mortgage to secure his contract, and is sued for a breach thereof, but no remedy is asked upon the mortgage and none is given, the action is properly brought in the county where the plaintiff resides, although the land is in another county, where the defendant resides. A removal of the cause to the latter county was properly refused.

2. Where the agent was an experienced salesman, and selected the goods himself, with privilege of returning such as were unsaleable, and there was no evidence of latent defects, he was not entitled to damages by way of counterclaim for unsalable goods, not returned.

CIVIL ACTION for breach of contract in failing to pay for goods, sold by defendant as agent of plaintiff, tried before *Bryan, J.*, at March Term, 1899, of the Superior Court of DURHAM County.

The plaintiff resided in Durham County, the intestate of defendant resided in Orange County, and to secure his contract, he and his wife, Bettie Harris, gave a mortgage to plaintiff on a tract of land in Orange County, also a note for $1,000. At March Term, 1898, the defendant demanded a removal of the cause for trial to Orange County in consequence of the mortgage. The presiding Judge, *Robinson,* refused the removal, and defendant excepted.

The answer contained a counterclaim for damages occasioned by the plaintiff furnishing unsalable goods to the defendant, and denied any indebtedness to plaintiff.

Issues.

(346) 1. Is the defendant indebted to the plaintiff, if so, in what amount? Answer: "$300 and interest."

2. Is the plaintiff indebted to the defendant, if so, in what amount? Answer: "Nothing."

There was no exception to the evidence, which is stated in the opinion.

His Honor charged the jury as follows:

In this action, the plaintiff seeks to recover of the defendant, as administratrix of H. Y. Harris, a balance due, as he claims, for goods. He contends the amount is $373.32, and the defendant sets up a counterclaim and claims damages, which she in her evidence says was as much as $500. The court will submit to you two issues, as follows: (His Honor then read the issues set out in the record).

The contention of the plaintiff is that he sold certain goods to H. Y. Harris; that Harris selected the goods he wanted and is liable to him for what he agreed to pay for them; that he had the privilege of returning the goods, and that he failed to do it, and that therefore he is liable for the balance due, which he contends is $373.32, with interest from March 18, 1896.

The contention of the defendant is that Harris bought certain goods, by sample; that he did not receive such goods as he bought; that the goods were inferior goods; that he could not make sales; that some of the goods were returned to his store; that the plaintiff refused to take barter, as he had agreed to do; that had the plaintiff furnished fresh goods and taken barter, the defendant could have conducted a successful

business and made money, and that by reason of such failure he was damaged to a large amount.

The exception of defendant to this portion of the charge is stated in full in the opinion.

His Honor continued: (347)

But if Harris, notwithstanding the goods were not such as he bought, kept them and continued to dispose of them, rather than return them to plaintiff, then the damages on this point would be nothing.

The exception of defendant to this portion of the charge is also fully stated in the opinion.

His Honor rendered judgment for the plaintiff in accordance with the verdict.

Defendant excepted and appealed.

J. W. Graham for appellant.
Boone, Bryant & Biggs for appellee.

DOUGLAS, J. The defendant in this action, H. Y. Harris, died during its pendency and his administratrix, Bettie Harris, his wife, became a party to the action. It appears from the record that one Summerfield was also brought into the action as administrator of H. Y. Harris, but he does not appear to have done anything further, as Mrs. Harris appears to have been thereafter recognized alone as sole administratrix. On March 14, 1896, H. Y. Harris entered into a contract with the plaintiff, the material parts of which are as follows:

"Whereas, the said A. Max has agreed to constitute the said H. Y. Harris his agent for the sale of goods and general merchandise at Caldwell Institute, N. C., and to furnish to the said H. Y. Harris one thousand dollars worth of goods, fresh general merchandise, at wholesale cash prices, in Durham, N. C., and the said H. Y. Harris contracts to dispose of said goods as the agent of said Adolph Max, and the title to said goods as between the said H. Y. Harris and A. Max, shall remain in the said A. Max until the said goods shall have been *bona fide* sold by the said H. Y. Harris as such agent. And the said (348) H. Y. Harris as such agent shall faithfully and honestly endeavor to pay to the said A. Max as much as $25 a week in cash and barter, and if he shall be able to accomplish the same and his said payments shall amount to as much as $25 per week, continuously, until the principal money due for the goods consigned to said H. Y. Harris, agent, shall be fully paid, then no interest will be charged on such principal money, and any profit on the goods, over and above the principal money due therefor, shall be turned over to said H. Y.

Harris, as compensation for his services as said agent. But if the said H. Y. Harris is not able to pay $25 per week continuously, until the principal money is fully paid, then he shall pay interest on said principal money at 6 per cent from the date when said goods and merchandise shall be conveyed to him, and the payment made by the said H. Y. Harris on the note taken as evidence of the goods furnished him as agent, will be allowed with interest from the date of each payment. The said A. Max will allow to the said H. Y. Harris, agent, the cash price in the first-class Durham stores for all the barter delivered to him by the said H. Y. Harris, agent, in payment for the stock of goods furnished to him. That if any time the said A. Max or H. Y. Harris, agent, desires to discontinue the business, the said A. Max will accept from H. Y. Harris, agent, any goods not sold or disposed of as payment on the note given for the purchase of goods by H. Y. Harris, agent, at the same price they were sold to said H. Y. Harris, agent, unless they shall be injured or damaged, and at market value on seasonable goods. This agency to continue as long as agreeable to both parties, and either one to have the right to dissolve at any time he may wish. The said A. Max agrees to replenish the stock if payments are made, so that at no time shall the said H. Y. Harris, agent, be due and owing more than the original amount advanced in goods to him as agent. And
(349) the said H. Y. Harris agrees to take the goods to Caldwell Institute and retail them for cash and barter, and to pay over to A. Max the proceeds of said sale, which he will endeavor to make as much as $25 per week until he has fully paid and discharged the entire amount due to A. Max, at the expiration of the time named in the bond. The said H. Y. Harris is to pay off the bond in full if demanded in cash, barter, or goods returned at the price at which they were furnished, unless injured or damaged, when proper deduction will be made; or if either shall desire a settlement before that time the business will be closed in the same manner on the demand made thirty days before."

The remainder of the agreement constituted a mortgage on certain lands in Orange County to secure payment for the goods. Harris also gave to the plaintiff his note for $1,000, in pursuance of the agreement. The defendant demanded the removal of this action to Orange County on the ground that the object of the action was in reality a foreclosure of mortgage on real property, and for a determination of a right and interest in real property situated in the county of Orange. The motion was refused, and the defendant excepted. All her remaining exceptions are directed to the charge of the Court.

The defendant denied any indebtedness to the plaintiff, and set up a counterclaim alleging serious damage from the plaintiff's failure to

furnish such goods in value and quality as he had agreed. The defendant asked no special instructions, but contented herself with indicating in her exceptions what she thinks the charge should have contained. The following exceptions show the scope of her contentions:

Second Exception.—"To this statement of contention defendant excepts, as his honor should have told the jury that defendant claimed the relation of mortgagee and mortgagor existed under (350) the written contract introduced by plaintiff; that defendant was the agent of plaintiff, and to be furnished with fresh general merchandise upon which he could have hoped to make a reasonable profit, and that he was prevented from doing so by the acts and conduct of plaintiff, who palmed off upon him a lot of shoddy, shelf-worn, stale goods, and destroyed the trade which the defendant had built up and could have maintained, if furnished with goods such as he had a right to expect under the contract, but being in the power and under the control of plaintiff he was forced to take what he could get."

Fourth Exception.—"To this the defendant excepts, as Harris, under the contract, was entitled to what reasonable profit he could have made on a lot of fresh general merchandise, as would attract purchasers, to be furnished by plaintiff to the amount of $1,000, and kept supplied up to that amount so that defendant could keep and hold such trade as he had obtained."

Fifth Exception.—"To this defendant excepts, and says that the same is erroneous, and that instead thereof his Honor should have told the jury, 'the buyer may always retain the goods and maintain an action for damage sustained by the supply to him of an unmarketable article or something different in character to that which he agreed to buy, or which by the contract the plaintiff was to furnish, and had a right to waive the breach of contract and wait until the other party sued him, and then assert by way of counterclaim or cross-action.' "

The other exceptions are substantially similar.

The defendant's contentions were clearly presented to us, and ably argued, but we do not think they are supported by the facts shown in the record. We think the motion for removal was properly (351) refused, as we do not see how the present action affects in any way the land in Orange County. It does not ask a foreclosure. The mortgage, which is a compound document of peculiar construction, is introduced simply for the sake of the contract, and is not referred to in the judgment. The question of its validity as a mortgage is not involved in this action.

We think that the defendant's remaining contentions are equally untenable. The evidence shows that Harris was 48 years old, had been

a merchant all his life, and personally selected nearly all the goods which he bought. A few shoes were bought by sample, but there is no evidence that these particular shoes did not come up to sample. In any event that point is properly presented in the charge.

We might not be disposed to question the defendant's view of the law as to latent defects if any latent defects had been proved, but the very contention of the defendant is that the plaintiff "palmed off upon him a lot of shoddy, shelf-worn, stale goods." These were all patent defects that might readily have been discovered upon examination by a merchant of such long experience as Harris when he selected the goods.

There are some portions of his Honor's charge which, standing alone, might be liable to objection, but, taken as a whole, we think it is substantially correct, and contains a fair presentation of the case.

Affirmed.

Cited: Marcom v. R. R., 126 N. C., 203; *Willeford v. Bailey*, 132 N. C., 406.

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(352)

BYNUM & PASCHAL v. JOHN F. CLARK AND W. D. CLARK, PARTNERS.

(Decided 5 December, 1899.)

Partnership—Notice of Dissolution.

Actual notice of dissolution of partnership must be given, especially to those who had previous dealings with the firm.

CIVIL ACTION upon a running account, submitted on appeal from Justice's Court of CUMBERLAND County, to *Robinson, J.*, at May Term, 1899, of the Superior Court, and judgment rendered by him in favor of plaintiff under circumstances stated in the opinion. Defendants excepted and appealed.

N. A. Sinclair for appellant.
S. H. McRae for appellee.

FAIRCLOTH, C. J. Prior to April 1, 1897, the defendant John F. Clark and others, were in a partnership business under the name of John F. Clark, agent, and had a running account with the plaintiffs, and on April 1, 1897, said copartners were duly incorporated as "The Manchester Cotton Mills," and the said corporation became the owners

of the business and assets of said copartnership. After the formation of said corporation, the defendant Clark ordered goods from the plaintiff—signing J. F. Clark, agent. The plaintiffs were never actually notified of the formation of said corporation, nor that it had succeeded to the business of John F. Clark, agent, nor of the dissolution of the said partnership.

The only question is: "Can the plaintiff recover, they having had no actual notice of the dissolution of the partnership or of the formation of the corporation? We think they can. In such cases, actual notice must be given, especially to those who had previous deal- (353) ings with the partnership.

The case is governed by *Eliason v. Sexton,* 105 N. C., 356, and *Alexander v. Harkins,* 120 N. C., 452.

Affirmed.

C. H. WELCH v. JOSIAH CHEEK.

(Decided 5 December, 1899.)

Malicious Prosecution—Termination Induced by Defendant.

1. Before a civil action for damages can be maintained for malicious prosecution, the criminal action must have terminated in some way, by *nol. pros.*, verdict, quashing, etc.

2. When the termination of the criminal action is entered by procurement or inducement of the defendant, he can not institute a civil action for malicious prosecution.

CIVIL ACTION for damages for malicious prosecution, upon a charge of embezzlement, tried before *Shaw, J.,* at March Term, 1899, of the Superior Court of RANDOLPH County.

The defendant introduced no evidence. The testimony tended to show, among other things, that the criminal prosecution had been compromised by the parties, and in consequence thereof the action had been dismissed by the magistrate, and the accused discharged.

Issues Submitted to the Jury.

1. Did the defendant cause the arrest of plaintiff upon the charge of embezzlement maliciously and without probable cause, as alleged in the complaint? Answer: "Yes."

2. If so, was said action terminated prior to the institution of this action? Answer: "Yes." (354)

3. Did the plaintiff compromise said action with the defendant, and agree to and consent to the ending of the action before J. P. Phillips, J. P.? Answer: "Yes."

4. What damages, if any, has plaintiff sustained by reason of said arrest? Answer: "$650."

The plaintiff moved for judgment upon the verdict, and so did the defendant. The court rendered judgment in favor of defendant—the plaintiff excepted and appealed.

J. A. Barringer for appellant.
J. T. Morehead for appellee.

FAIRCLOTH, C. J. This is an action for malicious prosecution. In the criminal action the plaintiff alleged that the defendant had embezzled $100 of plaintiff's money, which was denied. The plaintiff in this action was arrested under a warrant, and he alleges that it was done maliciously and without probable cause. The defendant avers in his answer that "the plaintiff prevailed on the defendant to let the matter drop, which was not done voluntarily by the defendant; on the contrary, there was no trial by the consent and at the procurement of the plaintiff," and that he paid some of the costs which had accrued. The jury rendered a verdict on the first, second and fourth issues in favor of the plaintiff.

The third issue, "Did the plaintiff compromise said action with the defendant, and agree to and consent to the ending of the action before J. P. Phillips, justice of the peace?" was answered "yes," after the evidence was heard. The above quotation from the answer, first above copied, we think raised an important issue, and was not merely an evidentiary fact as insisted by the plaintiff, and was properly submitted to the jury.

(355) It is a settled rule that, before an action like the present to recover damages can be maintained, the criminal action must have terminated in some way, either by *nol. pros.*, verdict or quashing, etc. When, however, the termination has been induced and brought about by the defendant, he can not maintain an action for damages. "Where a *nol. pros.* is entered by a procurement of the party prosecuted or by his consent or by compromise, such party can not have an action for malicious prosecution." *Langford v. R. R.*, 114 Mass., 431; *Marcus v. Bernstein*, 117 N. C., 31.

In *Welch v. Cheek*, 115 N. C., 310, and in the last-named case, what constitutes a legal determination of the action, preponderance of evidence, and on which party the burden of proof rests, etc., are discussed.

In *Bernstein's* case, *supra,* it appears that the plaintiff "acknowledged the claim and arranged with the prosecutor that, if he would withdraw the suit or take a *nol. pros.* he would settle the claim, which was agreed to." There being nothing to show *procurement* of the *nol. pros.* any more than that the defendant entered it of his own motion, and it appearing that the plaintiff had only paid a debt, which was his duty to do, it was held that the action for damages could be maintained. In the present case the jury have said that the plaintiff did compromise said action with the defendant, and agree to and consent to the ending of the action before the justice of the peace. In consequence of this fact the action was dismissed.

The fact settled by the answer to the third issue brings the case under the exception above referred to, and deprives the plaintiff of a right of action, and in that respect differs from *Marcus v. Bernstein, supra.*

This view disposes of the action, and it is unnecessary to examine other exceptions of a minor class.

Affirmed.

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(356)

H. WEIL & BROS. ET AL. v. SAMUEL C. CASEY ET AL.

(Decided 5 December, 1899.)

Lien of Judgment—Mortgage—Purchase Money.

1. A judgment debtor may purchase land, and at the same time he receives his conveyance may give, to secure any portion of the *purchase money,* a mortgage which will take precedence over the judgment, as a lien on the land purchased.

2. If upon acquiring the land, the judgment debtor immediately executes a mortgage, not for the *purchase money,* the lien of the mortgage will be subordinate to that of the judgment.

3. But if upon acquiring the land, the judgment debtor immediately executes a mortgage for the purchase money, and also to further secure a mortgage debt of prior date to the docketing of the judgment, while the judgment will be postponed to the purchase money, it will take precedence over the prior mortgage debt, and must be paid first.

FORECLOSURE PROCEEDINGS pending in the Superior Court of WAYNE County, at October Term, 1898, before *Bryan, J.* The land, consisting of three tracts, had been sold by the commissioner, and the fund was in hand. A petition in the cause was filed by A. T. Grady and J. H. Morris, two judgment creditors of defendant Samuel C. Casey; the debt due Grady was $59.65, that due Morris was $48.12. The plaintiffs

H. Weil & Bros., held a mortgage on two of the tracts, known as the "Creek tract" and the "Home tract," to secure a debt of $2,126.90; and this mortgage debt was prior to the lien of the judgment debts due petitioners. After the docketing of the judgment, Casey bought a third tract, known as the "Raynor tract," part of the purchase, $50, he borrowed from the plaintiffs, and on the same day of the purchase he executed a mortgage to the plaintiff, securing the $50, and also as an additional security for the $2,126.90 due the plaintiff upon the
(357) first mortgage. All three of the tracts were sold by the commissioner, and did not realize sufficient to pay off the mortgage debts and judgments. The Raynor tract brought $340. The plaintiffs, Weil & Bros., contended that they were entitled to the whole fund; the petitioners, while admitting that the plaintiffs were entitled to the proceeds of sale of the first two tracts and to $50 advanced as part of purchase money of the Raynor tract, contended that their judgment lien on the Raynor tract was superior to the mortgage lien of the plaintiffs on that tract, and that the judgments should be paid out of the balance of proceeds of sale of the Raynor tract, and the residue only belonged to the plaintiffs.

His Honor adjudged that the petitioners were not entitled to the relief prayed for and that their petition be dismissed with costs.

The petitioners Grady and Morris excepted, and appealed.

H. B. Parker for appellants.
I. F. Dortch and Allen & Dortch for appellee.

MONTGOMERY, J. This action was originally brought by H. Weil & Bros., and Junius Slocumb, trustee, against Samuel C. Casey and Sarah J., his wife. No pleadings were filed, but the record states that the plaintiffs Weil & Bros., by their attorney, filed a duly verified complaint in foreclosure of mortgage proceedings, and that no answer was filed, and judgment of foreclosure was obtained. The judgment is set out, and in the same the amount of the debt of the plaintiffs is declared, and the several tracts of land said to be mentioned in the complaint are condemned to be sold to satisfy the judgment. Before the sale was made, A. T. Grady and A. H. Morris, judgment creditors of the
(358) defendant Samuel Casey, were made parties-plaintiff. The case was heard upon an admitted state of facts, as follows:

1. On the date of the docketing of the judgments of Grady and Morris, Casey owned two tracts of land, one called or known as the "Creek tract," containing 256 acres, and another known as the "Home tract," containing 350 acres.

2. That the plaintiffs, Weil & Bros., held a mortgage on these two tracts of land, duly registered prior to the judgments, to secure a debt of $2,126.90.

3. That afterwards Casey bought by deed from Thomas B. Raynor another tract of land called the "Raynor tract," containing 200 acres, and that on the same day Casey and wife executed to Weil & Bros., a mortgage on the Raynor tract to secure the payment of a note of $50. for money advanced by Weil & Bros., to Casey, with which Casey paid to Raynor a part of the purchase money, and also to better secure th old debt of $2,126.90.

The judgment of foreclosure directed the sale of the three tracts of land for the purpose of paying the debt of $2,126.90 and interest, and also the $50 note.

5. In 1898, the homestead of Casey was duly laid off to him in the "Home tract" of 350 acres, and no objection has ever been made to the homestead allotment.

6. Casey and wife have no other property, subject to the payment of the judgments, than the Raynor tract of 200 acres.

7. That the commissioner appointed by the Court sold all three of the tracts, the Raynor tract of 200 acres bringing $340, and the total sum of the three tracts not bringing enough to pay the debt of Weil & Bros.

8. The deed from Raynor and wife to Casey, and the mortgage from Casey and wife to Weil & Bros., upon the Raynor land, were executed at one and the same time, and in consequence of an (359) agreement that both the deed and the mortgage should be executed at the same time, and to secure the $50 advanced, and also for the further security for the note of $2,126.90.

Upon those facts the plaintiffs Grady and Morris insist, that after the application of $50 and interest, to be paid to Weil & Bros. on account of the amount advanced by them to Casey as a part of the purchase money of the Raynor land, enough of the balance of the $340, for which the Raynor tract was sold by the commissioner, should be applied to their judgment and costs. His Honor being of opinion that the judgment creditors were not entitled to the relief they sought, dismissed their petition.

The question for decision then is: Does a mortgage, executed simultaneously with the delivery of the deed from the grantor to the mortgagor for another consideration than the purchase money of the land conveyed and to a person other than the grantor, with the understanding between the mortgagor and that other person at the time of the execution of the deed by the grantor that the mortgage should be so

made, hold good against the then existing judgments against the mortgagor? The plaintiff's counsel in their brief insisted that, as the deed from Raynor to Casey and the mortgage by Casey to Weil & Bros., were executed at the same time, and that as the $50 purchase money for the land was paid by the plaintiffs in consequence of an agreement and understanding that the mortgage should be executed to secure both the $50 and the antecedent debt, the whole was a concurrent transaction, i. e., one transaction, and that, although the title vested, it did not rest in him, and that the judgment liens did not therefore attach to the land. In support of that view, the cases of *Bunting v. Jones,* 78 N. C., 242, and *Moring v. Dickerson,* 85 N. C., 466, were cited. In both of (360) these cases, the consideration for the mortgage was the purchase money of the land, and when the Court in these cases referred to the deed and the mortgage as being one transaction, and that the two instruments should be treated as one because they were simultaneously executed, the Court had reference only to cases where the mortgage was for the purchase money of the land. In all the cases cited, the consideration of the mortgage was the purchase money of the land, and it was in *Moring v. Dickerson, supra,* stated in substance that all of the cited cases proceeded upon the view that the seizin of the grantee was but for the instant, and that it was never intended to be in him beneficially at all, but that the real purpose was to convey the title to the mortgagee as a security for the money advanced. The reason why the title did not vest in the purchaser of the land is that the purchase money had been advanced by the mortgagee, and when the Court said that because the deed and mortgage are executed simultaneously they are concurrent transactions, i. e., one transaction, it was only to say that if there had been an interval between the delivery of the deed and the execution of the mortgage, then the judgment liens would have attached, for a title would have vested in the grantee because of the interval. This learning may be found in Freeman on Judgment, sec. 373, which says: "No doubt one against whom a judgment has already been docketed may purchase land, and at the same time he receives his conveyance may give, to secure any *portion* of the purchase money, a mortgage which will take precedence over the judgment as a lien on the land purchased. . . . The reason assigned for this is, that the conveyance and the encumbrance being simultaneous, no opportunity is given for the judgment lien to attach. But it has also been decided that if, upon acquiring land, the judgment debtor immediately executes a mortgage, not for the *purchase money,* the lien of the (361) mortgage will be subordinate to that of the judgment."

The plaintiffs Weil & Bros., moreover, contend that, if the judgment creditors Grady and Morris had been entitled to the relief demanded, the homestead right of the defendant Casey would intervene to prevent the application of any part of the proceeds of the sale to the creditors, until the homestead had fallen in. We hardly understand this contention, because Casey and his wife were before the court, and the order of sale of the land, including the homestead, was made without exception or protest on their part. But if there had been exception, we do not see how it could have availed, for in *Gulley v. Thurston,* 112 N. C., 192, it was decided that the lien of a judgment was superior to that of a subsequently registered mortgage made on property outside of the debtor's allotted homestead. The homestead in the present case had been duly allotted to the defendant Casey, and no objection had been made to the allotment.

There was error in the judgment of the court below in dismissing the petition of the judgment creditors Grady and Morris. They were entitled to have the amount, principal, interest and costs, due upon their judgments satisfied out of the proceeds of the sale of the Raynor land in the commissioner's hands. The rest of the judgment is affirmed.

Modified and affirmed.

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(362)

A. H. SLOCOMB, TAXPAYER, v. CITY OF FAYETTEVILLE.

(Decided 5 December, 1899.)

Municipal Bonds—Acts 1899, Chaps. 18, 118 and 195.

1. Where a municipality has power to create a municipal debt, it has a right, by necessary implication, to levy the necessary taxes to pay it. The right to create a debt carries with it the duty to pay the same. *Charlotte v. Shepard,* 122 N. C., 602.

2. While the legislation of 1899, chs. 18 and 118, may authorize the establishment of an electric light plant for the benefit of the citizens of Fayetteville, and, incidentally, for suburban residents, at uniform rates, it is questionable whether a town could engage in a business enterprise for the profit that might be made, or that it would be sustained, although sanctioned by an act of the Legislature and a majority of the town voters.

3. The pleadings are silent as to whether this legislation was passed according to the provisions of Art. II, sec. 14, and Art. VII, sec. 7, of the Constitution; if it was not, this decision will afford no protection to the bondholder.

ACTION for an injunction to enjoin the issuing of town bonds by Fayetteville to establish and operate a system of electric lights, also a system of waterworks and sewerage, heard before *Timberlake, J.*, at September term, 1899, of CUMBERLAND Superior Court. The ground of the application alleged is that no provision was made in the Acts of 1899 for a special tax levy to pay the interest and create a sinking fund for the payment of the principal of the bonds authorized to be issued for the purpose.

(363) His Honor refused the injunction. Plaintiff excepted and appealed.

N. A. Sinclair for appellant.
H. L. Cook and H. McD. Robinson for appellee.

FURCHES, J. The plaintiff alleges that the defendant corporation is about to issue $15,000, in 6 per cent interest-bearing coupon bonds; that defendant has no authority in law to do so, and asks the court for an injunction to prevent such issue. The defendant admits that it is about to issue the bonds, but denied the allegation that it is without authority of law; and alleges that by the Laws 1899, ch. 18, and ch. 118, the defendant was authorized to submit the proposition to the vote of Fayetteville; that this has been done and the same has been ratified by a majority of the qualified voters thereof; that under these acts of the Legislature, and this ratification and approval by the vote of the city, the defendant is fully authorized and justified in issuing the bonds; that upon these allegations of defendant, which were not denied, the court refused to issue the injunction, and the plaintiff appealed.

We understand from the argument of plaintiff's counsel that he puts his contention upon the ground that there is no provision in chapter 118, or in chapter 18, for the levy of taxes to pay said bonds and the interest thereon. This seems to be true. Chapter 118 makes no provision for the levy of taxes for any purpose. And chapter 18 seems only to provide for the levying of taxes to defray the expenses of waterworks.

But where a municipality has the power to create a municipal debt, it has a right to levy the necessary taxes to pay it. This power attaches by necessary implication. The right to create a debt carries with it the duty to pay the same. And, as a municipality has no means of paying, except by taxation, it necessarily has this power. *Charlotte v. Shepard,* 122 N. C., 602. This question we consider as settled law in this State, and it has given us no trouble in deciding this case.

(364) But there are two other questions incidentally presented, and

not discussed by counsel, that we think proper to mention. One of these is that this legislation not only provides for the establishing of an electric light plant for the benefit of the citizens of Fayetteville, but also for the purpose of furnishing lights, a [and] *power,* to those not residents and citizens of the town. We see no objection to the town furnishing electric lights and power to its citizens for pay at uniform rates, as this is a means of local assessment, according to the special benefits received by such parties over that of the general public. And these assessments may be used for the support of the concern and the general benefit of the whole.

But as to whether a municipal corporation could engage in a business enterprise (even to erect and run an electric light plant) for the profit that might be made, would be sustained, is questionable, even if an act of the Legislature authorized it, and the same had been approved by a majority of the voters of the town.

But it appears that the object of this legislation was to authorize the establishment of an electric light plant for the benefit of the citizens of Fayetteville. And the furnishing lights and *power* to the suburban population would be only incidental to the main purpose; we do not hold that this can not be done.

The other important question is this: It is not alleged or denied in either the complaint or answer, whether the acts, chapter 18 and chapter 118, were passed and ratified as required by Art. II, sec. 14, of the Constitution of this State, or not. This must have been done to make the bonds valid. *Charlotte v. Shepard, supra.* And the determination of *this case* will not prevent that question from hereafter being presented; and while the judgment in this case might work an estoppel, we do not say it will as to the plaintiff Slocumb; it certainly would not as to other persons, not parties to this action.

We hesitated as to whether we should not hold that it was a (365) burden on the defendant to show that these acts had been passed according to the provisions of Art. II, sec. 14, and Art. VII, sec. 7, of the Constitution. This question has not been settled by any direct adjudication. But in *Bank v. Comrs.,* 119 N. C., 214 and the other subsequent cases presenting this question, the parties objecting to the legality have assumed the burden of showing that the acts had not been passed according to the requirements of the Constitution. This is consistent with the legal maxim of *"Omnia præsumunter rite esse acta"*—that it will be presumed they were legally passed, until the contrary is shown.

We therefore affirm the judgment appealed from. But if these acts were not passed according to the constitutional provisions cited above, parties taking the bonds may find no protection in this judgment.

Affirmed.

Cited: Debnam v. Chitty, 131 N. C., 687; *Brockenbrough v. Comrs.,* 134 N. C., 23.

L. A. BRISTOL, RECEIVER OF THE PIEDMONT BANK, v. COMMISSIONERS OF MORGANTON.

(Decided 5 December, 1899.)

Money Paid—Mistake of the Law—Invalid Tax Assessment—Acts 1897, Ch. 619, Sec. 79.

1. It is a general rule, that money paid under a mistake of the law can not be recovered.

2. The repayment of an ivalid tax assessment can not be recovered unless demanded in writing within thirty days. Acts 1897, ch. 169, sec. 79.

CIVIL ACTION begun in the justice's court to recover certain taxes alleged to have been improperly paid to the tax collector of Mor-
(366) ganton, and heard on appeal before *Bowman, J.,* upon admitted facts, at Fall Term, 1899, of BURKE Superior Court.

His Honor rendered judgment for the plaintiff, and defendant appealed.

The agreed facts are recited in the opinion.

S. J. Ervin for appellant.
Bynum & Bynum for appellee.

MONTGOMERY, J. The facts were agreed upon and submitted to the Court as upon a case agreed, a jury trial having been waived. The cashier of plaintiff bank listed before the proper authorities of the town of Morganton the capital stock of the bank at a valuation of $20,000. The tax collector of the town duly received the tax list and demanded from the receiver of the bank (the business of the same being at that time in liquidation and in the hands of a court receiver) the taxes due to the town on the stock assessment, and threatened to levy on the bank's

property if the taxes should not be paid by the receiver. The plaintiff made no demand within thirty days for the return of the taxes by the town, nor did he commence the action within six months from the date of the payment of the taxes. The plaintiff alleged in the complaint that the payment of the taxes was made under a mistake of fact, and, in the brief filed by counsel, that point is especially dwelt upon. There is nothing in the complaint showing any misunderstanding of the facts of the case, even if we should consider that pleading, in reference to a fact stated therein, after an agreed statement of facts which sets forth no fact from which it might be found that the payment of the taxes had been filed through a mistake of the facts.

The truth is, the matters alleged in the complaint show that there was no misunderstanding on plaintiff's part about the facts of the case. The agreed facts show that no such misunderstanding (367) existed, and the brief shows that the payment was not made under a mistake of fact. The cashier listed the taxes, which the plaintiff admits was proper. The plaintiff knew *that,* when he paid the taxes, but contends that the tax assessors and the town authorities should have assessed the taxes against the *individual* stockholders, instead of against the bank. The question then confronting the plaintiff, when the taxes were paid, was one of law—Should the bank pay them or the individual stockholders?

The plaintiff solved the question by concluding as a matter of *law* that he was liable for the taxes, and whether he was right or wrong (which we are not called upon to decide here) he was bound by his action. It was money paid under a mistake of the law.

The plaintiff does not insist that the taxes were assessed or levied for an illegal or unauthorized purpose, or that they were invalid or excessive; in fact, he argues that the assessment was proper in all respects, except that it ought to have been entered against the individual stockholders instead of against the bank; and, therefore, on his own argument, he cannot recover the amount paid as taxes, under section 79 of the Acts of 1897.

But if the plaintiff was in error in that position and the tax assessment was invalid on account of the alleged irregularity of the assessment, that is, that the assessment, after the stock had been listed by the cashier, should have been assessed against the individual stockholders instead of against the bank, then the plaintiff can not recover, for this action was not commenced within the time prescribed by law. Section 79, chapter 169, of the Acts 1897. *Hatwood v. Fayetteville,* 121 N. C., 209.

(368) But the plaintiff says that a recovery can be had on another principle, i. e., that as the property is in the custody of the Court, through its officer, the receiver, and a mistake having been made by the receiver, the mistake will be corrected to the end that the rights of the parties, for whose benefit the receiver was appointed, may be protected. The answer to that proposition is that the Court is bound by the law, and it could not and would not desire, by any decree made in a particular case, to prevent the operation of the general rule of law that money paid under a mistake of the law can not be recovered.

There was error in the judgment below on the facts agreed, and the same is

Reversed.

J. M. GRIFFITH AND JOHN O. GRIFFITH v. A. B. SILVER ET AL.

(Decided 5 December, 1899.)

Listing Land for Taxes—Taking Sheriff's Deed.

A person who lists the land of another in his own name for taxes, and allows it to be sold for the taxes, becomes the purchaser and takes the sheriff's deed, simply paid his own taxes, and acquires no title under the deed.

CIVIL ACTION to recover four separate tracts of land of 100 acres each, tried before *Allen, J.*, at Fall Term, 1899, of YANCEY Superior Court.

It was admitted that the paper title of the plaintiffs covered the land in suit, and that defendants were in possession of part thereof. The defendants claimed the land under a tax title. They had listed the (369) land, along with 300 acres of their own, as 700 acres, allowed it to be sold for the taxes, bid the whole off for tax and cost $17.21, took first the tax certificate and afterwards the sheriff's deed.

His Honor directed the jury, that if they believed the evidence, to find the issues in favor of plaintiff, which they did. Judgment accordingly, and defendants appealed.

Appellant not represented in this Court.
E. J. Justice and J. T. Perkins for appellee.

MONTGOMERY, J. In one of the townships of Yancey County a tract of land of 700 acres was listed for taxation for the years 1892 and 1893, in the name of the "Silver heirs." The defendants in this action are

"The Silver heirs," and they are in the possession of the 700 acres of land, claiming under a sheriff's deed made to them under a sale of the land for taxes. The lands were listed as one tract, and they embraced, according to the admissions of the answer, 400 acres which belonged to the plaintiff at the time of the sale. The case on appeal also shows that it was admitted that the land described in the complaint, and for the possession of which the plaintiff brought this action, was covered by the grants introduced by the plaintiff.

This is indeed a novel case, one entirely different from any we have had before us on the subject of titles under tax sales. The defendants listed the land of the plaintiff, together with their own, in a lump—in one tract—and by a description which gave the plaintiff no possible intimation that his land was embraced in the listing, allowed their own land, together with the plaintiff's, to be sold for their taxes, bought the whole at the tax sale, and now set up a title under the sheriff's deed.

We are of the opinion that by the defendants listing the plaintiff's land as their own, they are bound by that act for the pur- (370) poses of this suit, and when they bought at the sheriff's sale they simply paid their taxes, and the sheriff's deed conveyed no title.

Of course, as between the plaintiff and the defendants, the listing of the plaintiff's land by the defendants does not affect the plaintiff's title under the circumstances of this case, for the plaintiff could be in no manner bound by the act of the defendants in the listing of the land.

There was no error in the instruction of the judge to the jury, and the judgment is

Affirmed.

W. M. POWELL, ADMINISTRATOR OF JAMES E. POWELL, v. THE SOUTHERN RAILWAY COMPANY.

(Decided 5 December, 1899.)

Motion to Nonsuit—Evidence—Negligence—Contributory Negligence.

1. If there is any evidence, which in any reasonable aspect would support the verdict, it must go to the jury.

2. On motion to nonsuit for want of evidence, only the evidence favorable to the plaintiff must be considered, and that in the light most favorable to him.

3. Contributory negligence being an affirmative defense, can not be considered on a motion to nonsuit.

POWELL *v.* R. R.

CIVIL ACTION for injuries resulting in the death of intestate, James E. Powell, alleged to have been caused by negligence of defendant, tried before *Bowman J.*, and a jury, at Fall Term, 1899, of the Superior Court of BURKE County.

(371) The defendant denied the allegations of negligence, and alleged contributory negligence.

At the close of plaintiff's evidence, the defendant moved to nonsuit the plaintiff.

Motion refused, defendant excepted.

At the close of defendant's evidence, the motion to nonsuit was renewed, and was again refused. Defendant excepted.

Issues.

1. Was the plaintiff's intestate killed by the negligence of the defendant? Answer. "Yes."

2. Did plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer? Answer. "Yes."

3. If plaintiff's intestate, by his own negligence, contributed to his killing, could the defendant, notwithstanding the negligence of said intestate, have prevented the killing of said intestate by the exercise of care on its part? Answer. "Yes."

4. What damage, if any, is plaintiff entitled to recover? Answer. "$700."

There was no exception to the evidence or the charge.

An epitome of the evidence is contained in the opinion.

Judgment was rendered for plaintiff, and defendant appealed.

G. F. Bason for appellant.

Avery & Ervin and W. S. Pearson for appellee.

CLARK, J. There is no exception to evidence or the charge. The sole exception is that the court refused the defendant's mo-

(372) tion to withdraw the case from the jury, on the ground that there was no evidence. As the Constitution guarantees the right of trial by a jury of disputed issues of fact, if there is any evidence which in any reasonable aspect would support the verdict, the cause must be submitted to the triers of fact, subject to the discretion of the judge to set the verdict aside, if in his opinion not justified by the evidence. *Dunn v. R. R.*, 124 N. C., 252; *Cox v. R. R.*, 123 N. C., 606; *Fulp v. R. R.*, 120 N. C., 525; *State v. Green*, 117 N. C., 695; *S. v. Kiger*, 115 N. C., 746, 751.

In considering a motion to take a cause away from the jury upon the ground that there is no evidence, only the evidence favorable to the

plaintiff must be considered, and that in the light most favorable to him. *Purnell v. R. R.*, 122 N. C., 832. The defendant contends:

1. That there was no evidence that the plaintiff's intestate was killed by defendant's train.

There was no eye witness who saw the killing, but it was in evidence that the deceased was seen at a store near the defendant's depot in Morganton at nine o'clock at night, and again at five minutes past twelve, and the next morning he was found lying dead 300 yards east of the depot and between it and Campbell's crossing and about 100 yards from the latter. The deceased was lying on his back and there was blood on the grass and weeds. His head was lying east, his feet west about three or four feet from the end of the cross ties. His clothing had dust on them; he had a wound on the back of his head; his skull was crushed; wounds sufficient to cause death; fingers of right hand torn, and right shoulder bruised. His hat was found between the cross ties, and had grease on it, and looked like it had been run over by the wheel. There was no sign of scuffling on the ground. The intestate's usual way home was along the railroad track from the depot to Campbell's crossing. When seen that night at nine o'clock near the depot, he was thought to be sober, but had had (373 a dram; he drank whiskey, and was in the habit of getting drunk. The defendant's freight train passed that night between one and two o'clock going east.

Certainly there was more than a scintilla of evidence going to show that the deceased was knocked off the track and killed by the train, and the determination of the fact was properly left to the jury.

2. The defendant contends there was no evidence of negligence.

It was in evidence that it was a moonlight night when the deceased was killed; that the freight train which passed going east between one and two o'clock that night was a heavy train running twenty-five to thirty-five miles an hour; that the engineer on said train neither sounded the whistle for the station which was 300 yards west of the spot where the deceased was killed, nor for Campbell's crossing, which was one hundred or more yards east of the point, nor for the other (the tannery) crossing, in the town, within the corporate limits of which the deceased was killed, it being stated that he never sounded it at all; that the said town has a population of twenty-five hundred or three thousand; that the bulk of a man could have been discerned 200 yards away at two o'clock that night; that no other east-bound train passed that night; that it was probable that the light of the headlight would light up the point where the intestate was struck, so that the engineer on the right side of the engine might, with a proper look-

out, have seen the man who was sitting or lying down on the right side edge of the track, judging from his being found on that side. There was evidence in rebuttal of part of the above, but upon the conflict of evidence the jury are to decide. Upon the above, there was sufficient evidence to submit the case to the jury upon the issue as to negligence.

In *Fulp v. R. R., supra,* which much resembles this case, in (374) that the man was killed on the track (as the verdict here finds) at night, it was held that the failure to sound the whistle at the public crossing was negligence. Here, according to the plaintiff's evidence, there was a failure to sound the whistle at the station, and likewise at the two public crossings, all of which were in an incorporated town. There are many other cases holding that it is negligence not to sound the whistle or ring the bell at public crossings, among them, *Cox v. R. R., supra; Willis v. R. R.,* 122 N. C., 905; *Randall v. R. R.,* 104 N. C., 410, 416; *Gilmore v. R. R.,* 115 N. C., 660; *Russell v. R. R.,* 118 N. C., 1098; *Hinkle v. R. R.,* 109 N. C., 472. There was also evidence tending to show that the engineer with a proper lookout might have seen the deceased. The fact that the engineer, sitting on the right hand side of the cab on a moonlight night, did not know till two days thereafter that his engine had knocked a man off on that side of the track (as the verdict finds), is itself some evidence to be considered upon the question whether there was a negligent lookout, especially taken in connection with the plaintiff's evidence that the train was running from twenty-five to thirty-five miles an hour at night, and sounding no whistles at public crossings.

Contributory negligence being an affirmative defense can not be considered on a motion to nonsuit. *Cogdell v. R. R.,* 124 N. C., 302. Indeed, as already said, only the evidence of the plaintiff, and that in the light most favorable to him, can be considered, see cases collected on that point in *Cox v. R. R., supra.* The evidence to show contributory negligence and to negative negligence of the plaintiff must have all been admitted and the case submitted to the jury with instructions satisfactory to the defendant as there is no exception to the charge, nor for admission or rejection of evidence.

Affirmed.

Cited: Brinkley v. R. R., 126 N. C., 91; *Arrowood v. R. R., ib.,* 632; *Whitesides v. R. R.,* 128 N. C., 231, 235; *Bryan v. R. R., ib.,* 391; *Hord v. R. R.,* 129 N. C., 307; *Clegg v. R. R.,* 132 N. C., 294; *Butts v. R. R.,* 133 N. C., 83.

(375)

JOHN H. McNEELY v. COMMISSIONERS OF MORGANTON.

(Decided 5 December, 1899.)

Mandamus—Local Option—Acts 1895 (Private Acts), Ch. 158.

1. The local option law for Morganton (Private Acts, ch. 158) authorizes the commissioners to grant license for sale of liquor, provided a majority voted for license; if the vote is a tie vote, the commissioners have not the authority.

2. While the act provided that no election for the purpose should be within less than two years of the last previous election, on the first Monday in May, the day named (first Monday in May) fixes the time of the election, being the same day of election of municipal officers.

3. The act requires no separate registration of voters for such election.

CIVIL ACTION for mandamus to the defendants commanding them to hear the application of plaintiff and to grant to him license to retail spirituous liquors in Morganton, heard before *Allen, J.*, at chambers in Morganton, on 22d July, 1899. The mandamus was refused. Plaintiff excepted and appealed.

The circumstances are fully stated in the opinion.

S. J. Ervin and J. T. Perkins for appellant.
Avery & Avery and Avery & Erwin for appellee.

FURCHES, J., By various acts of the Legislature and the vote of the town of Monganton, it had been a "dry" town for twenty years or more, that is, the right to issue license to retail spirituous liquors by the small measure had been prohibited. This being the "status," when the Legislature of 1895 (ch. 158), passed and ratified an act authorizing an election to be held on the first Monday in May, 1895, at (376) which election it should be determined whether license should be granted for the sale of liquor by the small measure or not; that if a *majority* voted for licenses, they should be granted.

The act further provided that upon petition of one-third of the qualified voters of the town, it should be the duty of the commissioners to order another election on the first Monday in May, provided that no election so ordered should be within less than two years of the last previous election.

The provisions of the act of 1895 providing for said elections are as follows:

"Sec. 3. If at said election on the first Monday in May, 1895, or at any such subsequent election as herein provided, a majority of the votes cast shall have written or printed upon them the word 'license,' then spirituous, vinous and malt liquor may be sold within the corporate limits of Morganton."

At the election held on the first Monday in May, 1895, a majority of votes cast was for license. And in pursuance of the result of this election, the plaintiff was granted a license to retail liquor by the small measure in the town of Morganton.

In 1897, upon the petition of the requisite number of voters, the commissioners ordered another election on the first Monday in May of that year, when a majority of the votes cast were for license, and the plaintiff was again granted license to retail liquor in Morganton.

In 1899, upon the petition of the required number of the qualified voters of the town, the commissioners ordered another election to be held on the first Monday in May, 1899, and upon a count of the votes cast it was found that 151 votes had been cast for license and 151 votes had been cast against license. And this vote was so recorded and de-
(377) clared, showing that the "wets," or those in favor of license, *had not* received a majority of the votes cast. The plaintiff, considering that he was entitled to license under this election, applied to the commissioners and complied with all the requirements which would entitle him to a license, if the commissioners were authorized to grant it under said election. But the commissioners, believing they were not so authorized, refused to grant the plaintiff license, stating that they refused to issue the license solely upon the ground that they had no authority to do so, there not being a majority of the votes at said election on the first Monday in May, 1899, in favor of license.

Upon the refusal of the commissioners to grant the license, the plaintiff commenced this action in the Superior Court of Burke County to compel them to issue it, and asked for a writ of mandamus. Upon this writ being denied and the plaintiff and his surety on the prosecution bond being adjudged to pay the cost, the plaintiff appealed to this Court.

While this case presents an interesting and somewhat novel question, yet we do not think it a difficult one. The plaintiff's contention is that the town was "wet" on the first Monday in May, 1899, (date of the last election), and that it required a majority of the votes cast to change the "status." That being so, and there not being a majority *against* license, it was the duty of the commissioners to grant the license. This argument is plausible, but not sound.

We must remember that when the act of 1895 was passed, the town of Morganton was "dry." This is the status we start with, and it can not be contended that, had the election in 1895 resulted as the election in 1899 did, that the commissioners would have been authorized to issue license; for the reason that the act only authorizes them to do so if a *majority* vote for license. And the act provides for a resubmission of this question every two years if one-third of the (378) qualified voters petition the commissioners to that effect; and that "if at said election on the first Monday in May, 1895, or any subsequent election *as herein provided, a majority of the votes cast shall have written or printed upon them the word 'license,'* then spirituous, vinous or malt liquors may be sold within the corporate limits of Morganton."

It seems to us that this is plain language, showing that the result of one election only authorizes the issuance of licenses until the next election, and that the "status" at the subsequent election is just the same as it was at the first election; and that it requires a *majority* of the votes cast at each election to authorize the commissioners to grant license.

Suppose, instead of the Legislature authorizing one-third of the voters of Morganton to require an election to be held every two years, it had said that there shall be an election on the first Monday in May, 1895, and on the first Monday in May every two years thereafter, and if at said elections a majority of the qualified voters vote for license, the commissioners shall grant license, but if a majority do not vote for license at said elections, they shall not grant license. An election is had, and at the first election a majority vote for license, but at the second election there is not a majority for license—there is a "tie." Could it be contended that the commissioners would have the right to issue license? We see no difference in the fact that one-third of the voters had the right to require the election to be held every two years and the Legislature ordering it to be held every two years. It required a *majority* of the votes cast in either event to authorize the commissioners to act. This majority, "license" did not get; and the judgment must be affirmed.

There were two other grounds presented and argued, but neither of them is tenable. One is, that the first Monday in May, 1899, came two days earlier in the month than it did in 1897 and (379) therefore it lacked two days of being two years from the date of the election in 1897 until the election was held in 1899. But the act provided for the election to be held on the first Monday in May—the same day of election for municipal officers. We think this controls the time. It is like electing members of the Legislature every two years—elections to be held on the first Tuesday in November,

which may not be precisely two years, if we count the days. In fact the Legislature has changed the time of this election from November to August, and, if the plaintiff's contention should be sustained, it would invalidate that election. The other is that there was not sufficient time given of this election for the voters to register. But we see no provision for a separate registration of voters for this election. It is to to be held at the same time and place that the election is held to elect the town officers, and all persons qualified to vote in one election are qualified to vote in the other. And it is not claimed but what legal notice was given of this election, and that the legal time required for registration was complied with. This being so, in the absence of any suggestion of fraud, unfair practice or injury to the plaintiff, we can not invalidate this election on that account. *Quinn v. Lattimore,* 120 N. C., 426; *R. R. v. Comrs.,* 116 N. C., 563; *McDonald v. Morrow,* 119 N. C., 666; *Harkins v. Cathey, ibid.,* 649.

Upon a contested election, upon allegations of fraud such irregularities (if there such) might be offered and considered as evidence tending to sustain such allegations. *Howard v. Turner, at this term.* The judgment must be

Affirmed.

(380)

T. W. BRACKETT v. A. W. GILLIAM.

(Decided 5 December, 1899.)

References—Power of the Court—Exceptions.

The power of the court over references is very broad; it retains its jurisdiction in every case of reference, with power to review and reverse conclusions of law, and a discretion to modify and set aside the report, which discretion is not reviewable unless abused.

CIVIL ACTION, heard upon appeal from justice's court, before *Starbuck, J.,* at Spring Term, 1898, of MCDOWELL Superior Court, upon exception to report of the referee, by plaintiff.

The defendant filed no exceptions; the plaintiff abandoned all except a single exception relating to a credit of $32.90, which, if allowed defendant, would overpay plaintiff's account by $1.79, otherwise, defendant would be owing plaintiff $31.11. The referee reported that the evidence was so confused, and the accounts kept so unsatisfactorily, that it was impossible for him to ascertain all the facts, and that he had arrived at the conclusion of law, that for want of certainty,

the defendant is not due plaintiff any sum of money. The plaintiff insisted that as defendant claimed the credit, the burden was on him to prove it, and that on his failure to do this, as a matter of law, it ought not to be allowed him.

His Honor, while holding that plaintiff's contention as to the burden of proof was correct, yet upon the examination of the evidence, decided that defendant was entitled to the credit, and owed the plaintiff nothing. Judgment accordingly. Plaintiff excepted and appealed.

E. J. Justice for appellant. (381)
P. J. Sinclair for appellee.

CLARK, J. This case was heard in the Superior Court upon exceptions to a referee's report when all exceptions were abandoned except as to a credit of $32.90, which, if allowed defendant, would leave him discharged from indebtedness to the plaintiff. The referee held that the evidence was so conflicting and confused that he could not find how the fact was, and adjudged that, from the want of certainty, the plaintiff had failed to make out his case and could not recover.

The plaintiff's fourth exception was as follows: "The failure of the referee to allow Exhibit 6 ($32.90), as a credit on the plaintiff's account, or that it should be so allowed, but finding only that in view of the evidence it is impossible for him to ascertain all the facts in reference to each and every separate transaction, the plaintiff excepts to the referee's conclusions of law that the plaintiff is not entitled to recover any amount, and that the defendant is not due the plaintiff any sum of money." This exception brought the judgment of the referee that the evidence did not justify judgment for the plaintiff before the judge for review.

The court held that the referee erred as to the burden of proof, but that he had in fact rightly given the defendant credit for the $32.90, but for a wrong reason, that the court had the power upon the exception above set out, to review the referee's findings, and upon examination of the evidence the court found as a fact therefrom that the $32.90 had been paid to the plaintiff by the defendant, and that the plaintiff was not entitled to recover.

The plaintiff excepted to the judgment of the Superior Court upon the ground that the exception to the referee's report was only to the conclusion of law as to the burden of proof, and the (382) court having held with the plaintiff, as to the burden of proof, could go no further, and should have rendered judgment for the plaintiff. This is the sole point presented.

In the section of the report excepted to, the referee found, in effect, that the evidence was insufficient to justify him in finding whether the payment was made or not, and therefore the plaintiff could not recover by reason of the uncertainty. It is true that the plaintiff styled his exception "to the conclusions of law that the plaintiff is not entitled to recover," etc., but the referee did not so style it, and in fact that conclusion was a mixed one of law and fact; of fact, that the evidence was too confused to justify a finding of fact whether payment had been made; and of law, that therefore the plaintiff could not recover. The fourth exception therefore took the entire ruling of the referee, that the plaintiff could not recover, to the judge for review. The plaintiff could not bind the referee to the reason he gave for his conclusion while excepting to the conclusion. The exception being before the judge, he could overrule, modify or affirm the action of the referee. He could find the facts himself and affirm, as he did, the referee's conclusion, as stated in the fourth exception, though he reversed the reason given by the referee for such result.

The power of the court over references is very broad. As is said in the late case of *Cummings v. Swepson,* 124 N. C., 579: "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 and 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: Credle v. Ayers, 126 N. C., 17.

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(383)

J. R. HENDERSON v. SARAH MOORE.

(Decided 5 December, 1899.)

Judgment Erroneous, Appeal—Judgment Irregular, Motion in the Cause.

1. If a judgment is erroneous, that is, contrary to law, the remedy is by appeal; if irregular, that is, contrary to the course and practice of the courts, the remedy is by motion in the cause made within a reasonable time.

2. A court of equity remedies neither, when jurisdiction exists, and no fraud is alleged.

CIVIL ACTION to correct a former judgment of the court, and to stay the execution in the meantime, heard before *Shaw, J.*, at Fall Term, 1899, of WILKES Superior Court.

Sarah Moore had sued one N. O. Anderson in the justice's court for a steer, and recovered judgment against Anderson, who appealed to the Superior Court, and gave Henderson as security on the bond to stay execution in sum of $25. Sarah Moore again got judgment in Superior Court for $10, the value of the steer and costs. Judgment was rendered against Henderson, surety on the stay bond, for $10 and the costs at Fall Term, 1896, which together amounted to about $80, and for which execution issued against Henderson, who institutes this present action for his relief. A temporary order of restraint was granted, which at the hearing was dissolved and the case dismissed, on the ground that the plaintiff had mistaken his remedy.

Plaintiff excepted, and appealed.

W. W. Barber and Glenn & Manly for appellant.
R. N. Hackett for appellee. (384)

FAIRCLOTH, C. J. The defendant in 1896 obtained a judgment against N. O. Anderson on appeal from the court of a justice of the peace. The plaintiff was one of the sureties on the appeal bond, who now alleges that the judgment was for an amount in excess of his liability on said appeal bond, and seeks injunctive relief against an execution issued on the said judgment.

Every judgment of a court, having jurisdiction, is presumed to have been entered agreeably to law, and until reversed or vacated, is binding on all parties to the action. Idiots, lunatics, etc., are no exception to the rule. *Brittain v. Mull,* 99 N. C., 483, 492. If a judgment is erroneous, that is, contrary to law, the remedy is by an appeal. If it be irregular, that is, contrary to the course and practice of the court, the remedy is by a motion in the cause made within a reasonable time. *Foard v. Alexander,* 64 N. C., 69; *Neville v. Pope,* 95 N. C., 346; *Ward v. Lowndes,* 96 N. C., 367. A court of equity does not act on the ground that a judgment at law is erroneous or irregular, when jurisdiction exists and no fraud is alleged, but it proceeds upon its own conscientious view of the merits of the matter presented.

The paintiff in this case did not appeal to correct an error, if any was committed, nor move in the action in which judgment was entered to correct any irregularity, if there was any. He has simply misconceived his proper remedy.

Affirmed.

Cited: McLeod v. Graham, 132 N. C., 475.

(385)

C. J. COWLES v. G. W. McNEILL.

(Decided 5 December, 1899.)

Ejectment—Possession—Nonsuit—Evidence—Acts 1897, Chapter 109.

1. It is well settled, that on a motion of nonsuit, the evidence must be construed in the light most favorable to the plaintiff.

2. Where the defendant in his answer denied being in possession, but there was evidence that he was present at a survey made for the plaintiff, and claimed to be the owner—pointed to the wood he had cut upon it, and forbade the surveyor to enter on it—the evidence ought to have been submitted to the jury.

CIVIL ACTION for the possession of land, tried before *Allen J.*, at Spring Term, 1899, of WILKES Superior Court. The defendant disclaimed possession and moved to nonsuit the plaintiff under act 1897, ch. 109, for failing to offer evidence tending to prove it. Motion allowed. Plaintiff excepted and appealed. The evidence appears in the opinion.

Finley & Green for appellant.
No counsel contra.

DOUGLAS, J. This is an action for the possession of a tract of land described in the complaint. The plaintiff alleged that the defendants were in the wrongful and unlawful possession of the land and unlawfully and wrongfully withheld the possession of the same from the plaintiff. In the original answer, the defendants admitted that they were in possession, but denied that their possession was either unlawful or wrongful. In the amended or new answer as it is called in the
(386) pleadings, the defendants denied that they were in the wrongful and unlawful possession of the land, and set up a claim to the same in the nature of a notice of entry, a survey and a grant from the State, and aver that although the plaintiff's grant from the State for a tract of land alleged by the plaintiff to embrace the 50-acre tract, is older than the defendant's grant, yet the entry of the defendants and the notice of the entry are the older; that the survey and grant followed the entry of the defendants within the year following the entry, and that entry was filed in the office of the entry-taker of Wilkes County, where the land was situated, and that the plaintiff had notice of such entry. The plaintiff, replying to the amended

or new answer, alleged that the notice of entry which the defendants filed for the 50-acre tract in dispute was entirely void in law because of the uncertain description of the land, and because the entry was not advertised according to law, and that he had no notice, actual or constructive, of the defendant's entry when he made his own.

Both plaintiff and defendants tendered issues embracing several of the matters connected with the disputed facts concerning the several entries, surveys and grants. "After the jury were empaneled, and when called upon to read the pleadings, after the plaintiff's counsel had read the complaint, the defendants' counsel read the answer, called the new answer, in which they denied the allegation of the complaint that the defendants were in possession, and thereupon tendered an issue as to whether they were in possession of said land. The plaintiff claimed under a grant from the State of 193 acres, and introduced evidence tending to show his possession of the land covered by the grant, and that the 50-acre tract in controversy in this action, and claimed by the defendants by grant from the State, was within the boundaries of the 193-acre tract." The only evidence offered by the plaintiff as to the possession by the defendants of the 50-acre tract in controversy was that of C. H. Colvard and Charles (387) Cowles. Colvard testified that "he was a surveyor, that he surveyed the 193-acre tract claimed by the plaintiff; that at the time of the survey the defendant G. W. McNeill was present; that he, witness, saw some timber cut on the 50-acre tract—large trees, poplars; that said McNeill said some timber had been cut on the land by his son, Rufus McNeill, by his leave, and was not moved on account of the controversy over the land." Charles Cowles testified that "he was present at the survey, and saw the timber cut on the land in dispute; that the defendant G. W. McNeill got with them, and when they reached the 50-acre grant (the land in dispute), the said McNeill forbade them going on it; that they went with him to his old chestnut corner, the 50-acre tract, and he said it (50-acre tract) was his land; that he took them down the line where the timber was cut; said Rufus McNeill, defendant, cut it; he (G. W. McNeill) said it was his land, and he forbade us going on it."

The case further states that "when the plaintiff had produced his evidence and rested his case, the defendants moved to dismiss the complaint, as in case of nonsuit, under the Acts of 1897, ch. 109, upon the ground that there was not sufficient [evidence] to go before the jury upon issues raised as to the possession by the defendants of the land in controversy. The motion of defendants was allowed, and the plaintiff excepted."

After so many different pleadings, and so many different issues tendered by both sides, the case went off by direction of his Honor, on the single ground of want of possession by the defendants. As the matter was not submitted to the jury, the other issues are eliminated. Therefore, the only point before us is, whether there was more than a scintilla of evidence tending to prove the possession of the defendants. If so, it should have been submitted to the jury. *Spruill v. Ins. Co.,* (388) 120 N. C., 141; *Cox v. R. R.,* 123 N. C., 604, and cases therein cited. It is well settled that on motion of nonsuit the evidence must be construed in the light most favorable to the plaintiff. *Whitley v. R. R.,* 122 N. C., 987; *Cable v. R. R., ibid.,* 892; *Cogdell v. R. R.,* 124 N. C., 304. We think there was sufficient evidence to go to the jury. It tends to prove that the defendant G. W. McNeill had timber cut upon the land, and while he did not move it, he did not thereby intend to abandon his claim to it or the land. So far from doing so, he met the witnesses Colvard and Cowles, who were surveying the land for the plaintiff, took them down the line where the timber was cut, claimed the 50-acre tract as his own, and forbade them going on it. He may have been on the land in question, and probably was, as might well have been inferred by the jury; but in any event he was at or on the line asserting his ownership and defending his possession. In this way he forced the plaintiff to bring his action, and, after having done so, we do not think he should be permitted to slide out of the action, thus casting upon the plaintiff the costs thereof, and depriving him of the legitimate results of a judgment.

It was contended before us that this action, while in the form of ejectment, was in effect an action under chapter 6 of the Laws of 1893, to remove a cloud upon the title of the plaintiff's land. This may be so, but it is evident that neither the court below, nor either party to the action, regarded it in any such light. In any event, upon the disclaimer of possession, and even after the intimation of his Honor, the plaintiff might have asked leave to amend his complaint so as to clearly justify a judgment under the act of 1893. As, however, under the evidence he was entitled to go to the jury on the question of possession, a new trial is ordered.

New trial.

Cited: Brinkley v. R. R., 126 N. C., 92; *Coley v. R. R.,* 129 N. C., 413; *Liverman v. R. R.,* 131 N. C., 530.

(389)

V. T. GRABBS ET AL. v. THE FARMERS' MUTUAL FIRE INSURANCE ASSOCIATION OF NORTH CAROLINA.

(Decided 5 December, 1899.)

Fire Insurance—Insurable Interest—Waiver of Conditions by Agent—General Agency—Forfeitures.

1. An equitable, as well as a legal title constitutes an insurable interest in property.

2. Any person may insure who has an estate in the property, subject to damage or destruction by fire.

3. The knowledge of the local agent of an insurance company is in law the knowledge of the principal. Conditions in a policy working a forfeiture are matters of contract and not limitation, and may be waived by the insurer, and such waiver may be presumed from the acts of the agent.

4. An implied waiver is in the nature of an estoppel *in pais*, enforceable by any court of equity. An insurance company can not be permitted to knowingly issue a worthless policy upon a valuable consideration.

5. The possession of blank policies and renewal receipts, signed by the president or secretary is evidence of general agency, implying general powers.

6. Forfeitures are not favored in the law, and are not tolerated in equity, where adequate compensation can be made. Insurance contracts, where doubt exists, are construed most faborably to the insured.

CIVIL ACTION to recover loss by fire upon contract of insurance, tried before *Shaw, J.*, and a jury, at Fall Term, 1899, of STOKES Superior Court.

The issues, evidence, charge and exceptions by defendant are stated in the opinion.

There was a verdict for plaintiff. Judgment according to verdict. Appeal by defendant.

J. T. Morehead for appellant. (390)
Jones & Patterson and A. M. Stack for appellee.

DOUGLAS, J. This is an action brought upon a policy of insurance, containing the following stipulations: "This entire policy shall be void . . . if the interest of the insured in the property be not truly stated herein . . . or if the interest of the insured be other than

unconditional and sole ownership, or if the subject of insurance be building on ground not owned by the insured in fee simple . . . , and no officer, agent or other representative of this Association shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The defendant contends that these conditions have been violated, inasmuch as V. T. Grabbs, to whom alone the policy was nominally issued, was not sole owner of the property, which stood in the name of the "King's Cabin Farmers' Alliance Tobacco Manufacturing Company," which was not incorporated, and that no waiver affecting the title is endorsed on the policy. It also claims that the insured forfeited the policy by failing to pay his dues to the Association, which appears to be purely mutual. The plaintiffs contend that they have not forfeited their membership, and that the Association issued the policy with full knowledge, through its agent, of all material facts connected with the title to the property, thereby waiving the conditions now set up in defense. The issues and answers thereto, are as follows:

1. Did defendant execute and deliver to V. T. Grabbs the contracts of insurance referred to in the pleadings? Answer. "Yes."

(391) 2. Did defendant waive the condition in the policy as to the sole ownership of the property by V. T. Grabbs? Answer. "Yes."

3. Are the plaintiffs the owners of the property destroyed as alleged in paragraph 2 of complaint? Answer. "Yes."

4. Did the defendant insure said buildings in the name of V. T. Grabbs for the use and benefit of plaintiffs as alleged? Answer. "Yes."

5. Had V. T. Grabbs forfeited his membership in defendant company at the time of the alleged fire, as alleged in defendant's answer? Answer. "No."

6. Did paintiffs make proper proof of loss in accordance with the terms of said policy? Answer. "Yes."

7. Did the defendant waive its right to arbitrate the alleged loss under said policy? Answer. "Yes."

8. What damages, if any, are plaintiffs entitled to recover? Answer. "$800, with interest at 6 per cent from 18th April, 1896."

There was evidence tending to establish the plaintiff's contentions on all the issues. The plaintiff Graggs testified in part as follows: "When Vest brought the policy he told me he would have to issue it in my name; that it could not be done in any other way. I told him it

did not belong to me. I don't know that I called off every name. I told him that I was not the sole owner of it; that I was looking after it."

J. L. Vest, a witness for defendant, testified that "he brought the policy to V. T. Grabbs, put the memoranda at the bottom of the policy. I did not waive any conditions of the policy except one entered at the bottom of the policy. I did not know that any one but Grabbs was the owner of the property; question of ownership was not raised." But on cross-examination the same witness testified as follows: "I was agent of the company. I went to Grabbs because J. C. Wall had (392) taken a memorandum of the insurance. I don't know whether Wall was agent, he was advertiser and solicitor for defendant company. Grabbs told me some weeks before I delivered the policy he was not the sole owner. I told him he could insure the property in his name. His character is good. I knew these men had built this Alliance factory.

"Wall's business was to solicit insurance for the defendant company, and the memoranda he took had the name, postoffice and description of property. I filled out the policy from this memoranda. I got 20 per cent of premium paid by Grabbs. Some weeks before this I was talking to Grabbs as agent of the company, and he told me he was not the sole owner of the property, but had charge of the property. I told him he was the proper party to have it insured. I never knew the names of all the stockholders. I knew J. W. Kruger, Kiger and Grabbs."

Grabbs being recalled, testified, under exception, as follows:

"J. C. Wall came and wanted to insure the property. I told him all we had to insure was the factory, and he went and looked at the factory, and came back and said he could insure it in my name. I told him to whom it belonged. Wall went off with his memoranda, and Vest came in a few days with the policy."

The following is taken from the statement of the case:

"Among other things, the court charged the jury upon the second issue as follows: 'The contract of insurance in this case provides that the policy shall be void if the interest of the insured be other than unconditional and sole ownership, unless the waiver of this condition be endorsed on the policy. The court charges you that if you believe the evidence in this case, V. T. Grabbs, the insured named in said policy, was not the sole owner of the property insured, and that the waiver of this condition is not endorsed on the policy, and (393) the plaintiffs can not recover in this action unless the jury further finds from the evidence that the defendant company, through its agent, waived this condition. As to the waiver, the court charges you that

if you find upon the evidence that V. T. Grabbs, before receiving the policy, honestly, frankly and fully disclosed to the agent of defendant company the real facts in regard to the ownership of said property, and that said Grabbs was informed by said agent that it was proper to take out the policy in his own name, and that said Grabbs was induced to take out said policy in his own name, and to pay the premium thereon, by the assurance of the agent that this was the proper way to do, then the defendant waived the aforesaid condition in his policy, and the jury should answer the second issue, Yes. (Defendant excepted to the above charge.)

" 'The burden is upon the plaintiff to show by preponderance of evidence that the defendant waived said condition, and if the plaintiff has not shown it by a preponderance of the evidence, the jury should answer the second issue, No.'

"Upon the third issue the court charged the jury that if they found from the evidence that the plaintiffs were members of the King's Cabin Farmers' Alliance Tobacco Manufacturing Company, and composed said company, and that Spainhour and wife executed and delivered to said company the deed offered in evidence, so far as this action is concerned, they had an insurable interest in said property, and were the owners of said property, and they should answer the third issue, Yes. The defendant excepted.

"The court charged the jury fully upon all the issues, and there was no exception to any part of said charge except as above stated."

(394) We are of opinion that there was no error either in the admission of testimony or the charge of the court. The deed of Spainhour to the King's Cabin Farmers' Alliance Tobacco Manufacturing Company, made upon a valuable consideration, conveyed at least an equitable title in the land to the individuals composing the partnership. *Murray v. Blackledge,* 71 N. C., 492; *Simmons v. Allison* 118 N. C., 763, 776; Bates on Partnership, sec. 296; George on Partnership, p. 112. Having thus an equitable, if not a legal, title to the land, they had an insurable interest therein. 1 May on Insurance, secs. 86 and 87; Wood on Fire Insurance, sec. 257, *et seq;* 2 Beach Law of Insurance, sec. 863; Ostander on Fire Insurance, sec. 60. The last-named author, says, on p. 209: "Any person may insure who has an estate in the property subject to damage or destruction by fire. An insurable interest does not necessarily imply ownership." In the well-considered case of *Berry v. Ins. Co.,* 132 N. Y., 49, the Court says: "The rule is well settled that it is not necessary to support an insurance that the assured should have an interest, legal or equitable, in the property destroyed. It is enough if he is so situated with reference to it that he

would be liable to loss if it is destroyed or injured by the peril insured against." In this case the legal title to the property was in the son of the assured, with whom the assured had a *verbal* agreement whereby he was to occupy the premises during his life, and in consideration thereof to keep the building insured and in repair, and to pay the taxes. It was held that the insured could recover even if his verbal agreement with his son were void.

In the case before us we think that the plaintiffs had an insurable interest in the property destroyed, and could insure it, with the express or implied assent of the insurer, in the name of their agent or trustee.

This brings us to the question whether the plaintiffs can recover in the face of the stipulations in the policy as to the ownership (395) of the property and the conditions of waiver. We think they can.

The plaintiff Grabbs testifies that he fully and candidly informed the agent of defendant company as to the ownership of the property before the policy was issued, and in this he is corroborated by the witness Vest on cross-examination. It is not denied that Vest was the agent of defendant, and, as such, issued the policy. While not shown by the record in this case, it is well known that as a general rule fire insurance policies are issued in a different way from those of life insurance companies. The latter are usually issued directly from the home office, while fire insurance policies are generally sent to the local agent in blank, and are filled up, signed and issued by him. The blanks, while purporting to be signed by the higher officers of the company, usually have their names simply printed thereon in autographic *facsimile*. Under such circumstances, can it be doubted that the policy is really issued by the agent who, for all purposes connected with such insurance, is the *alter ego* of the insurer? That he is, seems too well settled to need citation of authority, and therefore his knowledge is the knowledge of the company. We can only repeat what we have so recently said in *Horton v. Insurance Co.*, 122 N. C., 498, 503: "It is well settled in this State that the knowledge of the local agent of an insurance company is in law the knowledge of the principal; that the conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer; and that such waiver may be presumed from the acts of the agent"—citing a number of cases.

The Supreme Court of the United States says, in *Ins. Co. v. Wilkinson*, 13 Wall., 222: "The powers of the agent are *prima facie* coextensive with the business entrusted to his care, and will not (396) be narrowed by limitations not communicated to the person with whom he deals." As the knowledge of the agent was the knowledge of the company, we have a case where the insurer, with full knowledge

of existing facts, received the premium and issued a policy of insurance which it knew would be absolutely void if strictly construed. In justice to the company we must construe that to be a waiver, which would otherwise be a deliberate fraud, such as no court could sanction or permit. Wagering policies are not permitted on the part of the insured; neither can they be allowed on the part of the insurer. We think the rule is well settled that where an insurance company, life or fire, issues a policy with full knowledge of existing facts which by its terms would work a forfeiture of the policy, the insurer must be held to have waived all such conditions, at least to the extent of its knowledge, actual or constructive. It can not be permitted to knowingly issue a worthless policy upon a valuable consideration. An implied waiver is in the nature of an estoppel *in pais,* which might well be enforced by any court of equity under such circumstances.

The conclusion of the opinion in *Berry v. Ins. Co., supra,* from the great insurance State of New York, whose standard policy we have adopted, meets our approval, and is as follows: "This statement fairly gave notice to the agent that the plaintiff was not the owner of the property, and that, as a part of the consideration for its use and possession, he had agreed to insure it. If the defendant desired further information as to the title, it should have requested it, and not having done so, it must be assumed now to have had notice of such facts as it could with reasonable diligence then have ascertained. This evidence justified the finding that the conditions of the policy as to title were waived, and this conclusion was not weakened by the fact that in (397) the policy delivered there was a condition that no agent had power to waive any of the conditions of the policy, and no notice to or agreement by any agent would be binding on the defendant unless expressed in writing and endorsed upon the policy and signed by the agent. The agents who issued the policy were general agents having authority to make contracts without reference to the home office, and their power to waive conditions in the policy was coexistent with that of the company itself. Conditions which enter into the validity of a contract of insurance at its inception may be waived by agents, and are waived if so intended, although they remain in the policy when delivered." This elaborate opinion cites many authorities which will be found therein. It is needless to say that the expression "general agent" occurring in the above opinion was used in its legal sense as implying general powers, and not in the geographical sense in which it is usually employed by insurance companies. This is clearly shown by a previous decision of the same court in *Carroll v. Ins. Co.,* 40 Barb., 292, holding that the possession of blank policies and renewal receipts,

signed by the president or secretary, is evidence of such general agency. See also May on Insurance, sec. 126, on p. 221, and secs. 129, 131, 132, 143; Beach, *supra,* sec. 1069, *et seq.; Wood, supra,* secs. 383, 384, 386, 388, 390, 391, 392, 393, 400, 401, 402; Ostrander, *supra,* secs. 53, 55; *Ins. Co. v. Wolff,* 95 U. S., 326, 330; *Ins. Co. v. Norton,* 96 U. S., 234, 240; *Ins. Co. v. Raddin,* 120 U. S., 183; *Ins. Co. v. Chamberlain,* 132 U. S., 304. These questions are ably discussed in *Ins. Co. v. McCrae,* 8 Lea., 513, and in the very recent case of *Wholley v. Assurance Co.,* (Mass.), 54 N. E. Rep., 548.

The general policy of the courts in all such cases is well stated by Justice BRADLEY in *Ins. Co. v. Norton, supra,* on p. 242, where he says for the Court: "Forfeitures are not favored in the law. (398) They are often the means of great oppression and injustice, and, where adequate compensation can be made, the law in many cases and equity in all cases discharges the forfeiture upon such compensation being made. It is true, we held in Statham's case that in life insurance time of payment is material, and can not be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding a forfeiture." Of a similar nature is the rule now of almost universal acceptance that in construing an insurance contract, where doubt exists, it is the duty of the court to give such construction as would be most favorable to the insured. Ostrander, *supra,* p. 703; Beach, *supra,* sec. 237; May, *supra,* secs. 174, 175; Wood, *supra,* secs. 57, 156; *Ins. Co. v. Coos Co.,* 151 U. S., 452; *Assurance Co. v. Companbia de Moagens do Barreiro,* 167 U. S., 149.

The only remaining exception is to the admission of the testimony of the plaintiff Grabbs as to his statements to J. C. Wall. As Wall was admittedly the soliciting agent of the defendant, and Vest had already testified that he filled out the policy from the memoranda furnished by Wall, we see no error.

We fully appreciate the beneficent purposes and results of insurance in all its forms. It enables many a young man struggling to get a start in life to obtain the necessary credit of which he would otherwise be deprived, and after life's struggle is over, perhaps suddenly ended by some unforseen accident, it lives after him to provide for those for whom he can no longer provide. It is beneficial equally to the individual and to the community. It encourages habits of thrift and economy as well as self-abnegation by providing a place for small savings that might otherwise be spent or lost. It shelters the widow and rears and (399) educates the orphan child, keeping him from the cold charity of the world, and better fitting him for the duties of a citizen. It permeates

all branches of business, and, by distributing throughout the country the losses of the few, it causes to be lightly borne by the many the burden that would crush the individual. Of course more money is paid in premiums than is returned in losses, as is shown by the large expenses and increasing surplus of the average company, but this can not be avoided. The enormous amounts thus held really in trust for other people, and the sacred nature of that trust, appeal most strongly to the fullest protection of the law, and that protection should be given equally to the insurer and the insured. The extraordinary development of insurance, and its necessary adaptation to the varying and complicated business relations of a progressive age, tax the utmost ability of the courts. But, while different conditions may require the application of different rules, one great principle must be always kept in view, and that is the ultimate objects of all insurance. While we should protect the companies against all unjust claims and enforce all reasonable regulations necessary for their protection, we must not forget that the primary object of all insurance *is to insure.* The great majority of the insured never get back their premiums, as they suffer no loss, and therefore the only consideration they ever receive for the payment of their premiums, at least in cases of fire, is the certainty of indemnity for any loss that might have occurred. We can not permit insurance companies by unreasonable stipulations to evade the payment of such indemnity when justly due, and thus defeat the very object of their existence. Such a policy is necessary for the protection equally of the insurer and the insured, as people will continue to insure as long as they are secure
(400) of the indemnity for which they have paid; but when once they begin to feel that they may by some unforseen technicality be deprived of all benefit from the contract into which they have honestly entered, they will seek some safer place for the investment of their savings. In other words, those companies that promptly and conscientiously fulfill their own obligations are virtually interested in having all others forced up to an equal degree of responsibility. We do not mean to say that contesting a valid claim is in itself morally wrong, as honest differences may arise, as in all walks of life; but we are gratified that in so vast a volume of insurance business so few contested claims should be brought to our attention. The judgment is

Affirmed.

Cited: Clapp v. Ins. Co., 126 N. C., 392; *Strause v. Ins. Co.,* 128 N. C., 65; *Bank v. Deposit Co., ib.,* 373; *Gwaltney v. Assurance Soc.,* 132 N. C., 933; *Gerringer v. Ins. Co.,* 133 N. C., 409; *Bray v. Ins. Co.,* 139 N. C., 393; *Fishblate v. Security Co.,* 140 N. C., 595; *Floars v. Ins. Co.,* 144 N. C., 239; *R. R. v. Casualty Co.,* 145 N. C., 116.

C. R. HEMMINGS v. J. M. DOSS.

(Decided 5 December, 1899.)

Mortgage—Parol Release—Statute of Frauds—Demurrer—Answer.

1. The statute of frauds must be set up in the answer, and not by demurrer.
2. A verbal agreement to release a mortgage is not within the statute.
3. A defendant, by his statement and agreement, admitted in his demurrer, may subject himself to an equitable estoppel from asserting his claim for incumbrance against the plaintiff's land.

Mr. Justice CLARK states the case as follows:

Appeal from *Allen, J.*, at Spring Term, SURRY Court. The plaintiff filed an affidavit for a restraining order which is treated as a complaint, wherein he alleged that the plaintiff was, in 1892, the (401) owner of a tract of land, described in the complaint, and at the same time one J. A. Danally was the owner of a tract of land—this last tract was encumbered by a mortgage to the defendant. That Danally proposed an exchange of lands with plaintiff. Plaintiff refused to make the exchange unless defendant would relinquish his lien thereon. Defendant stated to plaintiff that he would relinquish his lien on Danally's land and take a lien on the land plaintiff should convey to Danally in its place. Plaintiff, relying upon this promise, exchanged lands with Danally, and executed to Danally a deed to his tract, conveying a fee simple title. After plaintiff and defendant had made their exchange of lands, defendant refused to relinquish his lien on Danally's lands, though Danally executed to defendant, as agreed, a mortgage on the land conveyed by plaintiff to Danally. That, in making the exchange, plaintiff relied entirely upon the promise of defendant to relinquish the lien. That, subsequent to the exchange of lands, defendant advertised the land conveyed to plaintiff by Danally for sale. That at this time Dannally was the owner of the land conveyed to him by plaintiff. That on day of sale plaintiff was present and had made arrangements to buy the land and reimburse himself by taking a lien on the lands conveyed by him to Danally. That the sale was postponed without plaintiff's knowledge or consent, and in consideration of $1.00 paid defendant by Danally for 12 months. That before the time of extension expired, Danally sold the land and thereby made it impossible for plaintiff to protect himself. That at the end of the 12 months defendant again advertised the land for sale. By the false and

fraudulent representations of defendant, plaintiff has been greatly damaged, and brings this suit to have the mortgage of defendant upon his lands canceled.

(402) The defendant demurred *ore tenus* that the complaint did not state facts sufficient to constitue a cause of action, in that the alleged contract and agreement between the plaintiff and defendant was by parol and void under the statute of frauds. The judge, being of that opinion, dissolved the restraining order and dismissed the action.

Carter & Lewellyn for appellant.
Glenn & Manly for appellee.

CLARK, J. After stating the case. There was error in the ruling below. 1. Advantage of the statute of frauds can not be taken in this State by demurrer, since that admits the contract. The contract, though verbal, is valid and binding unless the invalidity by reason of the statute is set up by answer. *Loughran v. Giles,* 110 N. C., 423; *Williams v. Lumber Co.,* 118 N. C., 928.

2. The statute of frauds, The Code, 1554, requires only contracts to "sell and convey" lands or interest therein to be in writing, and hence a verbal agreement to release a mortgage is not within the statute. *Faw v. Whittington,* 72 N. C., 321; *Miller v. Pierce,* 104 N. C., 389; *Holden v. Purefoy,* 108 N. C., 163; *Joyner v. Stancill,* 108 N. C., 153; *Taylor v. Taylor,* 112 N. C., 27; *Sitterding v. Grizzard,* 114 N. C., 108.

3. Besides the above grounds, either of which is sufficient, the facts set out in the complaint and admitted by the demurrer constitute an equitable estoppel upon the defendant. *Gorrell v. Alspaugh,* 120 N. C., 362, 368.

It is true that the evidence of the parol discharge of a written contract within the statute of frauds, or an equitable estoppel by matter *in pais,* must be "positive, unequivocal and inconsistent with the con-

contract," and if left to the jury upon a denial in the answer,

(403) it must be with that instruction, but the allegation in the complaint is of that nature, and it is admitted by the demurrer.

In dissolving the restraining order and also in dismissing the action there was

Error.

Cited: Brinkley v. Brinkley, 128 N. C., 506.

STATE ON RELATION OF EDWARD WOOTEN v. M. A. WHITE, THOMAS J. CONGER ET AL.

(Decided 5 December, 1899.)

Taxes—Sheriff's Receipt—Revenue Act, 1895, Ch. 119—Title—Nonsuit Under Act 1897.

1. Where the complaint alleges that the plaintiff was seized and possessed of the land sold for taxes, and the answer admits that the plaintiff was *"possessed"* thereof, such admission is sufficient evidence of title within purview of the Revenue Act of 1895.

2. Where the plaintiff, a nonresident of Iredell County, owned two parcels of land in Statesville Township—one in the town and the other outside—and an agent of his, in December, 1895, went to the sheriff to pay the taxes, and on learning the amount paid it, and took the sheriff's receipt, general in its form, for taxes due from the plaintiff, in said township, although it omitted the parcel outside of the town, of which neither the agent nor the plaintiff was aware, and the sheriff, without notifying either, exposed said land for sale, and made a deed to the purchaser, the defendant Conger, the deed conveyed no title.

CIVIL ACTION on the official bonds of M. A. White, sheriff of Iredell County, for wrongfully selling plaintiff's land for taxes, tried before *Robinson, J.*, at August Term, 1899, of the Superior Court of IREDELL County.

The purchaser of the land, 31 acres, was afterwards made a (404) party and filed his answer. The plaintiff complained, that he was the owner of two parcels of land in Statesville Township—one a house and lot in the town of Statesville, and the other 31 acres outside of the town. That in December, 1895, his agent went to M. A. White, sheriff, to pay the taxes of plaintiff, was told the amount, and paid it to the sheriff, and took his receipt, general in form, and both the plaintiff and his agent supposed all the taxes were all paid; that the sheriff without giving notice to either of them, advertised the 31-acre tract and sold it to the defendant Conger in May, 1896, and in May, 1897, made him a deed.

The defendants answered, that the tax on the 31-acre tract had not been paid, and that the land had been sold according to law, and a deed made to Conger in May, 1897.

In the complaint was an allegation that the plaintiff was seized and possessed of the 31 acres. The answer conceded that plaintiff was possessed thereof. As a part of the plaintiff's evidence these para-

graphs of the complaint and answer were read to the jury upon the question of title.

The defendants introduced no evidence. The defendant Thomas J. Conger moved, so far as he was concerned, for judgment as of nonsuit, under the Act of 1897.

His Honor allowed the motion. Plaintiff excepted and appealed.

B. F. Long for appellant.

H. Burke, R. B. McLaughlin and H. P. Grier for appellee.

MONTGOMERY, J. This action was originally begun against M. A. White, sheriff of Iredell County, and Leroy Morrow, W. W. Houpe and S. A. Sharpe, the sureties on his official bond, to recover of
(405) them damages for the alleged unlawful sale of the relator's land for taxes listed in the year 1895. Afterwards, in the same action, the summons was issued against Thomas J. Conger, the purchaser of the land at the sheriff's sale for taxes, and a complaint filed for the recovery of the possession of the land—Conger having taken possession under the sheriff's deed. He appeared and demurred to the complaint on the ground that the causes of action set out in the complaint were improperly joined. The record is silent as to what became of the demurrer, but Conger answered, and it must be therefore that the demurrer was overruled without exception having been made. After the plaintiff had produced his evidence, and rested, the defendant Conger moved for judgment as of nonsuit under the Act of Assembly. The motion was allowed and the plaintiff excepted. The defendant Conger contended that the plaintiff made no proof of his title to the land at the time it was sold for taxes, as he was required to do under section 66 of chapter 119, Laws 1895. If that is true, the plaintiff was properly nonsuited. It must be examined.

In the third allegation of the complaint the relator alleged that he was *seized and possessed* of the tract of land at the time of its sale on the 4th of May, 1896, by the sheriff for taxes. In the third paragraph of the defendant's answer he admitted that the relator was *possessed* of the land at the time of its sale; and in this connection he further said that he had no knowledge or information sufficient to form a belief as to what interest the relator was seized of in the land. That paragraph of the answer was introduced in evidence by the plaintiff to show title in the plaintiff. We think that when the defendant admitted that the plaintiff was *possessed* of the land at the time of the sale, that was such an admission of title in the plaintiff as the statute required. *Possession* in law may be either lawful or unlawful, but when

one is said to be *possessed* of land, his possession is deemed to be (406) lawful. Webster defined possessed—"held by lawful title." It makes no difference with the defendant whether the plaintiff held the land in fee, or for life, or for years, if it was unlawfully sold by the sheriff for taxes, for the estate, whatever it was in the land, could be recovered by the plaintiff to the end that he might enjoy that interest during its continuance.

The other evidence in the case upon the plaintiff's appeal ought to have been submitted to the jury under proper issues and instructions, for if it had been and the jury had believed it, the plaintiff would have been entitled to recover possession of the land. The land was situated in Statesville Township, Iredell County. The plaintiff relator lived in Wilmington at the time of the sale. George H. Brown was the agent of the plaintiff at Statesville to pay his taxes there, and when he called upon the sheriff or his deputy to pay the taxes he asked that officer "what taxes were due by Mr. Wooten." That officer gave him the amount, which Brown paid, and took a receipt therefor. The relator owned a house and lot in the city of Statesville, and also the tract of land which was sold for the taxes, and the subject of dispute in this action, in Statesville Township, but outside of the city. The sheriff's receipt for taxes made no specification of the property. It seems that in the listing of the taxes, separate list takers were appointed in the year 1895, one set for Statesville Township, "inside," and another set for Statesville Township, "outside." Neither the relator nor his agent, Brown, knew of that arrangement. The receipt of the sheriff, when it was produced on the trial, showed that the word "inside" which was in parenthesis, and between the printed words "Statesville Township," had been stricken out by two distinct marks through it, made by pen and ink. The relator testified that he had never noticed the partial erasure of the word "inside" until it was shown to him on the (407) trial. The witness Brown said that he had never been asked for any further taxes claimed to be due by the relator, and the relator testified he had never had notice of any further taxes for that year. On cross-examination, however, the witness Brown testified that he did not pay the taxes due for the year 1895 upon the tract of land of the relator lying outside of the city of Statesville and in Statesville Township, and which was bought by the defendant Conger at the tax sale. So far then as the plaintiff's appeal is concerned, the case states that when the plaintiff's evidence was in, it appeared that the relator, through his agent, Brown, had called upon the sheriff for the taxes due by the relator; that a receipt for the taxes had been given, generally, for Statesville Township in which the land sold for taxes was situated,

for there was no evidence offered, so far as the plaintiff's appeal is concerned, to show that the word "inside" had been erased by the relator, and he had testified that he did not make the erasure. The relator then had a receipt for his taxes signed by the officer authorized by law to collect the taxes, and a receipt for them given upon an inquiry made by the agent of the taxpayer as to what taxes were due by the relator, and no further demand had ever been made, and no notice that any further taxes were due. Under the facts testified to in this case, if true, does the deed of the sheriff to the defendant Conger convey a good title to the land? It can not be so. We can not believe that any such effect can proceed from a proper construction of the Revenue Law of 1895, on the subject of the sale of land for taxes. It is true that in section 66 of chapter 119, Laws 1895, it is required of the claimant of land sold for taxes, before he can be permitted to question the title of the purchaser at the tax sale, that he shall overcome by proof certain conclusions and presumptions arising from the deed itself as to the (408) regularity of the assessment, levy and sale, yet we think that requirement does not refer to a case where the taxpayer has made such an offer as was made in this case by the relator, and where such a receipt had been given as the one passed by the sheriff to the relator. When a sheriff receives the tax list, with the proper order for collection endorsed thereon by the cerk of the board of commissioners, the same is in the nature of an execution. Certainly if a sheriff should return to the court an execution upon which he had made the endorsement that the amount mentioned in the execution had been paid to him by the execution debtor, he would not be allowed to sell under the same execution the property of the debtor, even though he had made a mistake in the return of the writ. By analogy to that conduct of the sheriff, the relator had the right to rest securely on the receipt which the sheriff passed to him for the taxes due on his property which had been listed in the township (Statesville) named in the receipt. If he had had property outside of that township, the case would be different.

We have treated the evidence offered by the plaintiff as appears in the plaintiff's appeal.

There is also an appeal by the defendant White and his sureties. A great deal more evidence was brought out on the issue submitted to the jury on that branch of the case after the motion for nonsuit had been allowed. We have not referred to that evidence in the plaintiff's appeal, because we do not wish to anticipate a future proceeding in the case.

We are not passing upon the legal effect of the evidence as it appeared in the case of the defendant White's appeal. The appeal of the de-

fendant White and his sureties will be retained in this Court until the determination of that part of the action against the defendant Conger.

There was error in the judgment of nonsuit.

New trial.

FURCHES, J., concurring: I concur in the judgment of the Court (409) that there was error in dismissing this action as to the defendant Conger, for the following reason: That the answer of Conger, which was offered in evidence, admitted title in the plaintiff Wooten; and the defendant Conger showed no title in himself.

This being so, the court should have instructed the jury that upon all the evidence, if believed, they should find that the plaintiff was entitled to recover.

FANNIE A. RICHARDSON, WIDOW, v. N. B. JUSTICE AND WIFE ET AL., HEIRS AT LAW OF JESSE RICHARDSON.

(Decided 5 December, 1899.)

Petition for Dower—Dissent From Will—Six Months—The Code, Section 2108.

By statute, Code, sec. 2108, the widow is allowed six months in which to dissent from her husband's will, nor will she be precluded from the exercise of this legal right by any agreement, even under seal, which she may be induced by the executor to sign, in ignorance of the condition of the estate.

The plaintiff, widow of Jesse Richardson, dissented from her husband's will, and filed this special proceeding for dower before the clerk of the Superior Court of CHATHAM County, which was transferred to term for trial upon issues raised, and was heard before *Brown, J.*, at Fall Term, 1899.

F. C. Poe, the executor of Jesse Richardson, on his own appli- (410) cation was made party-defendant, and interposed the following written agreement under seal, executed by the widow, as a bar to her petition for dower:

"Whereas, I, the widow of the late Jesse Richardson, have been and am somewhat dissatisfied with the last will and testament of my deceased husband; and whereas, I have so told F. C. Poe, the executor named in the said will, and he has considered the matter and has made to me a proposition which makes it entirely satisfactory to me, which propo-

sition is that he will pay to me the sum of seven hundred and twenty-eight dollars and eighty-four cents out of the first moneys coming into his hands as such executor, independent of the amounts left to me in the said will:

"Now, therefore, in consideration of said amount, to be so paid me, I hereby express my entire satisfaction with said will taken in connection with the said amount, and hereby agree to accept the same, abide by said will and take under it in all respects therein set out.

"In testimony whereof, I have hereunto set my hand and seal, this the 18th day of August, 1899.

"FANNIE A. RICHARDSON. [Seal.]

"Test: T. T. CLARK."

It appeared that the foregoing agreement was procured from her by the executor six days after the death of her husband; that she was in ignorance as to the condition of the estate, and that the executor had paid nothing and done nothing in consequence of the agreement.

His Honor ruled that the petitioner was not concluded by the contract set up in the answer, and had a right to dissent, and adjudged that she was entitled to her dower in the lands of her deceased husband.

Defendants excepted and appealed.

(411) *Womack & Hayes for appellant.*
H. A. London for appellee.

MONTGOMERY, J. This was a special proceeding commenced before the clerk of the Superior Court by the plaintiff against the heirs at law of her deceased husband for the allotment of her dower in his land. On the hearing of the matter in the Superior Court, it appeared that the petitioner, somewhat dissatisfied with the provisions of the will of her deceased husband, six days after his death entered into a contract under seal with F. C. Poe, the executor named in the will, by which she agreed to accept a proposition made to her by Poe to the effect that she would receive the sum of $728.84 to be paid her by the executor out of the first money coming into his hands as such executor—that amount to be outside of the provisions made in the will for the petitioner, and the petitioner to abide by the terms of the will. It also appeared that the executor, Poe, had incurred no extra expense, had taken no steps in consequence of the contract between himself as executor and the petitioner, that nothing had been done by him except those things in the ordinary course of administration, and that he had not acted on the agreement so as to cause any loss to the estate. Five days after

the contract and eleven days after the death of the petitioner's husband, this proceeding was begun. Upon the pleadings and the admitted facts his Honor was of the opinion that the petitioner was not concluded by the contract from entering and filing her dissent from the will, and that she was entitled to her dower. We think his Honor's judgment should be affirmed. Our statute, section 2108 of The Code, allows a widow six months from the probate of the will of her husband within which to dissent. Clearly that time is allowed by the law to enable the widow to make an examination into the value of the estate, the debts and liabilities, and for her to come to an intelligent con- (412) clusion as to the course she should pursue under all the circumstances that surround her. The circumstances of this case do not show that deliberation and care on the part of the petitioner which would preclude her from the right, after she made the contract and within the time allowed by law, from making dissent to the will. The haste was great. So far as we can see she had no acquaintance with the affairs connected with the estate; there had been no statement made showing how the estate was affected as to the liabilities of the deceased husband. She had no information upon which she could form a judgment as to what course she should pursue. The proposition of settlement was made by the executor six days after the death of the husband, and three days after the probate of the will. The record does not show any condition of facts which go to repel the idea that the widow did not have sufficient time after the probate of the will in which to make up an intelligent judgment as to her course, and we are brought to the conclusion under the circumstances of the case that she ought not to be concluded from dissenting to the will and from claiming her dower.

The contention of the defendant's counsel that the contract being under seal conclusively presumes that it was made upon a good and sufficient consideration does not apply here. The entire contract is set out, the agreement of the petitioner and the consideration for that agreement, but it is nevertheless such a contract as the law will not enforce against the petitioner for the reasons we have stated.

Affirmed.

(413)

J. W. POTTS ET AL., PARTNERS TRADING UNDER THE FIRM NAME OF F. S. NEAL & CO. v. T. L. DULIN ET AL.

(Decided 12 December, 1899.)

Farmers' Alliance—Collateral Note—Equities.

Where seven of the plaintiffs and thirteen defendants executed a promissory note for $5,000 to the agent of the Farmers' Alliance of Mecklenburg County, which was deposited as collateral security with the Commercial National Bank of Charlotte, for such sums as might be advanced in the conduct of a mercantile business, which failed, and the plaintiffs obtained the bank's interest in the note in order that the contribution between all the signers, whether plaintiffs or defendants, may be properly adjusted in this action, the solvency or insolvency of the defendants should be ascertained, the insolvent eliminated from the number, and then the amount of their *pro rata* shares be apportioned equally between the plaintiffs who signed the note and the solvent defendants, the aggregate parts apportioned to the solvent defendants to be added to their original *pro rata* shares, and that will constitute the proper amount for which judgment should be rendered in this action.

CIVIL ACTION to recover a balance due on a promissory note of $5,000, tried before *Starbuck, J.*, in Superior Court of MECKLENBURG County, at chambers, February 16, 1899, upon exceptions to report of referee. Judgment in favor of plaintiffs. Appeal by defendants.

The facts are stated by Justice MONTGOMERY, as follows:

The facts necessary to be stated to a proper understanding of this case were found by the referee, and are substantially as follows: For the purpose of enabling the Farmers' Alliance of Mecklenburg County to better conduct their mercantile business in Charlotte, twenty members of the Alliance (two from each sub-Alliance) executed their promissory note to F. S. Neal, agent, (found by the referee to be the agent of (414) the Alliance), to be deposited with the Commercial National Bank of Charlotte, as a collateral security for such sums as might be advanced on the faith of the collateral by the bank. F. S. Neal, one of the plaintiffs, was the agent of the Alliance for the conducting of its mercantile business. The bank advanced $3,800, under the agreement, without knowledge of any claims of offset or equities by the makers. The business of the Alliance failed, and F. S. Neal bought the remnants of the stock of goods. Then the bank, upon the back of the collateral note of $5,000, made the following endorsement: "This note is held as collateral security by the Commercial National Bank of Charlotte,

N. C., for the following notes of F. S. Neal, agent: One dated November 23, 1891, on demand, $2,000; one dated December 1, 1891, on demand, $1,000; one dated December 10, 1891, on demand, $800, with interest from date, and in consideration of the payment to the bank of said sums aggregating $3,800, and interest, the Commercial National Bank assigns to Jos. McLaughlin, trustee, all its interest in this collateral note and the said notes for $3,800, but without recourse on said bank. A. G. BRENIZER, Cashier.

"February 11, 1892."

Credits were made by Neal out of funds of the Alliance upon the debt which reduced it to $2,780, on the 10th day of August, 1893, including interest. McLaughlin, who is now dead, was the trustee of the plaintiffs, who were partners, under the name of F. S. Neal & Co. The plaintiffs John Beatty, W. S. Caldwell, J. S. Cashion, R. H. Flow, J. C. Hutchinson, W. A. Alexander and J. W. Potts, and all of the defendants except J. W. Brown, administrator of Thomas H. Brown, were the persons who executed the note of $5,000. Thomas H. Brown, whose administrator is party-defendant, also signed the note. The Alliance at the time was engaged in a mercantile or store business, and in a cotton business, the two being conducted separately; and that F. S. (415) Neal, as agent of the Alliance, and in its behalf, agreed that all the goods purchased should go into the store and be a security for the $5,000 note; that they would be staple goods, such as would sell easily, in case the store business was closed; that the profits of the store would go to the payment of the debts made in the bank on the credit of the $5,000 note, and that the business would be conducted strictly on a cash basis; that in violation of this agreement, $1,080.69, at one time and $321 at another time of the funds of the store were transferred to the cotton business, in which there had been a loss, without their consent; and that sales on a credit were made to the amount of $468.67, and that the agent had received as salary, or compensation for his services, the sum of $391.07 to which he was not entitled.

Jones & Tillett and Clarkson & Duls for appellant.
Burwell, Walker & Cansler for appellees.

MONTGOMERY, J., after stating the facts. This action is brought by the plaintiffs as a partnership, they alleging that they are the beneficial owners of the collateral note, and that it is unnecessary to join with them any person as the representative of the deceased trustee, and is for the recovery of the entire amount that was due by the Alliance for

money borrowed from the bank, and mentioned in the complaint to be $2,780.20, with interest on $2,447.72 from the 10th day of August, 1893.

The plaintiffs' contentions on the trial below were that the note of $5,000 was a negotiable paper, and that as the bank took it without notice of any equities that might be claimed by the makers under the law merchant, the plaintiffs, as a partnership, became, through
(416) McLaughlin, the trustee, the full beneficial owners of the note, and took it with the same rights against the makers which belonged to it in the hands of the bank, and that, therefore, they could recover the whole amount demanded in the complaint from the defendants.

The defense set up by the defendants was: First, that the amount due on the debts secured by the collateral note, as found by the referee, and alleged in the answer, was subject to credits of $1,080.69 and $321, because of the transference of those amounts from the mercantile business to the cotton business, without their consent, and to a credit of $468.67, because of goods sold on a credit by the agent, Neal, and which was lost, and for a further credit of $391.07, on account of a payment to himself as salary by the said F. S. Neal, to which he was not entitled, because F. S. Neal, one of the plaintiffs, had knowledge of those claims, and the knowledge of F. S. Neal of those claims of the defendants was knowledge to the other plaintiffs who were members of the firm of F. S. Neal & Co.

The defendants set up the further defense that if they were liable on the note in any form and for any amount, to F. S. Neal & Co., that then those of the plaintiffs who were joint makers of the note with the defendant were liable to contribute with the defendant their ratable parts to the payment of the debt.

The referee found, as matter of law, that the plaintiffs as partners took the note with full knowledge of the alleged equities of the defendants, because F. S. Neal, one of the partners, had knowledge of them, and because it was he who had procured the endorsement of the note to the firm by the bank, and the referee allowed, as credits on the plaintiffs' demand, the amounts of the alleged equities. The plaintiffs' exception to the finding of the referee was sustained by his Honor, who held that the plaintiffs were entitled to recover the
(417) whole amount demanded by them, free from any alleged equities of the defendants.

Notwithstanding the favorable ruling of his Honor upon the plaintiffs' exception to the referee's finding of law, the plaintiffs moved for judgment against the defendants for thirteen-twentieths on the amount due upon the note (the number of the defendants being thirteen, and,

as we have said, among the twenty signers of the note), and the judgment of the court is in accordance with the motion, and contains the motion, which is in the following words: "The plaintiffs now move for judgment against the defendants for thirteen-twentieths of the amount due upon the note, this judgment to be without prejudice to the rights of F. S. Neal & Co., to recover against the seven signers of the note, other than the defendants, their proportionate part or share of the liability, and without prejudice also to the rights of the defendants hereafter to have contribution among themselves and the other signers of the note, if any one or more of them shall pay a sum in excess of his or their legal and equitable share of the liability upon the note. This motion is granted."

Then follows in the judgment the amount of the plaintiffs' recovery against the defendants, $1,807.13, with interest on $1,590.94 from August 10, 1893, at 8 per cent, and costs, the same being the defendants' contributive share.

The contention of the defendants as to the alleged shortcomings of F. S. Neal, the agent of the Alliance, upon which the equities set up by the defendants as credits are founded, could not be allowed. Such a proceeding would enable the defendants to throw upon those of the plaintiffs, who were signers of the note with the defendants and who had paid upon the note, a debt jointly due by them and the defendants, a grossly disproportionate share of a debt for which they were all in law and in equity equally liable. In other words, if the de- (418) fendants' contention had been allowed, the plaintiffs, including seven of the signers of the note, would have had to answer for all the alleged shortcomings of Neal, the agent, when in law and equity all of the signers of the note were to bear them equally.

The defendants can not complain of the principle on which the judgment was rendered, and, it having been rendered on motion of the plaintiffs, we are relieved from the consideration of the question of law insisted on in the court below by the plaintiffs. It is open, however, to the objection that the matter of contribution was not adjusted on a strictly equitable basis. It may be that some of the defendants are insolvent, and, if so, then those of the defendants who are solvent will be called upon to pay more than their *pro rata* share, and under the judgment they would be compelled to proceed in another action to adjust the matter between themselves and the plaintiffs who were signers of the note, and some of the plaintiffs, or all, might be found to be insolvent. The latter is not improbable, for the referee found that the partnership of F. S. Neal & Co. was insolvent. The defendants are therefore allowed, if they so desire, when the case goes back to the Superior Court,

to have the matter of contribution between all of the signers of the note, whether they be plaintiffs or defendants, adjusted in this action either by a recommittal for that purpose to the referee or by consent of all parties. In that proceeding the solvency or insolvency of the defendants may be passed upon; those found to be insolvent eliminated from the number on account of their insolvency, (their elimination not to protect them of course against future demands for their ratable share if they should hereafter become solvent), and then the amounts of the *pro rata* shares of the insolvent defendants be apportioned equally between (419) the plaintiffs, who signed the note, and the solvent defendants, the aggregate parts apportioned to the solvent defendants to be added to their original *pro rata* shares, and that will constitute the amount for which judgment will be rendered in this action.

Modified and remanded.

KATE E. WALTON v. L. A. BRISTOL, RECEIVER OF PIEDMONT BANK, MORGANTON; THE NATIONAL BANK OF WILMINGTON.

(Decided 12 December, 1899.)

Married Woman's Property—Real, Personal—Power to Convey, Article X, Section 6, of the Constitution—Power to Charge Her Separate Estate—The Code, Sec. 1826.

1. The power of a married woman to convey her property, real or personal, is regulated by the Constitution, Art. X, sec. 6, and must be exercised by the written assent of her husband.

2. Her power to make contracts charging her separate estate is regulated by The Code, sec. 1826, which requires a similar assent.

3. Her property may not be charged or disposed of by her husband without her assent.

4. Where a married woman wrote her name upon and across the back of a $1,250 note belonging to her, to secure which was another note for $615, hypothecated by the payee L. A. Bristol, and her husband E. S. Walton, now dead, delivered the same (both notes) to the Piedmont Bank as collateral security to his indebtedness due said bank, which became increased by further dealings to $3,000, when Walton executed his note for that amount, endorsed by the Piedmont Bank, and borrowed the money from the National Bank of Wilmington, with which sum he paid off his indebtedness to the Piedmont Bank, which retained his wife's notes by agreement with her husband as collateral security for its endorsement of his $3,000 note to the Bank of Wilmington; *Held*, that this last arrangement required the assent of the wife, of which there was no evidence.

CIVIL ACTION for the immediate possession of certain promis- (420) sory notes, claimed as the property of plaintiff, and held by defendant L. A. Bristol, receiver of the Piedmont Bank of Morganton, tried before *McNeill, J.*, at Spring Term, 1899, of the Superior Court of BURKE County.

Jury trial was waived, and the facts were found by his Honor, who rendered judgment against the plaintiff, and she excepted and appealed to the Supreme Court.

The facts found by his Honor are fully recapitulated in the opinion.

Avery & Avery and Avery & Erwin for appellant.
S. J. Ervin for appellee.

MONTGOMERY, J., writes the opinion.
CLARK, J., writes dissenting opinion.

MONTGOMERY, J. This is an action on the part of the plaintiffs to recover of the defendants the possession of certain personal property consisting of certain promissory notes and another paper writing mentioned in the complaint; one of the notes being in the sum of $1,250, executed on the 18th March, 1893, by S. Huffman, L. A. Bristol, J. M. Huffman & Co., and J. H. Pearson, to J. V. Blackwell, or order, with certain credits endorsed thereon. The other note was in the sum of $615, executed by A. R. Buffaloe and C. E. Buffaloe to L. A. Bristol. The last-mentioned note was hypothecated by the payee, L. A. Bristol, with Blackwell, the payee of the first-mentioned note, as collateral security to that note. The other paper writing mentioned in the complaint is the assignment and transfer of the Buffaloe note as a security for the first-mentioned note. A jury trial was waived, and the facts were found by his Honor, which were in substance, as follows: The payee, J. V. Blackwell, of the first note, was the father of the plaintiff in this action, and after his death the note was assigned by his executor, I. T. Avery, to her as a part of her share of her father's (421) estate. Afterwards the plaintiff, who was then a married woman, the wife of E. S. Walton, now deceased, in the language of the finding of fact, "wrote her name upon and across the back thereof (the note), and her husband, E. S. Walton, delivered the same to the Piedmont Bank of Morganton, N. C., as collateral security to an indebtedness then due and owing by him to the said bank on account of overdrafts, and the same was accepted by the bank for this purpose, the bank and the said E. S. Walton thereafter continuing to have mutual dealings, the bond at all times remaining in the possession of the bank." After

that time the indebtedness of the husband to the bank became increased by overdrafts in a large amount until it amounted to about $3,000. That amount was borrowed from the other defendant, the National Bank of Wilmington, N. C., by the husband, E. S. Walton, and for which he executed his note payable to that bank. That note was endorsed by the Piedmont Bank upon agreement with the husband that the $1,250 note should be placed by the husband with it as security against loss by reason of its endorsemnet of the $3,000 note, and in order to secure the payment of that note. At the time of the loan by the Wilmington bank the husband, E. S. Walton, by letter, acquainted the Wilmington bank with the agreement between him and the Piedmont Bank. Later, E. S. Walton, the husband, wrote to the Wilmington bank that the $1,250 note was deposited with the Piedmont Bank as a collateral security to the endorsement of the $3,000 note. The amount realized on the $3,000 note from the Wilmington bank was applied by E. S. Walton to the payment of his indebtedness to the Piedmont Bank.

(422) The $3,000 note is still due and unpaid, and E. S. Walton is dead, and his estate is insolvent. Since these transactions the Piedmont Bank has failed; L. A. Bristol is the receiver, and was in possession of the note and the other paper writing mentioned in the complaint at the time this action was commenced.

Upon the finding of facts substantially set out as above stated, it was considered and adjudged by the court below that the plaintiff was not entitled to the possession of the note sued for, and the plaintiff appealed.

The contentions of the plaintiff, are: First, that if the endorsement and transfer of the note by the plaintiff be considered as a sale or conveyance of the same to the Piedmont Bank, it was not executed with the written assent of the husband, as was required by Article X, section 6, of the Constitution, and was therefore invalid. Second, that if the endorsement be considered as an attempt by the wife, the plaintiff, to charge her separate estate, the husband not having entered his *written* assent thereto, the attempt must fail, because it was prohibited under section 1826 of The Code; and, third, that if it be considered as an attempt by the wife to pass the title to the property in the note to her husband, it was ineffectual, because it was not made according to the requirements of section 1835 of The Code.

The defendants' contentions are: First, that the endorsement by the wife was effectual to vest the property in the Piedmont Bank, for they say that a married woman has a right, with the verbal assent of her husband, to sell or dispose of her choses in action, and that the law has drawn a line between the executed and executory contracts of married

women. Second, that upon the endorsement by the wife of the note, and the placing it in the hands of her husband, he was enabled to transfer it to the defendants, and they being innocent purchasers for value are not affected by the fact that she was a married woman. Third, that by virtue of the agreement between E. S. Walton, the hus- (423) band, and the Piedmont Bank, and the subsequent agreement between them and the Wilmington bank, in reference to the $3,000 note, the $1,200 note in the hands of the Piedmont Bank should be applied to the benefit of the Wilmington bank.

In the beginning of the examination of the contentions of the parties, it may be said that the aspect of the case which is presented as falling under the prohibition of section 1835 of The Code may be eliminated from our consideration, for it appears from the facts found that the note was not attempted to be given to the husband by the wife. It was endorsed by her, and then taken by the husband to the Piedmont Bank, and delivered by him to the bank as a collateral security to a then existing indebtedness of the husband for overdrafts, and it was accepted by the bank for that purpose.

If the endorsement by the wife be considered in the view of an attempt on her part to convey her property, her separate estate, to the defendants, then the attempt must fail, for she could not do that without the writen assent of her husband, and that was never had. Article X, section 6, of the Constitution, is in these words: "The real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." The Constitution as we have seen, so far as the wife's power to convey her separate estate is concerned, makes no difference between *real* property and *personal* property. If she undertakes to convey either species of property, the *written* assent of her husband must be had. In the brief of de- (424) fendants' counsel it is said: "But aside from all that, it would be a monstrous doctrine in our law that a married woman can, with the verbal assent of her husband, dispose of an article of personal property or endorse a note or draft, and receive the proceeds thereof, and then recover such security or property on the ground that she did not have the written consent of her husband. If such be the law, then her coverture becomes a sword instead of a shield. Certainly, if such be the law, no reported cases can be found in this State to sustain it,

and none should be found." But the *Constitution,* as we have seen, in the section we have quoted, distinctly requires the written assent of her husband in order to enable the wife to convey her separate *personal* property, and certainly no reported cases can be found in the Reports of this State against that constitutional requirement, and in the language of the brief, "none should be found." That a married woman should be able to draw her money out of a bank where it is deposited, or to receive payment of a note due to herself without the *written* assent of her husband, is altogether a different thing from *conveying* her property. In the first-mentioned cases, she brings into her estate all that she is entitled to, while in a sale of conveyance of her personal property without the assent of her husband she may be defrauded in the facts connected with the transaction or in the value of her property, and the Constitution, to doubly guard her property, requires the assent of her husband to be in writing.

The defendants' counsel cited us to the cases of *Taylor v. Sikes,* 108 N. C., 724, and *Kirkman v. Bank,* 77 N. C., 394. In the first-mentioned case, the transaction having occurred in Maryland, and no proof to the contrary having been introduced, the Court assumed that the common law prevailed in Maryland and applied the principles
(425) of the common law to the facts in the case. In the case of *Kirkman v. Bank,* the wife drew out of the bank a sum of money on her draft or order without the written assent of her husband, and after her death he, as administrator of his deceased wife, brought suit against the bank to recover the amount so paid to the wife. The court said that he could not recover against the bank, that the wife was not "conveying" her property or "disposing" of it, that she was only "receiving" her property. So it is seen that the cases of *Taylor v. Sikes* and *Kirkman v. Bank,* not only do not support the position of the defendants' counsel, but are authorities against it. Again, if the endorsement of the note by the plaintiff and its being deposited with the Piedmont Bank for the purposes found by his Honor be considered in the view of an attempt to charge the separate estate of the wife, it may be answered that it was for the benefit of the husband alone, and that he never gave his written assent to the transaction. As to the agreement made between the husband, E. S. Walton, the Piedmont Bank, and the Wilmington bank, in reference to the hypothecation of the $1,250 note to secure the payment of the $3,000 of the husband to the latter bank, and to save harmless the Piedmont Bank for its endorsement of the $3,000, it appears that the husband did make that agreement in *writing,* but the trouble is that the wife never gave her consent to that arrangement, and did not endorse the note for that purpose. The case

of *Bates v. Sutton,* 117 N. C., 94, cited in the brief of defendants' counsel, has no application here in any aspect, for the husband there gave his consent in writing to the purchase of the goods by the wife on account of her own separate estate; and her application for credit was in writing and contained a clause charging her separate estate for the same. As to the last position of the defendants' counsel, that is, that an endorsement by a married woman of a note belonging to her conveys the property therein to the holder who has paid (426) value for it, and who was ignorant of the fact that she was under coverture at the time of endorsement, we think it can not be maintained. The purchaser of such a note can not place a married woman in North Carolina, in her attempt to contract, in the position of a person free to contract. Our Constitution and our laws will not permit a married woman to make any contracts without the written assent of her husband, whether her coverture be known or not, except those authorized under section 1826 of The Code. But there was no finding of his Honor as to whether either of the banks knew that the plaintiff was not a married woman.

For the reasons given, we find error in the judgment of the Court below, and the same is

Reversed.

CLARK, J., dissenting. The Constitution of North Carolina, Art. X, sec. 6, 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 or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her huband, conveyed by her as if she were unmarried."

To any one who reads this section, as it is written, it must be clear that the property rights of a married woman remain as if she were unmarried, with the single exception that she can not convey without the written assent of her husband. That is the sole restriction upon her disposition of her property while living, and there is not even that restriction upon her disposition of it at death. The emancipation of married women as to their property rights could not be (427) more unequivocal. Her property is to *remain* her sole and separate estate and property, as if she were unmarried, except she can not convey without her husband's written assent. With that exception, her property rights remain unimpaired and unchanged by marriage.

To the rights guaranteed them by the Constitution, married women are entitled as fully as any one else. There is no restriction upon her *jus disponendi* or using her property, as "if she were unmarried," save in the one respect recited in the constitutional guarantee. There is no disability whatever imposed upon her freedom to contract, or avoiding the possible effect thereof upon her property. There is no constitutional presumption that a married woman, by the fact of marriage, becomes less intelligent, or less competent to contract than "if she were unmarried"—a state in which she is as free to contract as any man.

Two arguments have been advanced why the courts should exercise a paternal supervision of the Constitution and construe that it does not mean as to married women what the language unmistakably and unequivocally says.

The first is, that, as married women can not convey without the written assent of the husband, to allow them to contract without such assent would be to allow them to do indirectly what they can not do directly. That is an argument which might have been addressed to the Constitutional Convention, and doubtless was, but as it did not induce the Convention to shackle the property rights of married women by inhibition of their contracting on the faith and credit of property ownership, the courts should not do it.

The statute of frauds for more than two centuries has rendered invalid conveyances of realty unless in writing, but it has never occurred to any court to hold that no one could be liable upon a verbal con-
(428) tract whereby his realty could be subjected to sale, because "that would permit to be done indirectly what can not be done directly." The constitutional emancipation of married women should bear the same construction as has been for centuries given to the provision in the statute of frauds. A requirement of "writing" in one case, and of "written consent" in the other, as to "conveyance" can not be construed differently, so as to forbid "contracts" in the one case and not in the other.

The other objection is that the absolute property rights of a married woman "as if she remained unmarried" are in conflict with the common law precedents. That is exactly why the provision has been put in the Constitution, which is, and was intended to be, a complete break with the past in this as in several other respects.

In *Shuler v. Millsap,* 71 N. C., 298, SETTLE, J., says: "The Constitution of 1868, and the laws made in pursuance thereof, have so changed preëxisting laws on the subject of the estates of females, and the remedies affecting the same, that neither the elementary books nor our own Reports afford us much light in determining the questions

presented by the record. We are called upon to *make a new departure, leaving old ideas behind, and adapting ourselves to the new order of things.*"

In *Walker v. Long*, 109 N. C., 511, MERRIMON, C. J., Says: "The Constitution, Art. X, sec. 6, has wrought very material and far-reaching changes as to the rights respectively of husband and wife in respect to her property, both real and personal, and enlarged her personality and her power in respect to, and control over her property."

There are many other judicial enunciations recognizing the radical and complete break with the common law as to the status of married women. Whether that law was based upon the conception that a single woman (who had full control of her property) by the (429) fact of marriage gave conclusive proof of imbecility and incompetency, or that only those women who were lacking in discretion married, whatever the basis, the constitutional provision of 1868 swept away the disabilities of married women and guaranteed them the same rights of property "as if remaining unmarried," save that as to conveyances there must be the written assent of the husband.

The fanciful doctrine of "charges in equity" is a late creation by purely judicial legislation, for there is not a line of any statute to support it, and it is in direct conflict with the beneficent and liberal provision of the Constitution. The oft-quoted section 1826 of The Code, requires only written assent of the husband—nothing more. To require a "charging" is harking back to the time when a married woman not only had no control over her property, but was a chattel herself, and when Shakespeare correctly expressed the English law as to wives by making Petruchio say:

> I will be master of what is my own;
> She is my goods, my chattels; she is my house;
> My household stuff, my field, my barn,
> My horse, my ox, my ass, my anything.

The Constitution does not disable a married woman to contract, but on the contrary leaves her as free to do so as her single sister. It follows that when the plaintiff endorsed the note in bank and placed it in the stream of commerce, any one who bought it or loaned money on it in the absence of fraud or collusion (which is not charged) got a good title to it as against her, as fully as if she had been a single woman or a man.

The *jus disponendi* is inherent in the ownership of property, and remains in the married woman by the constitutional provision that her property is to remain hers as if she were unmarried, with the

(430) single exception of conveyances, which word refers to cases in which "conveyances" are required, i. e., deeds and leases of realty and mortgages of realty or personalty. No "conveyance" is required to pass personalty except by mortgage. This Court has held that the Legislature can not deprive any one of the *jus disponendi,* which is a vested right protected by the United State Constitution. *Hughes v. Hodges,* 102 N. C., 239; *Bruce v. Strickland,* 81 N. C., 267. But if it were held that the Legislature could restrict the "sole ownership" of her property guaranteed to a married woman by the provision of The Code, sec. 1826, it is to be observed: (1) That though that section has strangely enough been construed to apply to conveyances, when in its terms it applies to contracts only, by the same decisions the requirement of the husband's written assent has always been restricted to deeds and mortgages; and (2) that if it applied to personalty, the husband has here given his written assent by his letter to the Wilmington bank. It is true such assent was subsequent to the endorsement of the note in blank by the wife, but the assent need not be simultaneous. *Bates v. Sultan,* 117 N. C., 94.

Nor indeed is the endorsement in blank of a promissory note "a contract to affect her real or personal estate" in the purview of this action. The note is secured by mortgage, and appears to be collectible. This is not an action to make her chargeable with its payment (when that question might arise), but an action by her to recover possession of the note which she has endorsed, allowed to be put in deposit as collateral, and which is now so held with the written assent of the husband. Nor does the fact that the note was past due when endorsed cut any figure as to the plaintiff. The doctrine of set-offs in case of paper passed after maturity applies in favor of the maker, and not between the payee or endorser and endorsee.

(431) It can hardly be contended that the endorsement of a bill or note in blank is a "conveyance," for if so, all such endorsements are void for want of a grantee. But if it were a conveyance, there is, as above said, the written assent of the husband. *Bates v. Sultan, supra.* The word "conveyance" ordinarily refers to deeds of realty, or mortgages of either realty or personalty, i. e., to cases in which a "conveyance" is required. *Kelly v. Fleming,* 113 N. C., 133. And such is its meaning in this provision of the Constitution. It can not mean that a married woman can not sell a horse, a cow, an ear-ring, or cash a check without the written assent of her husband.

In this day, when married women own so large a share of stocks, bonds, promissory notes, drafts and checks, it is of far-reaching consequence to hold that the endorsement by them of such papers is invalid,

especially when (as in this case) the paper endorsed by the wife is tendered as a collateral in a written instrument containing not only the written assent of the husband but his request that it be so used. Commercial paper is sexless. When by proper endorsement it is put into the currents of trade, the taker of it before maturity should regard it as a "courier without luggage," and not be held to inquire and scrutinize whether any of the endorsers were or were not widows, wives or spinsters. And if he takes after maturity, he should be liable only to sets-off in favor of the maker. Apart from the constitutional rights of married women over their property being the same as that of single women (except as to "conveyances" which refer to deeds and mortgages), the commercial law has never before held the taker of commercial paper to scrutinize the sex or marital condition of endorsers of such paper. The endorsement by a married woman payee of a check stands on the same footing as her endorsement when payee of a promissory note, so far, certainly, as entitling the holder to receive the proceeds (432) of the check or note, which is the only matter at issue here.

The recent statute, revising and codifying the law of negotiable instruments, chapter 733, Laws 1899, was drawn by a committee of able lawyers appointed by the American Bar Association to secure uniformity of legislation upon the subject, and has been adopted by many states. In it, there is no intimation that the doctrine of the disability of married women has been imported into the mercantile law or invalidates the endorsement of a promissory note by a married woman. This is at least a legislative construction. It must further be remembered that in the present case it is not even found that the holders of this paper, taking when so endorsed, knew that the endorser (who was not the original payee), was a married woman.

Even at common law, the endorsement of a note by a married woman was valid to transfer the note (though not to make her liable as endorser) if the husband was present (*Menkins v. Heringhi,* 17 Mo., 297), or if made with his authority or consent (*Prestwick v. Marshall,* 4 C. & P., 594; *Stevens v. Baale,* 10 Cush., 291; *Mudge v. Bullock,* 83 Ill., 22; *McClain v. Weidemayer,* 25 Mo., 364; *Nimes v. Bigelow,* 45 N. H., 343), and the husband's authority may be presumed from his conduct or subsequent ratification. *Prince v. Brunette,* 1 Bing. N. C., 435; *Mudge v. Bullock, supra; Coxlia v. Connelly,* 15 Ind., 141; *Cobb v. Duke,* 36 Miss., 60. It would be strange, therefore, if since the liberal provisions of our Constitution an endorsement of a promissory note by a married woman should now be invalid to carry title to it, especially under the circumstances of this case.

Cited: Jennings v. Hinton, 126 N. C., 51; *Brinkley v. Ballance, ib.,* 396; *Rawls v. White,* 127 N. C., 20; *Vann v. Edwards,* 128 N. C., 425; 426; *Smith v. Ingram,* 132 N. C., 967; *Vann v. Edwards,* 135 N. C., 675.

Overruled: Vann v. Edwards, 135 N. C., 678.

(433)

A. C. DAVIS v. GEORGE BLEVINS, THOMAS HEATH.

(Decided 12 December, 1899.)

Judge's Charge—The Code, sec. 413.

1. A judge may not, by his manner and emphasis, intimate an opinion upon the facts.

2. But where there is no suggestion that the manner or tone of the judge was improper, and the statement excepted to is no more than a legal proposition, not denied by any one, there is no error.

ACTION OF EJECTMENT, tried at Fall Term, 1899, of ASHE Superior Court, before *Allen, J.*

There was verdict and judgment for the defendants. Plaintiffs appealed.

Case on appeal.

The jury, after receiving the instructions of the judge, retired at 6:30 o'clock p.m., on the 27th, to consider their verdict. On the morning of the next day, at 10:30 o'clock, the jury came into court, and the foreman addressed his Honor in the following words: "Members of the jury differ as to what the evidence was as to the buckeye."

Whereupon, his Honor, the judge, looked over his notes and read to the jury what his notes contained as to said evidence. Then his Honor turned to the jury and said: "You must bear in mind that in this action the plaintiff must recover on the strength of his own case. The defendant need not have any case, but he can rely on the weakness of the plaintiff's case."

(Plaintiff excepts to the singling out this point and charging the jury in this manner.)

The jury retired again, and in three-quarters of an hour (434) brought in a verdict againt the plaintiff.

Todd & Pell for appellants.
R. A. Doughton for appellees.

FAIRCLOTH, C. J. This is an action of ejectment. After the jury had the case for several hours, they came into court and the foreman said: "The members of the jury differ as to what the evidence was as to the buckeye." His Honor read from his notes as to said evidence and turned to the jury and said: "You must bear in mind that in this action the plaintiff must recover on the strength of his own case. The defendant need not have any case, but he can rely on the weakness of the plaintiff's case." The plaintiff excepted to the singling out this point, and charging the jury in this manner, and insists that it was an expression of opinion on the sufficiency of the evidence on the issue of fact to be found by the jury, and that it was in violation of The Code, sec. 413.

It is unqestionably true that any remark of the judge to the jury, from which they may infer his opinion as to the sufficiency or insufficiency of the evidence pertinent to the issue, is *error,* but if the excepting party could not possibly be injured by it, it is no ground for a new trial. *State v. Dick,* 60 N. C., 440. A judge may not, by his manner and emphasis, intimate an opinion upon the facts. *Riger v. Davis,* 67 N. C., 185. If he does so, it is error; but unless the record alleges such tone, emphasis or manner, this Court can not see or know that it is so, and must give the language its usual signification. *State v. Wilson,* 76 N. C., 120; *State v. Jones,* 67 N. C., 285. When once such error is committed, it can not be corrected by the judge after the jury have the case in charge. *State v. Caveness,* 78 N. C., 484. It is not error for the judge to state a proposition to the jury which (435) is universally admitted. *State v. Gay,* 94 N. C., 814. In the present case, there is no suggestion that the manner or tone of the judge was improper, and the statement to which exception is made is no more than a legal proposition, not denied by any one. We can see no error.

Affirmed.

MUTUAL RESERVE FUND LIFE ASSOCIATION OF NEW YORK v. CYRUS THOMPSON, SECRETARY OF STATE.

(Decided 12 December, 1899.)

Domestication of Foreign Corporation in North Carolina, Acts 1899, Chapter 62.

Where the general counsel of a foreign corporation undertook to comply with the requirements of Act 1899, ch. 62, for domesticating the corporation in North Carolina, without the knowledge or consent of its officers and directors, and with their disapproval, when known to them, his action was properly annulled by the court upon their application.

CONTROVERSY WITHOUT ACTION submitted to *Moore, J.*, at chambers, September 23, 1899, in WAKE Superior Court, to vacate and annul the alleged incorporation of the plaintiff in North Carolina. His Honor adjudged in favor of plaintiff, and the defendant appealed.

Attorney-General for appellant.
J. W. Hinsdale and Shepherd & Busbee for appellee.

FAIRCLOTH, C. J. Controversy without action. An act of Assembly, 1899, chapter 62, provides the manner in which a foreign cor-
(436) poration may become a domestic corporation in North Carolina, by filing in the office of the Secretary of State a duly certified copy of its charter, etc. From the agreed facts it appears that the plaintiff is an insurance company, chartered by the laws of the State of New York, and doing business in its principal office in the city of New York; that the charter, by-laws, and other papers required by said act, were filed with the Secretary of State on or about May 2, 1899; that neither the officers, the board of directors nor the members of the plaintiff association have ever authorized or directed the filing of the said charter and by-laws with the Secretary of State, or consented that the members of the said New York association should have become incorporated in the State of North Carolina, but that whatever has been done in the premises has been done without their knowledge or consent; that the board of plaintiff directors, by resolutions, promptly disavowed the authority and validity of such filing of a copy of the charter, etc., as aforesaid, and so notified the defendant, and demanded a return of the papers so filed, which he refused to do.

It is admitted that said charter and papers were filed as before stated, by the general counsel of the plaintiff without the plaintiff's knowledge

or consent. It is admitted that said counsel's authority was to prosecute and defend suits in cases specially entrusted to him by the executive committee or board of directors of said association; that, in details, the said attorney procured certificates for transacting business in other States, and attended to the payment of taxes and license fees imposed upon said association by different States and countries, and that his authority is limited to the foregoing; that said attorney never intended to take steps to incorporate said association under the laws of North Carolina.

Under the above agreed and admitted facts his Honor adjudged: (437)

1. That the filing of said charter and by-laws was nugatory, and the plaintiff association is not a domestic corporation of North Carolina.

2. That the alleged incorporation of the plaintiff corporation in North Carolina be vacated and annulled.

3. That a copy of this judgment be filed with the Secretary of State with said charter and by-laws.

In this judgment we see no error.

Affirmed.

STATE ON THE RELATION OF A. R. HERRING ET AL. v. W. J. PUGH ET AL.

(Decided 12 December, 1899.)

Costs, General Rule—Exceptions.

As a general rule, the Court will not review and decide the merits of a cause which has been settled, or the subject matter destroyed, since the judgment below, merely to decide who should have paid the costs, except

(1) Where the very question at issue is the legality of a particular item of costs, or

(2) The liability of a prosecutor for costs in a criminal action, or

(3) Taking the case below as properly decided, whether the costs of that court were adjudicated against the proper party.

ACTION FOR INJUNCTION, pending in Superior Court of SAMPSON County between the plaintiffs as County Board of Education, under act 1897, v. the defendants as School Directors under act 1899. There was judgment rendered in favor of plaintiffs at final hearing before *Timberlake, J.*, at chambers, May 31, 1899, and defendants took an

appeal to Supreme Court. The plaintiffs had filed no injunction bond.

During the pendency of the appeal the defendants, by motion
(438) in the cause, obtained an injunctive order to restore the possession of the property to the defendants, from *Bryan, J.*, at chambers, 22d August, 1899, and the plaintiffs took this appeal.

The appeal of defendants in the main action has been decided adversely to them, and inow the appeal of plantiffs comes up to me disposed of.

Stevens & Beasley, Marion and George E. Butler for appellants.
Allen & Dortch, E. W. and J. D. Kerr for appellees.

CLARK, J. This is an appeal by the plaintiffs from mandatory injunction granted on a motion in the cause, to restore possession of property to the defendants, *Horton v. White,* 84 N. C., 297, pending an appeal to this Court by the defendants from an adverse judgment in the main action. On the appeal in the main action the judgment adverse to the defendants has been affirmed, and, the cause of action having thus been terminated, an adjudication upon the merits in this appeal would simply decide an abstract proposition of law, since judgment in this appeal could now have no possible effect but to determine who should pay the costs. The Court has repeatedly held that this will not be done. *Wikel v. Comrs.,* 120 N. C., 451; *Russell v. Campbell,* 112 N. C., 404; *Pritchard v. Baxter,* 108 N. C., 129; *Hasty v. Funderburk,* 89 N. C., 93; *State v. R. R.,* 74 N. C., 287; *Futrell v. Deans,* 116 N. C., 38; *Elliott v. Tyson, ibid.,* 184. The exceptions to the general rule that this Court will not decide upon a mere question of costs, are (1) Where the very question at issue is the legality of a particular item of costs (*Elliott v. Tyson,* 117 N. C., 114; *Blount v. Simmons,* 120 N. C.,

19), or (2) The liability of a prosecutor for costs in a criminal
(439) action (*State v. Byrd,* 93 N. C., 624), or (3) Taking the case below, as properly decided, whether the costs of that court were adjudicated against the proper party. *State v. Horne,* 119 N. C., 853.

But none of these exceptions violate the rule that the Court will not review and decide the merits of a cause which has been settled, or the subject matter destroyed, since the judgment below, merely to decide who should have paid the costs. Whether the motion appealed from in this instance was rightly or wrongfully allowed, *Hinson v. Adrian,* 91 N. C., 372, whether the mandatory injunction pending the appeal was properly or improperly granted, Clark's Code, sec. 558, has ceased to have any practical importance whatever since the decision of the

appeal in the principal cause, and there being nothing left but a question of costs, the Court will not pass upon the merits of an order which it can now neither affirm nor disaffirm, merely to decide as to the costs.

Appeal dismissed.

Cited: Comrs. v. Gill, 126 N. C., 87; *Taylor v. Vann,* 127 N. C., 244, 248, 254.

W. G. MIZZELL v. G. A. McGOWAN AND WIFE, LAURA A. McGOWAN, ET AL.

(Decided 12 December, 1899.)

Watercourse—Drainage—Upper and Lower Tenants.

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

2. 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. Hocutt v. R. R.,* 124 N. C., 214.

3. The upper owner can not *divert* and throw water on his neighbor, nor the latter back water on the other, with impunity.

CIVIL ACTION for alleged damages in diverting from its natural (440) course and discharging water upon the lands of plaintiff, tried before *Moore, J.,* at March Term, 1899, of the Superior Court of PITT County.

Same case reported in 120 N. C., 134. A severance of the defendants was allowed, and G. A. McGowan has since died.

There was verdict and judgment in favor of defendant Laura A. McGowan. Plaintiff appealed.

The charge of the court, to which plaintiff excepted, is quoted in the opinion.

DOUGLAS J., writes the opinion.

FAIRCLOTH, C. J., writes dissenting opinion.

A. M. Moore and Aycock & Daniels for appellant.
Jarvis & Blow and J. L. Fleming for appellee.

DOUGLAS, J. This is a civil action in which the complaint, after setting out ownership and possession, alleges as follows:

"2. The defendants, by means of ditches and canals cut by them, have wrongfully and unlawfully collected large quantities of water and discharged it upon the lands in unusual quantities and with greater rapidity and force than before.

"3. That defendants, by reason of ditches and canals cut by them, have wrongfully and unlawfully *diverted* from its natural course large quantities of water, and discharged it upon the lands of the plaintiff."

The defendants, after denying all the allegations of the complaint, further answer as follows: "That on the....day of August, 1882, by a certain deed executed by the plaintiff and others to these defendants, the said defendants acquired the right to convey the waters referred to in the complaint from their lands and through the lands of the plaintiff and the other grantors in said deed, a copy of which said deed is attached hereto and made a part of this answer."

(441) This part of the answer, with the deed referred to, and another written agreement, were offered by the plaintiff as evidence on the trial for the purpose of showing the defendants' connection with the ditches. It appears that Mrs. L. A. McGowan is the only defendant remaining in the action. The issues and answers thereto were as follows:

1. Is plaintiff the owner of and in possession of the lands described in the complaint? Yes.

2. Did Mrs. Laura A. McGowan wrongfully and unlawfully divert any water from its natural channel and discharge it upon the land of the plaintiff? No.

3. What damage, if any, has plaintiff sustained by reason of the wrongful diversion of said water? None.

4. What damage, if any, has plaintiff sustained by reason of the wrongful collection of water, and its discharge with greater force and rapidity upon plaintiff's land? None.

The following is all of the charge that appears in the record:

The court instructed the jury as to the different phases of the case and, among other things, charged the jury as follows, to wit: "The owners of lands drained by a watercourse may change and control the natural flow of the surface water thereon, and by ditches and otherwise accelerate the flow or increase the volume of water which reaches the stream; and if he does this in the reasonable use of his own premises he exercises only a legal right and incurs no liability to a lower proprietor. But a landowner can not concentrate and discharge into the

stream the surface water of his land in quantities beyond the natural capacity of the watercourse, to the damage of the lower riparian owners.

"Therefore, it being admitted by the plaintiff that Broad Creek and Moye's Run are natural watercourses, and that the water of Cooper, Cannon and Baldwin swamps, or at least a portion thereof, naturally flow into Moye's Run, if you shall find from all the evi- (442) dence in this case that the lands of said swamps were susceptible of drainage for agricultural purposes, then the defendants had the right to make such canals in these swamps as were necessary to drain them of the water naturally falling thereon, although in so doing the flow of water in Moye's Run was thereby increased and accelerated, and the flow of water was increased on the plaintiff's land, if you shall find that Moye's Run was capable of receiving such increased flow of water and carrying it on toward Tar River."

The Court also charged the jury as follows:

"If you find that the defendants, by means of the Parker's Chapel canal, or otherwise than by means of the canal in Moye's Run, drained as much water from Baldwin's Swamp as they diverted into Moye's Run; if you find that they diverted water from its natural course into Moye's Run, then no damage resulted from such diversion, and you will so find."

(The plaintiff excepted to the foregoing direction to the jury.)

The Court also told the jury that there was no evidence which connected the defendant L. A. McGowan with any diversion of water in Cooper or Cannon swamps, if there was any diversion; and that they could not consider the evidence of the diversion of water in those swamps, but must restrict their inquiries to Baldwin's Swamp.

(The plaintiff duly excepted to this direction of the jury.)

There were several exceptions to the testimony, some of which may be good; but, as they are not very clearly expressed, we will not consider them, as we are compelled to order a new trial for error in the charge of the court.

This case was here before, being reported in 120 N. C., 134. The opinion therein rendered becomes, as far as it goes, the law of the case. Among other things, it says: "The defendants asked the court to charge the jury that, if they find from the evidence that Broad (443) Creek and Moye's Run are natural watercourses, and that the waters of the other swamps naturally flow therein, and were susceptible of drainage for agricultural purposes, then the defendants had a right to make such canals in these swamps as were necessary to drain them of the water naturally falling thereon, although in so doing the flow

of water in Moye's Run was thereby increased and accelerated, and the flow of water was increased on the plaintiff's land. This prayer embraces the substance of all the prayers. His Honor modified the prayer by saying 'provided he does not thereby damage said land.' Defendants excepted. We think his Honor should have given the defendant's prayer, in substance, without the proviso. A watercourse is well defined by Angell on Watercourses, sec. 4 (7th Ed.), and the evidence in this case shows that Broad Creek and Moye's Run are natural and well-defined watercourses according to that definition. This question has been much discussed in many courts. The surface of the earth is naturally uneven, with inequality of elevation. The upper and lower holdings are taken with a knowledge of these natural conditions, and the priviledge or easement of the upper tenant to carry off the surface water in its *natural* course under reasonable limitations, and the subserviency of the lower tenant to this easement are the natural incidents to the ownership of the soil. The lower surface is doomed by nature to bear this servitude to the superior, and must receive the water that falls on and flows from the later. The servient tenant can not complain of this, because *aqua currit et debet currere ut solebat.* The upper owner can not *divert* and throw water on his neighbor, nor the latter back water on the other with impunity.

. . . Under this principle the defendants are permitted *not to divert* but to drain their land, having due regard to their neigh-
(444) bor, provided they do not more than concentrate the water and cause it to flow more rapidly and in greater volume down the natural stream through or by the lands of the plaintiff." We have italicized such words as peculiarly apply to the case as it now stands, which differs only from the former case on appeal in that the issue of *diversion* is clearly raised in the pleadings and proof. The case seems to have been tried upon the theory that the defendant caused ditches to be cut, whereby water was diverted to the land of the plaintiff; but that she claimed the right to do so either from some power in the deed set up in the answer, or some supposed compensation arising from an old ditch which carried off some part of the water that might otherwise help to flood the plaintiff's land. This old ditch, existing from a time whereof the memory of living man runneth not to the contrary, had no connection whatsoever with the ditches cut by the defendant; nor does it appear to have owed either its origin or its maintenance to any act of the defendant. Even if it had, it would not change the principle, which is thus briefly stated in *Hocutt v. R. R.,* 124 N. C., 214, 219: "It is now well settled that neither a corporation nor an indi-

vidual can divert water from its natural course so as to damage another. *They may increase and accelerate, but not divert.*" We must stand by the rule thus laid down, but can not extend its application. In itself it frequently works a necessary hardship, as naturally much of the water that falls in a swamp remains there or is carried off by evaporation, while the remainder flows off so slowly as generally not to overtax the natural outlets. While giving to the owner of the higher land the full benefit of his natural easement, we can not permit him to go beyond it under the plea that he or somebody else has cut an independent ditch somewhere else that is supposed to counterbalance the injury he has done by the unlawful diversion of water. To do so (445) would destroy the principle itself, and open up an endless series of defenses confusing in their tendencies and largely speculative in their nature. A party may acquire an additional easement by grant and in some cases by condemnation with adequate compensation. *Beach v. R. R.,* 120 N. C., 498. In the case at bar, the defendant seemed to rely in her answer upon some such easement conveyed in the deed she set out, but did not press that defense upon the trial. We presume her reason for not doing so was because the deed provided that such ditches should begin at tidewater, whereas the evidence tended to show that they did not reach tidewater. It may be that the agreement, even if carried out in good faith, did not cover the locality where the waters were diverted. In any event, the verdict seemed to depend upon that part of his Honor's charge holding that if the defendant had, by some other means, drained as much water from Baldwin Swamp as she diverted into Moye's Run, the plaintiff could not recover. In this there is substantial error. Of course, if the defendant had drained so much water from Baldwin's Swamp that what remained, together with the diverted waters, would not have exceeded the capacity of Moye's Run, the plaintiff would not have been damaged and no cause of action would have arisen. But such was not the case, as it appears that the plaintiff suffered substantial damage.

New trial.

FAIRCLOTH, C. J., dissenting. I am unable to agree with the majority of the Court in this case. This action was brought against six defendants, including Mrs. Laura A. McGowan. She is the widow of G. A. McGowan, who died since suit brought. For some reason, no one was put on trial except Mrs. McGowan. There is a mass of evidence applicable to the conduct of all the defendants. I shall not trouble myself with the evidence, for the reason, after read- (446)

ing it, I find there is no evidence against Laura A. McGowan. The only issue submitted as to her, was, whether she had diverted water from its natural channel and discharged it on the lands of the plaintiff.

The action is not brought upon alleged breach of contract referred to in the opinion, but it is an action of tort. The trial shows that the question referred to the waters of Baldwin Swamp, the allegation being that the defendant Laura had, by cutting ditches, etc., thrown some of those waters on the plaintiff's land. There is no evidence that she did so. The jury so found. His Honor did not charge that there was any such evidence, and the opinion of this Court does not recite that there was any such evidence. The allegation is denied and the proof fails. If it be assumed that there was an error in the charge, I fail to see why a new trial should be ordered as to Laura A. McGowan, who is not shown to have taken any part in the alleged tortious act. One of plaintiff's witnesses testified: "I think that the ditch which carried the water from the basin to Baldwin Swamp was cut by Billy McGowan, and was widened and deepened by George McGowan." The agreement referred to allowed defendants to cut and drain "to the mouth of the five-foot canal, known as the Baldwin canal, cut in the summer of 1878," the date of the agreement being August 1, 1882.

Cited: Lassiter v. R. R., 126 N. C., 512; *Mizell v. McGowan,* 129 N. C., 94; *Rice v. R. R.,* 130 N. C., 376; *Mullen v. Water Co., ib.,* 502; *Craft v. R. R.,* 136 N. C., 51; *Clark v. Guano Co.,* 144 N. C., 76; *Briscoe v. Parker,* 145 N. C., 17.

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W. E. QUIN v. J. A. SEXTON.

(Decided 12 December, 1899.)

Promissory Note Under Seal—Contemporaneous Agreement—Evidence.

1. Where the plaintiff and defendant, as a speculation, bought land under mortgage, and sold the same, taking a note from the purchaser payable to defendant, and expecting to pay off the mortgage out of the proceeds of the note when collected, and the defendant gave his note under seal, to the plaintiff for an amount representing his share in the purchase note, with the express agreement that it was to be paid out of the proceeds of the purchase note when collected, and not otherwise, and the purchaser became insolvent and never paid any part of his note, and the land was sold under the mortgage, and brought nothing over, evidence of the whole transaction was competent as a defense to the note in suit.

2. The evidence of the mode of payment did not alter or contradict the written contract contained in the note in suit, but was a different contract, not put in writing. *McGee v. Craven*, 106 N. C., 351.

CIVIL ACTION upon a note under seal, tried before *Brown, J.*, at WAKE Superior Court, May Term, 1899.

The execution of the note by the defendant was admitted.

The plaintiff here rested his case.

It was admitted that the contract was made in the State of Alabama; that plaintiff, Quin, was a citizen of, and defendant, Sexton, was temporarily residing in Alabama, at the time of the contract.

The defendant offered to testify in his own behalf, and was asked to state any agreement or understanding that existed between himself and the plaintiff contemporaneously with the execution and delivery of the note sued on.

To this testimony the plaintiff objected. Objection was over- (448) ruled, and the plaintiff excepted.

The testimony of the defendant was as follows:

"The plaintiff owned an one-eighth interest in a tract of land, and I owned seven-eighths. We sold it to Thomas B. Kelly for $14,000. We took Kelly's notes—no cash was paid. I proposed to have one note made to Quin by Kelly for his share. Quin asked me not to do that, but to give him my note for an amount representing Quin's interest, with the distinct understanding that the note he was to give should not be paid until the Kelly notes were paid; and that then my note was to be paid only out of proceeds of Kelly notes. I agreed to this, and gave the note sued on upon those conditions.

"The Kelly notes proved insolvent. I never collected a cent on them, and never could.

"The land we sold Kelly was under mortgage when we sold it to Kelly, and plaintiff knew it. It was afterwards sold under this mortgage, and Kelly lost the land, and we lost Kelly's notes, as he was wholly insolvent."

To the admission of the foregoing evidence the plaintiff duly objected. Objection overruled. Plaintiff duly excepted.

The defendant put in evidence The Code of Alabama, Vol. I, 1886, sec. 2667 (2981), p. 593, which is as follows:

"The defendant may by plea impeach or inquire into the consideration of a sealed instrument in the same manner as if it had not been sealed."

The court submitted the following issues to the jury:

1. At the time of the execution and delivery of the note sued on,

was it understood and agreed between plaintiff and defendant that said note was given by defendants to represent plaintiff's interest in
(449) the Kelly notes, and defendant's note should be paid only out of proceeds of Kelly notes, and not paid until Kelly notes were collected? Answer.

2. Have the Kelly notes or any part thereof been collected by defendant; if so, what part? Answer.

The plaintiff duly objected to the submission of these issues; objection overruled, and plaintiff excepted.

The court intimated that it would charge the jury that if they found the facts to be as testified to by defendant, Sexton, they should answer the first issue, "Yes," and the second issue, "No."

The plaintiff excepted, and submitted to a nonsuit, and appealed.

R. T. Gray and R. O. Burton for appellant.
Shepherd & Busbee and Armistead Jones for appellee.

FURCHES, J. Plaintiff alleges that on or about the 28th day of July, 1890, the defendant, being indebted to him in the sum of $1,647, executed to him his promissory note therefor; that said note was under seal, due twelve months after date, with interest from date; that plaintiff lives in Alabama, and that this is an Alabama contract.

Defendant answered, admitting that he executed the note, and that it had not been paid; but sets up new matter in his answer as a defense to the plaintiff's right of action, in which he says that, in fact, he was not owing the plaintiff anything when this note was given, and that the same is without consideration. The defendant further alleges that he and the plaintiff, by an agreement previously entered into, purchased a tract of land on speculation—the plaintiff's interest being one-eighth, and the defendant's interest being seven-eighths thereof; that there was a mortgage on said land for a large amount when they bought;
(450) that they sold this land to one Kelly, on time, expecting to satisfy and remove this mortgage with the purchase money received from Kelly; but Kelly failed, became insolvent, did not, and could not, pay the purchase money or any part thereof; and for this reason the plaintiff and defendant were not able to pay the mortgage; that the land was sold thereunder, bringing only a sufficient amount to pay the mortgage debt, and Kelly lost the land, and the plaintiff and defendant lost their debt.

That when they sold the land to Kelly, by agreement between plaintiff and defendant, Kelly made the note for the purchase money to the

defendant, and the defendant gave the note sued on to the plaintiff for his part of the purchase money, but with the distinct understanding and agreement that it was only to show the plaintiff's part of the price for which they had sold the land. And it was distinctly agreed that the note was to be paid out of the purchase money when received from Kelly, and that it was not to be paid until the purchase money for the sale to Kelly was paid; that no part of the purchase money has ever been paid, and never will be paid, as Kelly is utterly insolvent and nothing can be made out of him by legal process.

The defendant went upon the witness stand and testified to the facts stated above. The plaintiff objected to this evidence upon the ground that the note sued on was the written contract of the defendant, and that he could not add to, vary or contradict the same by oral evidence. The plaintiff's objection was overruled, and the plaintiff excepted.

The plaintiff offered no evidence in reply or rebuttal of this evidence of defendant, and the evidence was closed.

The Court then intimated the opinion that it would charge the jury, that if they believed the evidence, they should find for the defendant. Upon this intimation the plaintiff took a nonsuit, and appealed.

It can not be disputed but what the matter testified to by the (451) defendant, as to what the contract was between him and the plaintiff, had it been reduced to writing as a part of the contract, either as a condition in the note or a defeasance in another paper, would have constituted a good defense to the plaintiff's action.

The only question then is, is this parol evidence competent? And this question depends upon the fact as to whether it varies or contradicts the note sued on. The plaintiff contends that it does; that the note states that defendant owes the plaintiff $1,640; that the note is under seal, which imports a consideration, and this can not be contradicted by defendant.

We agree with the plaintiff in these contentions that a note under seal imports a consideration, and none need be shown. We also agree with the plaintiff that the defendant can not add to or contradict a written instrument (the note) by parol evidence. This seems to be established law in this State, and as we agree with the plaintiff in this contention, we cite no authority to support a proposition so well established as this seems to be.

But the defendant contends that his evidence does not change or contradict the note sued on; that he does not deny the note; but he says that it did not contain the contract between him and the plaintiff

that he has testified to, nor was it intended by the parties that it should do so; that there is no statute requiring that said contract should be in writing, and, as no part thereof was reduced to writing, there is no legal reason why he may not testify to the same.

While we agree with the plaintiff that a written contract can not be added to or contradicted by parol evidence, we also agree with the defendant that the contract which his uncontradicted testimony established, if believed, is a diffrent contract from that contained in (452) the note sued on. According to the terms of this contract, the note sued on was *not to be paid until the purchase money for the land sold to Kelly was paid,* and the uncontradicted testimony of the dedefendant is, that not a dollar of that money has ever been paid, and not a dollar will ever be paid.

This doctrine seems to be well sustained, if not settled law in this State. In *McGee v. Craven,* 106 N. C., 351, where the plaintiff sold the defendant a tract of land at the price of $900, the defendant paying part of the purchase money and giving his note for the balance of the purchase money, this note was not paid at the time stipulated therein, and the plaintiff brought suit upon it for its recovery. The defendant answered, admitting the execution of the note, but alleged that it was given in part payment of a tract of land purchased from the plaintiff, supposed to contain 111 acres; that at the time the note was given it was agreed by the plaintiff that said note should not be paid until the land was surveyed, and if, upon a survey, the land did not run out 111 acres, the plaintiff would deduct from the note the deficiency according to the price agreed to be paid per acre; that the land has been surveyed and failed to measure out 111 acres, and the defendant claimed a deduction from the face value of the note to this amount. The plaintiff there, as here, objected to this evidence as contradicting and varying the written contract (the note sued on), but the court overruled the objection. The defendant was allowed, under the charge of the court, and the finding of the jury, the deduction claimed for the deficiency in the quantity of land sold, as was agreed by the parties. The plaintiff appealed to this Court, where the ruling of the court below was sustained—the Court citing as authority in support of its opinion the cases of *Manning v. Jones,* 44 N. C., 368; *Doughtery v. Boothe,* 49 N. C., 87; *Twiddy v. Saunders,* 31 N. C., 5; *Wall v. Pope,* 82 N. C., (453) 57; *Parker v. Merrill,* 98 N. C., 232; *Michael v. Foy,* 100 N. C., 178; *Sherrill v. Hogan,* 92 N. C., 345. And in the case of *Sherrill v. Hogan,* in support of the same proposition, the Court cites

Hon v. O'Mally, 1 Maine, 387; *Twiddy v. Saunders, Doughtery v. Boothe,* and *Manning v. Jones, supra; Terry v. R. R.,* 91 N. C., 236.

We could multiply authorities to a very great length from our own reported cases, besides text-writers and decided cases from other jurisdictions, to support this proposition, but the doctrine seems to be so well settled here and elsewhere that we deem it unnecessary to do so.

The defendant introduced the statute of Alabama, which he claims authorized the court to inquire into the consideration of the sealed note. But we have not thought it necessary to consider that statute.

We think that we may say that the doctrines contended for by both plaintiff and defendant are recognized as established law in this State, and do not conflict with each other. The trouble (if there be trouble) is in their application. But, by keeping the two principles well in mind, we think this may be done without any great difficulty.

Holding, as we do, that the defendant's evidence was competent to prove the contract that the note sued on was not to be paid until the Kelly note was collected, and it being shown that no part of that note has ever been paid, and that it can not be collected, the judgment of nonsuit must be affirmed.

Affirmed.

Cited: Woodcock v. Bostic, 128 N. C., 247.

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(454)

CAPE FEAR AND YADKIN VALLEY RAILROAD COMPANY v. McADOO KING ET AL.

(Decided 12 December, 1899.)

Condemnation of Land—Exceptions—Interlocutory Order—Premature Appeal.

1. Motion to file exceptions to report may be allowed in the discretion of the court.

2. An order allowing such motion is interlocutory, and an appeal therefrom is premature.

PETITION for appraisal and condemnation of land for use of plaintiff's road, heard upon appeal of defendants from the order of the clerk confirming the report of commissioners, before *Timberlake, J.,* at July

Special Term, 1899, of GUILFORD Superior Court. No exceptions had been filed, and the defendants moved for leave to file then *nunc pro tunc*. Motion allowed. Plaintiff excepted.

His Honor, upon motion of defendants, granted an order for re-appraisement. Plaintiff excepted and appealed.

J. T. Morehead and G. M. Rose for appellant.
C. M. Stedman for appellees.

FAIRCLOTH, C. J. This is the plaintiff's petition to have certain land, needed by the plaintiff for its use as a depot, valued, etc. The defendant also filed a supplemental petition to carry out the object in a friendly way. Commissioners were appointed to assess damages, benefits, etc., who filed their report with the clerk, and the matter went by appeal to the Superior Court. No exceptions were filed by the defendants to the report before the clerk. On the call of the case in
(455) the Superior Court, his Honor, on motion, allowed exceptions to be filed *nunc pro tunc*, and ordered a new appraisal to be made as to the value and damage of the premises described in the petition. From these orders the plaintiff appealed.

We see no doubt that his Honor had power to allow amendments, etc., under our system of procedure. Code, secs. 273, 1946, Acts 1887, ch. 276, and several decided cases under those sections found in Clark's Code. The court having power to make such orders, does so in the exercise of its discretion, which ordinarily we can not review.

The orders appealed from seemed to be necessary steps in the cause. At any rate they were interlocutory, and were not appealable until after final judgment upon the report of the commissioners, at which time the plaintiff will have the benefit of its exceptions. The appeal is premature. *Hendricks v. R. R.*, 98 N. C., 431. Appeal dismissed, and judgment below

Affirmed.

(456)

SADIE A. HOLT ET AL. v. R. M. COUCH.

(Decided 19 December, 1899.)

Tenants in Common—Partition—Rents and Profits—Expenses—Insurance, Taxes, Repairs, Improvements—Facts Found by Referee—Betterments.

1. Facts found by a referee, based upon competent evidence, and confirmed by the court below are not reviewable.

2. The Code, ch. 10, p. 182, relating to betterments, has no application to tenants in common, but is for the protection of purchasers only of a supposed good title.

3. Equity is effected among tenants in common, either by assiging the improved part of the property to him who makes it, at its value before improvements are made; or if that can not be done, then by a reasonable allowance to the one who has enhanced the value of the property.

4. It is a general rule that where a cotenant claims an eqality of benefit, he must submit to an equality of burden, fairly incurred, in good faith.

5. If property is not susceptible of being divided the court will order an account before partition of proceeds of sale is made, and provide for a suitable compensation for improvements.

CIVIL ACTION for a division of rents and profits, consolidated with proceedings for partition by sale of the property, tried before *Timberlake, J.*, at August Term, 1899, of MOORE Superior Court, upon exceptions to report of referee as to rents, profits and expenditures.

The parties were tenants in common of the "Hotel Ozone," at Southern Pines—each owning one-half interest. The sale had been made and approved.

The plaintiffs filed exceptions to the report of referee, which were overruled, and the report confirmed. Plaintiffs appealed.

The case is fully stated in the opinion.

Douglass & Simms for appellant. (457)

Black & Adams and W. E. Murchison for appellee.

FAIRCLOTH, C. J. Prior to February, 1891, C. E. Holt and the defendant were tenants in common of the property described in the complaint, situated at Southern Pines, in Moore County, each owning

one-half interest therein. The said owners erected on the lot a building, the lower front part for a store, and the upper story was partially constructed for a boarding house. C. E. Holt died on February 17, 1891, and the plaintiffs became the owners of his interest in said property, they being nonresidents of the State. After Holt's death the defendant remained in the sole possession and management of the property, and finding the building unattractive and not profitable as a store and boarding house, he made changes, additions, and improvements, and thus converted the building into a more modern hotel, called the "Ozone Hotel." He paid all expenses, insurance, taxes and repairs, and collected the rents and profits. It does not appear that the plaintiffs took any active part in the management of the property.

On April 30, 1895, the plaintiffs instituted an action against the defendant for one-half of the rents since the death of C. E. Holt, alleging the annual rental value to be $500.

On November 30, 1895, the plaintiffs filed their petition in the proper court to sell said property for partition. Subsequently these two actions were by agreement consolidated. An order of sale was made without prejudice to the rights of either party as to improvements or rents put upon or arising out of said real estate.

(458) At August Term, 1898, the case was referred, to take an account and pass upon the law and facts, and report, etc. The referee reported on the pleadings and the evidence, the following facts.

"3. That the value of the improvements put upon the property by R. M. Couch, since the death of C. E. Holt, is $938.

"4. That the said improvements were reasonable, necessary and advantageous to the property, and were neither authorized nor objected to by the plaintiffs.

"5. That the amount of insurance and taxes paid on said property by the defendant since the death of C. E. Holt, is $971.

"6. That the average rental value of the premises since the death of said C. E. Holt, is $200 per year."

He, then, as matter of law, concludes that the defendant be charged with one-half the rental value, to wit, $850, and credited with one-half of the value of the improvements, to wit, $469, and with one-half of the amount expended in paying taxes and insurance on the property, to wit, $485.50 and that there is a balance of $104.50 due the defendant by the plaintiffs on said account.

This report was confirmed by the court, and judgment entered accordingly, from which the plaintiffs appealed.

The plaintiffs except to each item of the account and to the findings of fact and legal conclusions of the referee. When the facts are found by the referee, if based upon competent evidence, although conflicting, as we find to be the case in this instance, such findings are not reviewable by this Court. Taking, then, the facts as reported, his legal conclusions are correct.

The plaintiffs, by their exceptions, do not pointedly present the legal propositions relied on by their counsel in his argument, but we consider them according to his contentions. They are:

1. That a cotenant, except by consent, has no right to make im- (459) provements by additions, change in the structure, etc., as distinguished from repairs, etc., for preservation of the property.

2. That in no event, except by consent, can a cotenant in sole possession, expend more than the rents and income of the property, and charge his cotenants therewith, because that would put it in his power by recklessness to impair the value or indirectly dispose of the value of his cotenants' interest, presumably for his own benefit.

To avoid confusion, we may here state that The Code, ch. 10, p. 182, on close examination, has no application to tenants in common. That provision is for the protection of a purchaser of land, who makes lasting improvements under the belief that he had a good title. After judgment is entered against him for the land, he may as herein provided have an allowance for the improvements, usually called *betterments.*

As we decide to affirm the judgment, we will examine the plaintiff's authorities to support his proposition. They rely on *Norton v. Sledge,* 29 Ala., 478, 498. This was a bill for partition. Sledge and George H. Horton were tenants in common, and George Horton was trustee of the interest of his son George H. The trustee expended on the property more than the rents and income, and the excess was not allowed him when the partition was closed. The Court remarked: "George Horton can in no event be entitled to compensation for improvements made beyond the rents charged against him," for the reason that "in the partition, George Horton (trustee) has no direct and immediate interest, but he has an indirect interest." This does not apply, owing to a different state of facts, the trustee claiming compensation out of the property in which he had no interest.

Field v. Leiter, 117 Ill., 341: The Court held that, "One tenant in common may rightfully insist that the other shall contribute his proportional share for the preservation of the joint property, (460) but he can not insist that he shall enter upon new investments to be paid for from the joint property or out of other funds belonging to

him *against his judgment and inclination.*" This case will not fit, as the expenditures in the case we have were not made against the "judgment and inclination" of the plaintiffs.

Elrod v. Ketter, 89 Ind., 382: "Where improvements thus made affect the entire property, compensation will not be made upon partition, unless the improvements were *necessary* or *useful* to the enjoyment of the estate . . . or were made under such circumstances as create an *equitable claim.*" This seems to be an authority in favor of the defendant, as the referee finds that the improvements "were reasonable, necessary and advantageous to the property."

Taylor v. Baldwin, 10 Barb., 582, (in 1850): It does not appear well settled in this country . . . that one tenant in common, without any contract, can make necessary repairs upon the property and charge his cotenant in an *action* for the amount." There is no question of that kind here before us.

Israel v. Israel, 30 Md., 120: "A tenant in common, occupying the common property, will not be allowed for expenses which were incurred *not* for the preservation of the property, but rather to gratify his taste and contribute to his convenience." We probably would agree to that proposition upon the same state of facts. It was, however, an action for "use and occupation." There seems to be no ground to doubt that the common property is liable for its taxes, and the tenant who pays them "will have a lien upon the common property to secure such reinbursement." 11 Am. and Eng. Enc., 1109.

The plaintiffs except to the insurance item in the defendant's account. It is not distinctly stated whether the insurance was taken
(461) for the whole property or for the defendant's interest in it. The only evidence is this:

Question. "Mr. Couch, why was it you insured that building alone for $3,000, when you stated that it was not worth any rent at all?" Answer. "It was what money I had put in it, in case it was burned."

Question. "So you were going to collect from the insurance company even if it was not worth anything?" Answer. "The insurance company did not consider the rents. I left it with the agent."

The inference is that the insurance covered the whole property unless there was contrary evidence. No point was made about it in the evidence, and it was upon the plaintiff to rebut the reasonable inference, if it was not correct.

The object of a court of equity is to arrive at a just conclusion in every case, and among tenants in common it may be done either by assigning the improved part of the property to him who makes it, at its

value before the improvement is made, or, if that can not be done, then by a reasonable allowance to the one who has enhanced the value of the property. This is well expressed in 1 Story's Eq. Jurisprudence, sec. 656b: "In suits in equity also for partition, various other equitable rights and claims and adjustments will be made, which are beyond the reach of courts of law. Thus, if improvements have been made by one tenant in common, a suitable compensation will be made him upon the partition, or the property on which the improvements have been made assigned to him. So courts of equity will not only take care that the parties have an equal share and just compensation, but they will assign to the parties respectively such parts of the estate as would best accommodate them and be of most value to them, with reference to their respective situations in relation to the property before the (462) partition. For in all cases of partition, a court of equity does not act merely in a ministerial character, and in obedience to the call of the parties who have a right to the partition, but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex æquo et bono* according to its own notions of general justice and equity between the parties." This Court has made similar rulings in *Pope v. Whitehead,* 68 N. C., 191, and in *Collett v. Henderson,* 80 N. C., 337.

It is a general rule that where a cotenant claims an equality of benefit he must submit to an equality of burden, and if the loss results from error in judgment or carelessness of the one in charge of the property, it will still fall upon both equally. If, however, the loss is caused by positive wrong or a nuisance, then the wrongdoer must alone bear the loss. In all such instances, good faith is always required. 11 Am. and Eng. Enc., 1107. If the property is not susceptible of being divided, then the court will order an account before partition is made, and provide for a suitable compensation for the improvements. 17 Am. and Eng. Enc., 758n; *Reed v. Reed,* 68 Me., 568. Other authorities are accessible, but these are deemed sufficient.

Turning then to the case at bar, we discover from a review of the record that the common property was of small value at the time the improvements commenced; that the defendant in the exercise of his honest judgment conceived the purpose of making a change in the building suited to local conditions, and that the plaintiffs gave no attention to their property for several years, and tacitly allowed the defendant to manage it as he deemed best, and finally demanded by action, full rents for the improved condition of the property, and no suggestion of bad faith or positive wrongful conduct on the part of the defend-

(463) ant is made. It appears in a general way that disappointment and loss took place by reason of fluctuations in values at Southern Pines, as a health and pleasure resort. It does not appear that the defendant has abused the confidence of his cotenants, or his position in relation to the property. He bears half of the depreciation in the value of the property, and the account stated by the referee shows only a small difference in his favor.

Upon the foregoing view of the case, we see no error in the record. Affirmed.

DOUGLAS, J., concurring in result. While concurring in the judgment of the Court, I must dissent from its opinion, if it intends to hold that a tenant in common can, without the consent of his cotenants, put substantial improvements upon the common property, and thus obtain a lien thereon for the value of his improvements. This would permit him in its logical result to *improve* his coöwners entirely out of their own property. If this be the rule sought to be established, in my opinion, it would not only be contrary to the current of authority, but capable of very great abuse. A cotenant has no right to control the property of others contrary to their will. If he wishes to improve the common property, he can very easily communicate with the other owners. If they consented, they would be equally bound, and perhaps if they did not object, they might be held to have acquiesced. It would impose no hardship upon him to require him to drop them a postal card, while it would impose very great hardship upon them to permit him to encumber the common property at his own pleasure without the consent or even knowledge of the coöwners. Such a ruling was not necessary to the decision of this case. The defendant is entitled to re-

(464) imbursement for taxes, and perhaps for insurance, either of which would be greater than the small balance of rents left after deducting the value of his improvements. In this way, the judgment can be sustained, and full justice done to the defendant without overturning or ignoring any of the well-established principles of equity. I therefore concur in the judgment of the Court, but respectfully dissent from its opinion as written.

Cited: Cochran v. Improvement Co., 127 N. C., 389.

CITY OF SOUTHPORT v. PRUDENCE STANLY.

(Decided 19 December, 1899.)

Municipal Authorities—Power to Sell Town Property—The Code, Sec. 3824—Limitations.

1. The power granted by The Code, sec. 3824 to the town authorities to sell town property does not extend to the sale or lease of any real estate, which by the terms of the act of incoporation is to be held in trust for the use of the town, or to such real estate with or without the buildings on it as is devoted to the purposes of government, including town or city hall, market house, houses used for fire departments, or for water supply, or for public squares or parks. In respect thereto, there must be a special act authorizing such lease or sale.

2. The Legislature itself would be wanting in power to confer upon town or city the right to sell public streets, in reference to which bordering property owners had located their improvements. *Morse v. Carson*, 104 N. C., 431.

ACTION OF EJECTMENT, tried before *Allen J.*, at March Term, 1898, of the Superior Court of BRUNSWICK County. Jury trial waived.

The present town of Southport was originally incorporated and known as Smithville. The commissioners of Smithville had conveyed to W. H. Craig, in 1883, by lease for 99 years, a portion of (465) a town lot reserved in the charter for the use of the town. Craig conveyed his interest in the unexpired lease to the defendant in 1892, and she is in possession. The authorities of Southport being of opinion that the lease made by their predecessors was *ultra vires*, brought this action to recover the property. His Honor rendered judgment in favor of defendant, and plaintiffs excepted and appealed.

Bellamy & Peschau for appellant.
No counsel contra.

MONTGOMERY, J. This is an action brought by the plaintiffs to recover the possession of a piece of land situated in the town of Southport. The town of Southport was originally incorporated in 1792, under the name of Smithville. The name Smithville was changed to Southport by an act of Assembly of 1887, but no other changes were made by the last-mentioned act in the provisions of the old charter. Under the original charter, 150 acres of the State's lands were appropriated to the town of Smithville, and were vested in certain commis-

sioners and trustees named in the charter. These commissioners and trustees in the words of the act, "were authorized and required to lay out a town containing 100 lots, to consist of a half-acre each, or thereabouts, with convenient streets and squares, which lots, streets and squares are hereby constituted and erected a town, and shall be called and known by the name of Smithville, and the surplus of land shall remain as a common for the use of the said town . . . and the commissioners . . . are hereby required to make, or cause to be made, a fair plan of said town, and mark, or number, each lot therein, and, after reserving ten lots for the use of said town, shall take
(466) subscriptions for the remainder from such persons as may be willing to subscribe for the same," etc. In the year 1883, a former board of commissioners of the then town of Smithville undertook to convey, by deed of lease for 99 years, the piece of land described in the complaint to W. H. Craig, the lessor of the defendant in this action. The piece of land in question is a part of one of the lots reserved for the use of the town, and the main question in the case is, whether the act of the commissioners, in attempting to make the lease, was *ultra vires.*

The defendant's contention is, that the lease is good under the provisions of section 3824 of The Code. The language of that section is as follows: "The mayor and commissioners of any incorporated town shall have power at all times to sell at public outcry, after thirty days' notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best." The question presented for our decision then, brings up for construction the above-quoted section of The Code. The power of the General Assembly to authorize the governing authorities of a town or city to sell or lease any real estate of the town or city, whether it be parks, squares, public buildings used for the purpose of town government, or other buildings, or places necessary to properly protect or govern the town, is not before us. If it was, there would not be a moment's hesitation in declaring that such power exists. The only limitation on the power of the General Assembly in the matter would be, that that body could not divest or provide for divesting the rights of the owners of lots having a property or easement in the adjacent streets or alleys with reference to which they invested their money in the lots, and the improvements placed upon them by undertaking to confer upon the town or city, or upon any others, the power to sell the same for the
(467) benefit of the town or city. *Moose v. Carson,* 104 N. C., 431.

But the question before us is, does the statute (Code, sec. 3824), confer upon the governing bodies of towns and cities power to dispose of such property of the town or city as we have mentioned. We are of the opinion that it does not. It is clear that if such a power existed under the statute, it would be in the power of the governing authorities of a town or city to practically annul its charter—a thing which certainly could not be done except by the General Assembly, through a bill enacted for that purpose. If the commissioners or aldermen could, under the section of The Code above quoted, sell one public square or park, or building used for government purposes, why they could logically sell every building owned by the town, and every public square, and by that means destroy the means of properly governing the municipality, and also greatly impair the value of all real estate within the city or town limits. It is true such action on the part of the commissioners might not be probable, but it could be done—it is possible that it could be done —under the construction which the defendant put upon The Code section. The reasonable construction of the statute must be that the town or city authorities can sell any personal property, or sell or lease any real estate which belongs to the town or city as the surplus of the original acreage ceded for the town or city site, or such land as may have been subsequently acquired or purchased: But in no case can the power be extended to the sale or lease of any real estate which, by the terms of the act of incorporation, is to be held in trust for the *use* of the town, or any real estate with or without the building on it which is devoted to the purposes of government, including town or city hall, market houses, houses used for fire departments or for water supply, or for public squares or parks. To enable the town or city authorities to sell such of the real estate of (468) the towns or cities as is mentioned just above, there must be a special act of the General Assembly authorizing such lease or sale. The facts were found by consent by the court, and judgment rendered for the defendant and against the plaintiff, and there is error in the judgment.

Reversed.

Cited: Turner v. Comrs., 127 N. C., 154; *Brockenbrough v. Comrs.*, 134 N. C., 22.

A. M. BENNETT ET AL., DISPENSARY COMMISSIONERS AND MANAGER, *v.* THE COMMISSIONERS OF SWAIN COUNTY.

(Decided 19 December, 1899.)

Dispensary Act 1899, Chapter 558—Mandamus.

1. An act may be constitutional in part and unconstitutional in part.
2. The validity of the Dispensary Act of 1899, ch. 558, is in no wise dependent upon its acceptance by the county commissioners, and as the act requires them to pass upon the official bonds of dispensary commissioners and manager, tendered to them, it was their duty to do so in good faith.
3. Mandamus is the proper remedy against a public officer who refuses to discharge a specific duty required of him by law.

ACTION OF MANDAMUS to require the defendants to pass upon the official bonds of plaintiffs, Dispensary Commissioners and Manager, under the act 1899, ch. 558, tried before *Starbuck, J.*, at SWAIN Superior Court, and judgment filed 22d May, 1899, directing the mandamus to issue. Defendants appealed.

The opinion states the case.

F. C. Fisher for appellants.
A. M. Fry for appellee.

(469) CLARK, J. Section 11, chapter 558, Laws 1899, prescribes that the town commissioners of Bryson City shall appropriate one-third and the county commissioners of Swain two-thirds of the funds necessary to establish and keep in operation the dispensary created in said town by that act, the net profits arising therefrom to be divided between the town and county in the same proportion. The county and town commissioners aforesaid declined to make any appropriation for the establishment of the dispensary. Section 3 of the said act requires the manager to give the bond therein prescribed, to be approved as other official bonds, and section 14 prescribes the bonds for the dispensary commissioners. These bonds were prepared and tendered to the county commissioners, who refused to act on them, either to approve or to disapprove the same, on the ground that having refused to make the appropriation required by the act, the dispensary became illegal.

This is a proceeding by mandamus to compel the county commissioners to consider and pass upon the bonds aforesaid tendered by the plaintiffs, manager and commissioners of the dispensary. The court below properly granted the mandamus. The validity of the act was made in nowise dependent upon its acceptance by the county and town commissioners. They were simply directed by the act to make certain appropriations to aid in the establishment of the dispensary. That was a purely incidental requirement, and, if unconstitutional, as defendants claim, it would not impair the constitutionality of the rest of the act, for an act may be constitutional in part and unconstitutional in part. *McCless v. Meekins,* 117 N. C., 34.

Whether the requirement of the appropriation of money by the county and town commissioners is constitutional or not, is not presented, as the plaintiffs not only do not ask judgment that the appropriation be made, but in open court expressly waived all claim to it. The rest of the act is in substance the same as that (470) providing a dispensary for Cumberland County (ch. 235, Laws 1897), which was held constitutional in *Guy v. Comrs.,* 122 N. C., 471, and therefore need not be discussed. The commissioners should, as ordered by the court below, proceed in good faith, according to the purpose of the act, to consider and pass upon the sufficiency of the bonds tendered by the plaintiffs.

That mandamus is the proper remedy against a public officer who refuses to discharge a specific duty required of him by law, has been often decided. *R. R. v. Jenkins,* 68 N. C., 602, cited in *Russell v. Ayer,* 120 N. C., at p. 186; *Tate v. Comrs.,* 122 N. C., 812; *Harrington v. King,* 117 N. C., 117.

Affirmed.

Cited: Garsed v. Greensboro, 126 N. C., 162; *S. v. Gallop, ib.,* 984; *S. v. Smith, ib.,* 1058; *Martin v. Clark,* 135 N. C., 179.

D. S. RUSSELL v. HILL AND NELSON.

(Decided 19 December, 1899.)

Trover, Conversion—Title, Possession.

1. In an action in the nature of trover, the plaintiff in order to recover must show both title and possession or the right of possession.

2. If a person in adverse possession of land sells the growing timber, which the purchaser cuts and removes, the latter can maintain an action against a wrongdoer who converts it, and the real owner of the land would have to proceed against the party in possession for damages to the freehold.

3. Against a wrongdoer possession is presumptive evidence of title, subject to rebuttal.

ACTION in the nature of trover, for the conversion of logs, tried before *Starbuck, J.*, at June Term, 1899, of the Superior Court
(471) of SWAIN County, upon an agreed state of facts, the material parts of which are restated in the opinions. His Honor rendered judgment in favor of defendants, and plaintiff appealed.

G. S. Ferguson and J. F. Ray for appellant.
R. L. Leatherwood for appellee.

MONTGOMERY, J. This case was heard upon an agreed state of facts, the material parts of which are as follows:

In 1887, after entry and survey, F. H. Busbee, trustee, received a grant from the State for a tract of land in Swain County. Iowa McCoy made a subsequent entry and survey, and received a grant from the State for a part of the land embraced in the grant to Busbee, trustee. Busbee, trustee, was the owner of the land by virtue of his grant, which was properly registered, and registered before the entry, survey and grant of Mrs. McCoy. Mrs. McCoy had no knowledge of Busbee's grant except the notice which the law implies from the fact of registration. Mrs. McCoy sold to the plaintiff certain timber standing on the land embraced in her grant, and the plaintiff cut the timber and carried the same in the shape of logs to the bank of the Nantahala River, a floatable stream, for the purpose of floating them to the Asheville Furniture Company.

While the logs were lying on the river bank, the defendants, without any claim of right or title to them from Busbee, trustee, or from anyone else, so far as the record shows, took possession of the logs without the consent of the plaintiff, and sold and delivered them to the Asheville Lumber Company for $686.84. The lumber company is insolvent.

The court, upon the facts agreed, adjudged that the plaintiff could not recover, and rendered judgment accordingly.

We are of the opinion that there was no error in the ruling
(472) and judgment of the court. Busbee, trustee, was the legal

owner of the land. Mrs. McCoy was not in possession. If she had been in adverse possession, the title to the logs would have passed to the plaintiff, and he could have maintained this action; and Busbee would have been compelled to proceed against Mrs. McCoy for damages to the freehold. *Brothers v. Hurdle,* 32 N. C., 490; *Ray v. Gardner,* 82 N. C., 264; *Howland v. Forlaw,* 108 N. C., 567.

The present action is in the nature of the old action of trover, and before the plaintiff could recover in an action of that nature he had to show both title and possession or the right of possession. The cases in our reports seem to be all one way on that point. In *Laspeyre v. McFarland,* 4 N. C., 187 (620), the plaintiff, who did not have the legal title, the action being trover for a negro slave, was nonsuited for that reason. On the trial, the defendant showed no title in himself, but proved the plaintiff's lack of title. On the appeal, this Court, in sustaining the judgment below, said: "It is one of the characteristic distinctions between this action and trespass that the latter may be maintained on possession, the former only on property and the right of possession. Trover is to personalty what ejectment is to realty. In both, title is indispensable. It is true that, as possession is the strongest evidence of the ownership, property may be presumed from possession. And, therefore, the plaintiff may not in all cases be bound to show a good title by conveyances against all the world, but may recover in trover upon such presumption against the wrongdoer. Yet it is but a presumption, and can not stand when the contrary is shown. Here, it is completely rebutted by the deed, which shows the title to be in another and not in the plaintiff. So in the case before us, the title to the land from which the timber was cut is shown, by the agreed state of facts, to have been in Busbee, trustee, and not in the plaintiff, or Mrs. McCoy. (473)

The same point arose in *Barwick v Barwick,* 33 N. C., 80, and was decided in the same way. The Court said: "But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property; for the real owner may forthwith bring trover against the defendant and force him to pay the value the second time. And the fact that he paid it in a former suit would be no defense . . . ; consequently trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except where the property is restored

and the conversion was temporary. Accordingly, it is well settled as the law of this State that to maintain trover the plaintiff must show title and the possession or a present right of possession." In the last-mentioned case, the Court went on to say, in substance, that, in some of the English books, and in some of the reports of our sister states, cases might be found to the contrary, but that those cases were all founded upon a misapprehension of the principle laid down in the case of *Belemere v. Armory,* 1 St., 505. There, a chimney-sweep found a lost jewel. He took it into his possession, as he had a right to do, and was the owner because of having it in possession unless the true owner should become known. That owner was not known and it was properly decided that trover would lie in favor of the
(474) finder against the defendant to whom he had handed it for inspection and who refused to restore it. But the Court said the case would have been very different if the owner had been known. *Barwick v. Barwick, supra,* is sustained by *Boyce v. Williams,* 84 N. C., 275. The cases of *Craig v. Miller,* 34 N. C., 375, and *Branch v. Morrison,* 50 N. C., 16, cited by the plaintiff's counsel in the argument, were decided on a different state of facts from those in this case, and, when read carefully, will be found to support the cases from which we have quoted.

Affirmed.

DOUGLAS, J., dissents.

Cited: Vinson v. Knight, 137 N. C., 441.

THOMAS BRENDLE v. SAMUEL SPENCER ET AL., RECEIVERS OF THE RICHMOND AND DANVILLE RAILROAD COMPANY.

(Decided 19 December, 1899.)

Willful or Wanton Injury—Contributory Negligence.

1. It is settled that contributory negligence, even if admitted, is no defense to willful or wanton injury.

2. The finding of such injury by the jury eliminates all questions of negligence on both sides.

3. The defendant company is responsible for the willful and wanton injury occasioned by its employees, while on duty, in its service.

4. Where the defendant's engineer, on a passing train, blew the whistle loud and shrill to frighten the horses driven by the plaintiff, and the horses take fright and run away, and the plaintiff is injured, the defendant is responsible.

CIVIL ACTION for damages for personal injures occasioned by the alleged wanton and willful conduct of defendants' employees, tried before *Starbuck, J.*, at June Term 1899, of the Superior Court of SWAIN County.

The whole case is covered by the opinion.

G. F. Bason and F. H. Busbee for appellants. (475)

T. H. Cobb, R. L. Leatherwood and G. S. Ferguson for appellee.

DOUGLAS, J. This is a civil action for damages against the defendants as receivers of the Richmond and Danville Railroad Company, caused by the alleged negligent and willful conduct of the defendants' servant in frightening horses driven by the plaintiff.

The plaintiff alleged in his complaint, that while driving a pair of horses to a hack one-half mile up the Tuckaseigee River from Bryson City, he went into the mouth of Deep Creek to water his horses, and that while his horses were so being watered, the defendant ran one of its trains over the trestle crossing Deep Creek, willfully, wantonly and maliciously blew its engine whistle for the purpose of frightening plaintiff's horses; that it did frighten them, causing them to run out of the mouth of the creek into the river, and to injure plaintiff. He further charged that the defendant negligently blew the whistle at an unusual place, all of which was denied by the defendant.

Issues submitted to and responses of the jury:

1. Did defendants' engineer or fireman, wantonly, wrongfully, and intentionally sound the whistle of the engine for the purpose of frightening the horses the plaintiff had in charge, and was the plantiff injured thereby? Yes.

2. Was the plaintiff injured by the negligence of the defendant? Not answered.

3. Did the plaintiff, by negligence of his own, contribute to his injury? Not answered.

4. What damage has plaintiff sustained? $1,200.

The following is all the charge of the court that appears in the record:

(476) The court charged as follows, upon the first issue:

To answer first issue "Yes," the burden is upon the plaintiff to prove by the greater weight of evidence that the engineer blew the whistle maliciously or wantonly, as I will presently explain, and thereby frightened and caused the horses to run into the river, and injured the plaintiff.

If the whistle was blown for the purpose of frightening the horses, it must have been either a malicious or a wanton act. If with a desire to cause injury, it was malicious. If in a spirit of sport or indifference to the consequences, it was wanton. So far as the element of malice or wantonness is concerned, the question for you to determine is whether the whistle was blown for the purpose of frightening the horses.

To find that the blowing was malicious or wanton, you must find in the first place that the engineer had seen plaintiff and the horses, or that the fireman had seen them and informed the engineer. Even though you should find that the engineer had knowledge of the presence of plaintiff and the horses, the evidence would not warrant you in finding malice or wantonness if the whistle was blown at about the usual place and in a usual manner. Therefore, to answer first issue "Yes," you must find that it was blown at an unusual place or in an unusual and unnecessary manner. I do not mean to say if it was blown at an unusual place or in an unusual manner you ought to find that it was blown maliciously or wantonly, or, in other words, for the purpose of frightening the horses, but merely that unless you do find that the place or the manner was unusual, there would not be sufficient evidence upon which to answer the first issue "Yes." If you do find that the place or manner of the blowing was unusual, then that fact is to be considered by you in connection with all the evidence in determining whether the whistle was blown to frighten the horses; and it is a matter altogether for you

(477) as to what, if any, weight shall be given to the fact. To sum up, if you are satisfied, by the greater weight of the evidence, that the engineer had knowledge of the presence of plaintiff and the horses; that he blew the whistle at an unusual place or in an unusual manner; that his purpose was to frighten the horses, and that he did frighten and cause them to run into the river, and thereby injure the plaintiff, you will answer the issue "Yes." If you do not find these to be the facts you will answer it "No."

In lieu of defendants' twelfth request the court charged if the whistle was blown directly over the road leading up the creek under

the trestle, that fact is immaterial in so far as the being over the road is concerned. If the trestle was an unusual place at which to blow the whistle, that fact is a matter of evidence for you to consider, as I have explained; but the fact that the road leading up the creek ran under the trestle is immaterial.

The defendant asked the court to give the following among other instructions:

5. The defendant had the right to run its trains over its track and to make the noises caused by the blowing of the whistle, which were necessarily incident to the operating of its trains; and if the jury find from the evidence that no more noise was made than was necessary, the answer to the first issue should be, "No."

Exception 1. This instruction was modified as follows: "Unless the whistle was blown at an unusual place, for the purpose of frightening the horses, and thereby caused the injury"; and to such modification the defendant excepted.

The finding of the jury on the first issue eliminated all question of negligence either of the defendant or the plaintiff. This appears to have been admitted, as no part of the charge is sent up except that relating to the first issue. The charge appears to us unexceptionable, and the special instructions asked by the de- (478) fendants were properly refused, except in so far as given. It is well settled that contributory negligence, even if admitted by the plaintiff, is no defense to willful or wanton injury. 3 Elliott on Railroads, secs. 1175, 1251, 1254, 1642; 2 Wood on Railroads, p. 1452; Beach on Cont. Neg., secs. 46, 50, 64, 65, 416. The large number of cases cited by the said authors fully sustain the principle.

This case arises out of the same facts as *Everett v. Receivers,* reported in 121 N. C., 519, and again upon a rehearing in 122 N. C., 1010. In that case, Everett recovered for the loss of the horses, while now the plaintiff brings this action to recover for injuries received by him at the same time and from the same causes. The evidence was much the same, but in the case at bar the jury have found that the injury was caused by the *wanton and intentional* act of the defendants' servant, and not his mere negligence. We nowhere find in the record any motion for nonsuit or that the defendants asked the court to charge that there was not sufficient evidence to go to the jury as to the first issue, nor is there any exception to the failure to do so. As, however, the defendants' counsel devoted almost his entire argument to that point, we may say that it is not now before us, but if it were before us it would be without merit.

The plaintiff testified that "when I got into the creek and the lead horse was drinking, the train ran on to the trestle. The fireman was on this side of the engine, standing looking down on me. He turned back into the engine. The whistle blew quick, and the horses sprang off with me. The whistle was all right at once, sorter like a gun firing." Joe Hatcher testified: "From where I was standing I could see *persons* in the engine cab. When I first saw them, *they* were looking in direction of carriage. When they got on road nearly under trestle and most opposite me, whistle blew and *they* (479) were then looking towards carriage. There was nothing to obstruct their view of carriage. It was a short, shrill whistle—very loud. Have been acquainted with character of blow for stations; it was a long blow; this was a different blow." Mrs. Everett testified: "Whistle was sharp and shrill. River was considerably swollen. When whistle blew, I saw *them* looking out of the engine window —seemed to be looking towards us. Think I saw two men in engine looking—one sitting, the other standing; am sure I saw one." Whit Sutton testified: "At the time of the accident I was just this side of the trestle; familiar with station blows; good deal of difference between the blow this time and the usual blow. *They* were sitting leaning out the cab window with *their* faces turned toward the team, as they were coming on over the trestle looking out the side window, no obstruction between them and the carriage." The testimony of the defendants tended to show that there were only two men in the cab at that time, the engineer and the fireman; and if there were more than one man looking towards the carriage, one of them must have been the engineer. Several witnesses testified that the whistle was sounded at an unusual place, and that the character of the blow was entirely different from the usual station blow. Taken in the light most favorable to the plaintiff, and upon such a motion it must have been so taken, there is certainly more than a scintilla of evidence. *Spruill v. Ins. Co.*, 120 N. C., 141; *Cox v. R. R.*, 123 N. C., 604. It is true, witnesses for the defendant testified to a different state of facts, but the jury evidently exercised their constitutional and immemorial privilege of believing just such testimony as they thought proper. With that right no one can interfere. The judgment is

Affirmed.

Cited: Palmer v. R. R., 131 N. C., 252; *Foot v. R. R.*, 142 N. C., 54; *Stewart v. Lumber Co.*, 146 N. C., 50, 60, 61, 77, 102.

(480)

GEORGE H. SMATHERS, RECEIVER OF WESTERN CAROLINA BANK ET AL. V. COMMISSIONERS OF MADISON COUNTY.

(Decided 19 December, 1899.)

County Bonds—Funding Debts for Necessary Expenses—Special Tax—The Constitution, Art. V, Sec. 6, and Art. II, Sec. 14—Mandamus.

1. Where the limit prescribed by the Constitution for the levy of taxes by the commissioners for general county purposes is reached, Art. V, sec. 6, and it becomes necessary to invoke the aid of the Legislature to authorize them to levy special taxes to meet the payment of county bonds and interest, the requirements of Art. II, sec. 14, must be strictly complied with as the whole of them are mandatory.

2. The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with Art. II, sec. 14, of the Constitution.

CIVIL ACTION for judgment and mandamus to enforce collection of interest on certain Madison County bonds held by the plaintiff as receiver of Western Carolina Bank. The defense was (1) That the bonds were invalid, being issued without legislative authority for the purpose of funding outstanding county indebtedness; (2) That the constitutional limit of taxation had already been reached by the commissioners; (3) That the legislative act of 1887, chapter 398, authorizing the commissioners to issue these bonds to pay the outstanding indebtedness, had not been passed in conformity to the requirements of the Constitution, Art. II, sec. 14; (4) That the bonds had not been sold for cash, as required by the act; but were exchanged at par for county indebtedness.

The cause was moved from Madison County to Transylvania (481) County for trial, and was tried by *Coble, J.*, at September Term, 1899, of the Superior Court, upon an agreed statement of facts.

His Honor rendered judgment for the debt, and the defendants appealed.

The facts and circumstances of the case are fully stated by Mr. Justice MONTGOMERY, who writes the opinion in both appeals.

FAIRCLOTH, C. J., dissenting.

George H. Smathers for appellant.
J. M. Gudger, Jr., for appellee.

MONTGOMERY, J. This action was brought to recover of the defendants certain amounts of money due to the plaintiff Smathers, receiver of the Western Carolina Bank, as interest on certain bonds issued by the commissioners of Madison County, and to compel by mandamus the commissioners to levy a special tax to pay the interest as well as to create a sinking fund to pay the principal of the bonds when they shall become due. It is not a controversy submitted without action, under section 567 of The Code, but, after the pleadings were filed, the plaintiff and defendants agreed upon the facts and submitted the same to the court for its judgment. The facts are substantially as follows: The county of Madison was indebted to various persons, the consideration of the indebtedness being the necessary expenses of the county already incurred, and, being unable to pay the same and at the same time to conduct the ordinary business affairs of the county with its resources obtainable through the taxes levied up to the full constitutional limitation, procured through its board of commissioners the enactment of a law by the General Assembly on the 17th of March, 1887, (Public Laws of 1887, ch. 398),

(482) authorizing the commissioners to issue coupon bonds and to sell the same to pay the outstanding indebtedness of the county incurred for necessary expenses and to levy a special tax to meet the interest on the bonds and also to create a sinking fund to pay the bonds at maturity. The commissioners issued bonds for that purpose, under the act, to the amount of $21,000, in denominations of $1,000 and $500 each, payable in 20 years, and bearing interest at 6 per cent, and payable on the first days of December and June of each year. The bonds were not sold for cash by the treasurer of the county, as was required by the act, but they were, at their face value, exchanged for the outstanding indebtedness of the county as provided for under the act, no interest being charged on either side from the date of the issue to the exchange of the same for the county indebtedness. The proper authorities of the county have levied a special tax each year, including 1896, to meet the interest on the bonds, and, for the years 1897 and 1898, to create the sinking fund besides; and the interest due to the plaintiff bank, up to and including the interest for the 1st of December, 1895, has been paid and nothing since has been paid except $495, in the year 1897, and the balance of the interest due, as stated in the complaint, is due and

unpaid. The commissioners have declined to order any part of the fund arising from the special tax levy of 1898 to be paid to the plaintiff as interest on the bonds which he holds, or to create a sinking fund for the payment of the bonds, and they declined on the first Monday in June, 1899, to levy any tax for the purposes required by the act, on the ground that the act authorizing the issue of the bonds and the levying of the special tax therein provided for was not passed by the General Assembly in accordance with the requirements of Article II, section 14, of the Constitution of the State. The commissioners of the county at their annual meetings on the first Mondays of June, 1898, and 1899, levied a tax for general county purposes up to the constitutional limitation, and that (483) the whole was necessary to meet the current expenses of the county. The plaintiff bank was not the original purchaser of the bonds now held by the plaintiff, Smathers, its receiver, but bought them in open market, in 1889, and paid 90 cents on the dollar for them, and the bank had no actual notice of any irregularity in the issue and sale of the bonds. From the Senate and House Journals of the session of 1887, it appears that the "yeas" on the second reading of the bill were entered on the House Journal, but it was not stated that there were no "nays," and that in the Senate the first and second readings of the bill took place on the same day.

Upon the facts, the judgment of the Court was asked as follows, (in the language of the counsel of both the plaintiff and the defendant):

1. As to the validity of the said bonds.

2. As to the validity and constitutionality of the tax levy provided for in the said act of 1887.

3. If said bonds are valid, then are the Western Carolina Bank, and Geo. H. Smathers, receiver thereof, or either of them, entitled to a writ of mandamus from the court to compel the board of commissioners of said county of Madison to meet in extra session, and levy the special tax provided for in the said act of 1887, to meet the interest on said bonds, and create a sinking fund, provided for in said act, for the year commencing June 1, 1899; and if said board can not by law be required to meet in extra session to levy said special tax on that date, then can said board of commissioners be required to meet on the first Monday in June, 1900, to levy said special tax, as well also as the tax to be levied on that date, to meet the interest on said bonds, and create the sinking fund, as provided for in said act of 1887, for the year commencing the first day of June, 1900?

(484) 4. As to what judgment, if any, the plaintiffs are entitled to against the defendant board of commissioners, for the interest due the plaintiffs on said bonds, so held by Geo. H. Smathers, receiver aforesaid, but the judgment of the Court is not asked as to any other question raised by the pleadings.

The Court rendered a judgment in the following words: "And the Court being of opinion that the said bnds are valid, having been made and exchanged for claims of indebtedness created for the necessary expenses of the county, and the said special-tax levy attempted to be authorized by the said act of 1887 is invalid and unconstitutional, since the said act was not passed according to the requirement of Article II, section 14, of the Constitution of North Carolina, as appears from the facts above set out.

"It is therefore considered and adjudged that the plaintiffs do recover judgment against the defendant board of commissioners of said county for the balance of the interest accrued and due for the years 1896, 1897 and 1898, and up to June 20, 1899, the beginning of this action, on said bonds, to wit; three thousand and seven dollars ($3,007), and the costs of this action to be taxed by the clerk.

"It is further considered and adjudged that the plaintff is not entitled to a writ of mandamus as prayed for to compel the said defendant board to levy the said special tax."

Both parties appealed from the judgment of the Court. The plaintiff's appeal was only from that part of the judgment in which the Court refused to grant the writ of mandamus prayed for in the complaint. The error assigned was that, as the indebtedness of the county was for necessary expenses, his Honor should not have held that it was necessary that the bill authorizing the issue of the bonds and the levying of the special tax should have been passed in compliance with section 14, Article II of the Constitution, to make them (485) valid, and that he should have ruled, if that section of the Constitution had any bearing on the manner in which the particular act should have been passed, that all that was mandatory in that section had been complied with.

We will now discuss the position of the plaintiff. It appears from the facts agreed that for the years 1898 and 1899, the levy of taxes by the commissioners for general county purposes was up to the limit prescribed by the Constitution, and it must be inferred from the fact that legislative aid was invoked in 1887 to enable the commissioners to settle the outstanding indebtedness of the county that the indebtedness could not be paid with the taxes levied and collected

up to the constitutional limit, although the record is silent on this point. It became necessary, therefore, for the commissioners, in 1887, to invoke the aid of the Legislature to authorize them to levy special taxes to meet the payment of the bonds and the interest, for in Article V, section 6, of the Constitution, it is ordained that "the taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly." *McCless v. Meekins,* 117 N. C., 34; *Tate v. Commissioners,* 122 N. C., 812. The commissioners for several years thought they had the power to issue the bonds and to levy the taxes for their payment under the act which we have been discussing, and the only question presented by the plaintiff's appeal is whether it was necessary that that act should have been passed according to the requirement of section 14, Article II, of the Constitution?

The contention of the plaintiff is that all of that section of the Constitution which is mandatory is embraced in the words "and unless the yeas and nays on the second and third read- (486) ings of the bill shall have been entered on the Journal," and that that requirement was complied with. The argument of Mr. Smathers was able and exhaustive. In support of his position he cited the case of *Carr v. Coke,* 116 N. C., 223, and insisted that, by that decision, the certificate of ratification of the act by the speakers was a presumption conclusive and irrebutible, that the bill had been read three times in both houses, and that that conclusive presumption, together with the fact that the yeas and nays in both houses had been entered on the journals, made a full compliance with the constitutional requirement. The counsel was mistaken, however, in believing that the *nays* were entered on the journal of the House upon the second reading. The record shows that the yeas were entered, but does not show that there were no nays. But even if that had been the case, the decisions of this Court are to the effect that the whol of section 14, Article II, is mandatory. *Bank v. Comrs.,* 119 N. C., 214; *Comrs. v. Snuggs,* 121 N. C., 394; *Comrs. v. Call,* 123 N. C., 308; *City of Charlotte v. Shepard,* 122 N. C., 602. In *Comrs. v. Snuggs, supra,* at p. 399, the Court said: "But in that class of legislation, the purpose of which is to legislate under section 14 of Article II of the Constitution, a literal compliance with the language of that section is a condition precedent, and one which must be performed in its entirety before the bill can become a law." In *Bank v. Comrs., supra,* the Court said: "This case has no analogy with *Carr v. Coke.*

That merely holds that when an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house and ratified. Const. Art. II, sec. 23. And so it is here; the certificate of the speaker is conclusive that this act passed three everal readings in each house, and was (487) ratified. The certificate goes no further. It does not certify that this act was read three several days in each house, and that the yeas and nays were entered on the journals. The people had the power to protect themselves by requiring in the organic law something further as to acts authorizing the creation of bonded indebtedness by the State and its counties, cities and towns, and the fact certified to by the speakers of three readings in each house and ratification.

There was no error in the ruling of his Honor in the court below, nor in the judgment, and the same is

Affirmed.

FAIRCLOTH, C. J., dissents.

DEFENDANTS' APPEAL

Where bonds are issued to secure the outstanding debt of the county, incurred for its necessary expenses, they constitute a valid debt against the county.

MONTGOMERY, J. His Honor held that, as the consideration upon which the bonds were issued was the indebtedness of the county, incurred for its necessary expenses, the bonds constituted a legal and valid debt against the county. The defendants excepted, and appealed from this ruling and judgment. The ruling was correct. Legislative aid was not necessary to enable the county commissioners to bond such indebtedness. As far back as 1876 this Court held, in *Tucker v. City of Raleigh*, 75 N. C., 267, that it was not necessary, in order that a municipal corporation might create a debt for necessaries, that a popular vote should be required therefor, and that when such a debt had been created, the authority to contract implies that the municipality had the power to furnish to the creditor proper evi- (488) dence of the debt—evidence by its bond. The same point precisely was decided in like manner in *McCless v. Meekins*, 117 N. C., 34. Such being the law, it follows as a matter of course that, whenever there is a municipal debt incurred for necessary municipal expenses, it becomes the duty of the proper municipal authori-

ties to levy a special tax to pay it without seeking the aid of legislative authority if such special tax, together with the other regular taxes, should not exceed the constitutional limitation. Nor is it necessary in cases where the Legislature authorizes a county or city or town to levy a special tax to pay a debt created for the necessary expenses of the county, city or town, to submit the matter to a popular vote. *McCless v. Meekins,* and *Tate v. Comrs., supra; Herring v. Dixon,* 122 N. C., 420. In the last-named case, the decisions on this point are summed up as follows:

"1. For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.

"2. For necessary expenses the county commissioners may exceed the constitutional limitation by special legislative authority without a vote of the people. Constitution, Art. V, sec. 6.

"3. For other purposes than necessary expenses, a tax can not be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority. Constitution, Art. VII, sec. 7."

No error.

FAIRCLOTH, C. J., dissents.

Cited: Glenn v. Wray, 126 N. C., 732; *Black v. Comrs.,* 129 N. C., 126; *Comrs. v. DeRosset, ib.,* 279; *Debnam v. Chitty,* 131 N. C., 677; *Jones v. Comrs.,* 135 N. C., 226; *Bank v. Comrs., ib.,* 243; *Comrs. v. Stafford,* 138 N. C., 455.

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(489)

HINKLE, CRAIG & CO., v. MATTIE GREENE (WIDOW)

(Decided 19 December, 1899.)

Conditional Sale—Year's Allowance, The Code, Sec. 1275.

1. A conditional sale of personal property made to the husband, registered after his death, like a mortgage, takes precedence over an allotment of year's allowance, including this property made to his widow after the registration. *Williams v. Jones,* 95 N. C., 504.

2. While the widow's right to her allowance was valid against the general creditors of her deceased husband, it is postponed to liens and equities existing at his death.

HINKLE *v.* GREENE.

CIVIL ACTION for personal property, tried before *McNeill, J.*, at Spring Term, 1899, of WATAUGA Superior Court, upon a case agreed, which is stated in the opinion.

His Honor rendered judgment in favor of plaintiffs, and defendant appealed.

No counsel for appellant.
W. C. Newland, W. B. Councill, Jr., and E. S. Coffin for appellee.

FAIRCLOTH, C. J. This case was heard upon agreed facts, viz.:

1. That in March and April, 1898, the defendant's intestate purchased certain personal property from plaintiffs, and gave his promissory notes for the purchase money, in which notes it is recited that the title (of said property) remains in the plaintiffs until the whole be paid.

2. That said intestate died November 2, 1898, and on November 5, 1898, said notes were duly registered in register's office in Watauga County, and soon thereafter the defendant caused her year's (490) allowance to be assigned to her, and the allottment includes the personal property purchased as above stated, for which said notes were given, and on December 15, 1898, the defendant was duly appointed administratrix on her said husband's estate.

The Code, section 1275, requires that, "All conditional sales of personal property, in which the title is retained by the bargainor, shall be reduced to writing and registered in the same manner for the same fees, and with the same legal effect as is provided for chattel mortgages." The question then arises, which has the better title, the plaintiff by his registration of said notes or the defendant by the assignment of her year's allowance? The case must be governed by the principle announced in *Williams v. Jones*, 95 N. C., 504. In that case, the chattel mortgage was registered after the death of the mortgagor, and the allotment of the widow's year's allowance included the mortgaged property. It was held that the mortgage may be registered after the death of the mortgagor; also, that the widow's right to her allowance was valid against the general creditors of her deceased husband, but as to the liens and equities she takes the property in the same plight that her husband held it, and therefore subject to the mortgage lien, because the registered conditional sale is attended with "the same legal effect as is provided for chattel mortgages," and, besides, is good between these parties.

This is the only question for us, to be found in the record.

Affirmed.

(491)

EMMA McLEAN v. T. J. SHAW ET AL.

(Decided 19 December, 1899.)

Cloud Upon Title—Judgment Lien—Acts 1893, Chapter 6.

1. A judgment lien is not included in the terms "estate" and "interest" used in the act of 1893, ch. 6, relating to actions to remove cloud upon title.

2. A prayer for relief would be considered by the Court after a sale under execution, should the purchaser delay to commence suit for possession; then the claimant to the title, whether in or out of possession, could proceed under the act of 1893 against such purchaser.

ACTION to remove cloud upon title of plaintiff to land claimed by her, pending in the Superior Court of SWAIN County, heard before *Moore, J.*, at chambers, 26th August, 1899, upon a motion to continue an injunction order to the final hearing. Motion allowed. Defendant appealed.

The case is fully stated in the opinion.

F. C. Fisher for appellant.
A. M. Fry for appellee.

MONTGOMERY, J. A tract of land claimed by the plaintiff was about to be sold under an execution which was issued upon a judgment rendered in favor of the defendant against P. P. McLean, the husband of the plaintiff, when the plaintiff commenced this action under chapter 6 of the Laws of 1893, to remove an alleged cloud from her title caused by the judgment and execution. A restraining order was made against the defendant enjoining him from making the sale under the execution, and the same was afterwards continued until the final hearing. The affidavits filed in the cause show that there is an issue as to the bona fides in the execution of (492) the deed under which the plaintiff claims. This is an appeal by the defendant from the rule continuing the restraining order.

It was conceded by the plaintiff's counsel, on the argument here, that, under such cases as *Southerland v. Harper,* 83 N. C., 200, and *Bristol v. Hallyburton,* 93 N. C., 384, the plaintiff would not be entitled to the relief she seeks; but he contended that the action could be maintained under chapter 6 of the Laws of 1893, and that until the hearing of the case injunctive relief against the execution sale ought to be afforded the plaintiff.

Under a line of decisions of this Court, culminating with *McNamee v. Alexander,* 109 N. C., 242, it was held that a plaintiff could not maintain an action to remove a cloud upon his title unless it appeared affirmatively that he was rightfully in possession of the land. The act of 1893, chapter 6, extended such relief to those who were not in possession. *Daniel v. Fowler,* 120 N. C., 14. We think, however, that it is not in contemplation of the act that a judgment lien should be included in the terms "estate" and "interest" as they are used in the act. If a judgment ought for any good reason to be canceled and discharged, and the creditor should refuse to cancel it, the debtor has his proper remedy by independent action or motion, as may suit the circumstances of his case. If, as in the case before us, the real estate levied upon should be claimed by one other than the execution debtor, then nothing can more quickly bring up for trial the plaintiff's prayer for relief (to have the cloud removed from his title) than to allow the execution sale to take place. If the purchaser should delay to commence suit for recovery of possession, then the claimant can commence proceedings under the act of 1893.

For the reasons above stated, we think there was error on the part of the court below in continuing the restraining order.

Error.

Cited: Connor v. Dillard, 129 N. C., 51.

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(493)

T. M. DELOZIER ET AL. v. R. L. AND J. BIRD.

(Decided 19 December, 1899.)

Receiver of Rents and Profits—Possession.

Where a receiver of rents and profits has been appointed by the Court, he stands in the shoes of landlord, and by pernancy of the rents is constructively in possession, and any disturber of that possession will be in contempt.

PETITION TO REHEAR. Case reported in 123 N. C., 689. Petition dismissed.

F. C. Fisher for petitioner.
Davidson & Jones, A. M. Fry and R. L. Leatherwood contra.

CLARK, J. This is a rehearing of the case reported in 123 N. C., 689, restricted to one point. The court below found as facts:

1. That the lands were in possession of the receiver appointed by the court, as shown by the order appointing said receiver.

2. That the plaintiff and other respondents entered on the premises in the night time and took possession of said property, so in custody and control of the court, and hold possession of the same by force and in defiance of the orders of the court; and further, that they tore down the dwelling house which was on said land, and removed the same from the premises, and committed other injury and spoil upon said property. Whereupon they were attached for contempt and ordered to "restore said house to the said property (494) in the same plight and condition that it was before the wrongful and unlawful tearing down the same, and that they immediately turn over and deliver possession of said property to defendant in the action to be held by him subject to, and under the orders of, a receiver theretofore appointed," with an order committing respondents to jail till they comply, but providing that upon such compliance being made to appear to any judge riding the district, after notice to the defendant, the attachment may be dissolved.

This was an action of ejectment, and the receiver had been appointed on the motion of the plaintiff. The order makes it the duty of the receiver to collect from the defendant one-third of the crops growing or which shall be grown upon the land during the litigation, to superintend the gathering and measuring of said crops, and to sell the said one-third thereof and hold the proceeds subject to the order of the court. The plaintiff and the other respondents contend, and correctly, that the first finding of fact that the lands were in the possession of the receiver "as shown by the order appointing him," is really a conclusion of law, and reviewable, for it depends upon the legal effect of that order. But it would seem there was no error in the legal construction of the order, for in 5 Thomps. on Corp., sec. 6928, *note,* it is said: "Where a receiver of rents and profits has been appointed, and tenants have attorned to him, or have accounted to him, for a share of the crops, etc., belonging to the landlord, a thereafter a sheriff levies execution thereon, he will be in contempt for thus attempting to disturb the constructive possession of the receiver." Citing *Bank v. Schermerhorn,* 9 Paige (N. Y.), 372. The reason seems to be that the receiver being placed in pernancy of the rents is in the shoes of a landlord, and therefore con- (495) structively in possession, and any interference with the possession of the tenant (which is *sub modo*), interferes with the control of the landlord, or of the receiver of the court, who stands in the stead

of the landlord. In *Crow v. Wood,* 13 Beaven, 271, it is said that the appointment of a receiver of "the income of property (whatever that might be)" would not put the receiver in possession of the realty, but that it would be otherwise if the receiver was ordered to receive the rents of the estate out of which they were issuing. Besides, in the present case, the judge finds the fact that the respondents "hold possession of the property by force, and in defiance of the orders of this court." This certainly is an explicit finding of fact, and we are bound by it. Nor was there any error in ordering the plaintiff in ejectment who had taken possession of realty, pending litigation, to restore it to defendant, or to the receiver. *Horton v. White,* 84 N. C., 297.

Petition dismissed.

Cited: Williamson v. Pender, 127 N. C., 489; *Wilson v. Lumber Co.,* 131 N. C., 164.

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(496)

W. A. COLE v. D. L. BOYD, R. G. A. LOVE.

(Decided 19 December, 1899.)

Verification of Complaint—Judgment Final—Judgment by Default and Inquiry—Code, Sec. 258.

1. Where a properly verified complaint would entitle a plaintiff to judgment final, for want of an answer, if the complaint is not properly verified, the judgment should be by default and inquiry.

2. A verification to complaint, "that the facts therein stated of his own knowledge are true, and that those matters stated on information and belief he believes to be true," is not a stubstantial compliance with the requirement of The Code, sec. 258, which requires that "the verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true." *Phifer v. Insurance Co.,* 123 N. C., 410.

ACTION FOR DEBT, with attachment proceeding, heard before *Coble, J.,* at HAYWOOD Superior Court, Fall Term, 1899, and judgment final on the complaint for want of answer, to which defendants excepted and appealed. Exceptions are stated in the opinion.

G. S. Ferguson for appellants.
Moody & Welch for appellees.

DOUGLAS, J. This is a civil action in the nature of debt, begun by attachment. The complaint was filed in the Superior Court on the 12th day of September, 1898, during the fall term of said court. No answer nor other pleading was filed by the defendants during said term. At Spring Term, 1899, the defendant demurred to the complaint, whereupon an amended complaint was filed by order of the Court. No answer was filed at this term, nor within the time allowed (497) thereafter, and at Fall Term, 1899, the Court refused to allow the defendants to file an answer, and rendered a final judgment for the plaintiff. The defendants excepted and appealed, assigning the following grounds:

"1. For that the facts stated in the complaint do not constitute a cause of action against the defendants.

"2. For that the judgment is for default final, and should only be for default and inquiry for the want of a verified complaint, the purported verification not being as the law requires."

The verification is as follows: "W. A. Cole, plaintiff, being duly sworn, says, that he has heard read the foregoing complaint, and knows the contents thereof, and that the facts therein stated of his own knowledge are true, and that those matters stated on information and belief he believes to be true."

We can not agree with the defendants in their first exception, but we are compelled to do so regarding their second exception. The verification of the complaint is substantially similar to that which this Court held insufficient in *Phifer v. Ins. Co.*, 123 N. C., 410. It is useless to repeat the argument in that case, but we would again call the attention of the profession to the provisions of The Code, and the necessity for a substantial compliance therewith. We do not wish to be understood as insisting upon a *literal* compliance. Such a requirement would be needless and unreasonable, and would be contrary to the spirit of our present system, which seeks to secure a fair and prompt determination of all actions upon their merits, without useless technicalities. Any form of words that is equivalent thereto will be sufficient. We may even go further and say that we would permit any form of verification that, taken in connection with the form of statement in the pleading clearly distinguishes between personal (498) knowledge and information so as to render the affiant legally responsible for the truth of every material allegation. But the object of verification is to verify. If it fails to do this, it is worse than useless. If a party wishes to bind his opponent with the obligations of a verified pleading, he must bind himself, and must so state every material allegation that it will not only rest under the moral sanctity

of an oath, but that its falsity will fasten upon him the penalties of perjury. This, being the object of a verification, is the true test of its sufficiency. Section 258 of The Code requires that "the verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true." While it is not necessary to follow the exact words of the statute, it is always safe to do so, and we would strongly advise such a course in preference to mere experimental practice, which is always dangerous. As the complaint was not properly verified, that is, in contemplation of law not verified at all, the plaintiff is not entitled to a final judgment. This judgment will therefore be stricken out in the court below, and judgment by default and inquiry entered in lieu thereof.

Error.

FAIRCLOTH, C. J., dissents, citing *Alspaugh v. Winstead,* 79 N. C., 526; Eaton's Forms, 588.

Cited: Payne v. Boyd, post 502; *McLamb v. McPhail,* 126 N. C., 220; *Best v. Dunn, ib.,* 561; *Cantwell v. Herring,* 127 N. C., 84; *Martin v. Martin,* 130 N. C., 28.

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(499)

H. D. PAYNE v. D. L. BOYD, M. HENRY.

(Decided 19 December, 1899.)

Insufficient Verification—The Code, Section 258.

A verification to complaint to be effectual must substantially accord with with The Code, sec. 258. *Cole v. Boyd,* at present term.

ACTION FOR DEBT, with attachment proceeding, heard before *Coble, J.,* at HAYWOOD Superior Court, Fall Term, 1899, and judgment final on the complaint for want of answer; to which defendants excepted and appealed.

Exceptions are stated in opinion.

G. S. Ferguson for appellants.
Moody & Welch for appellee.

DOUGLAS, J. This is a civil action, the material facts of which are sufficiently stated in the judgment, which is as follows:

The above cause coming on to be heard at this the Fall Term, 1899, of Haywood County Superior Court, before Hon. A. L. Coble, Judge of the Third Judicial District, presiding and holding the courts in the Twelfth Judicial District, and being fully heard upon the pleadings, record and orders heretofore made in the cause, and it appearing to the satisfaction of the court that summons in the above cause was duly served upon the defendant D. L. Boyd on May 10, 1898, and that a warrant of attachment was regularly issued from the Superior Court of Haywood County in the above cause, and levied upon certain lumber in the possession of the defendants, which is fully described in the affidavit filed to obtain said warrant of attachment, and the defendants, on May 12, 1898, filed an undertaking as required by statute with R. G. A. Love and W. N. (500) Cooper as sureties, conditioned that the defendants would pay the plaintiff whatever judgment the plaintiff recovered of the defendants in this action; and it further appearing to the satisfaction of the Court that the plaintiff filed his verified complaint in the above cause at Fall Term, 1898, of said Superior Court alleging that the defendants were indebted to the plaintiff in the sum of $544.45, with interest thereon from May 11, 1898, and that at Spring Term, 1899, the plaintiff by order of court filed his amended complaint alleging said indebtedness and specifically setting out the contract and agreement upon which said indebtedness arose, and the defendants having failed to answer said amended complaint, which was a verified complaint, within the time required by the orders of this court, and it appearing to the satisfaction of the court from said verified complaint, that the defendants are indebted to the plaintiff in the sum of $544.45, with interest thereon from May 11, 1898, until paid: It is now, upon motion of W. B. and H. R. Ferguson, and Moody & Welch, attorneys for the plaintiff, considered, adjudged and decreed by the court that the plaintiff have and recover of the defendants and R. G. A. Love and W. N. Cooper, their sureties on said undertaking in attachment, the sum of $544.45, with interest thereon from May 11, 1898, until paid, together with the costs of this action to be taxed by the clerk.

Defendants object and except to the above judgment, on the following grounds.

1. For that the facts stated in complaint do not constitute a cause of action against the defendants.

2. For that the complaint shows upon its face that the contract set out as an exhibit in the complaint was for the performance of

(501) certain of entire contract, and it is not alleged in complaint that plaintiff performed their part of the contract, and that they are ready, willing and able to do so, and that he does not allege that he has been prevented from complying with his contract by any default of the defendants; and for the further reason that the contract shows on its face that the lumber to be delivered at the Waynesville depot was in different classes, at different prices, and that the complaint does not show that the plaintiff delivered any specified amount of lumber at any agreed price, and that upon such complaint judgment final can not be entered by default.

3. For that the complaint is not verified as required by statute.

The objection and exceptions were overruled by the court and judgment signed, and the defendants excepted and appealed to Supreme Court. Notice of appeal waived. Appeal bond fixed at $425.00.

Bond to stay execution fixed at $500.00.

And it is agreed by counsel for plaintiff and defendants that the record in the cause, orders heretofore made, judgment and exceptions above stated shall constitute the case on appeal.

We do not think that the defendants' first exception can be sustained. While we think it doubtful whether the complaint, even if properly verified, would have justified more than a judgment by default and inquiry, we are satisfied that the verification is not sufficient to sustain a final judgment. The verificaton is as follows: "H. D. Payne, plaintiff in this action, being duly sworn, says, that he has heard read the foregoing amended complaint, and that he knows the contents of the same, and that the facts therein stated of his own knowledge are true, and those matters stated on information he believes to be true."

This is substantially the form of verification which this (502) Court has held to be insufficient in *Phifer v. Ins. Co.,* 123 N. C., 410, and *Cole v. Boyd,* at this term. The opinions of the Court in those cases determine its judgment in the case at bar. We deem it necessary to adhere to the reasonable enforcement of this rule in the interest of substantial justice. In the present case it does not appear to work any hardship, and in all cases the party can appeal to the discretionary power of amendment lodged in the court, which we doubt not will be exercised upon all proper occasions. The judgment final will be stricken out in the court below and judgment by default and inquiry entered in lieu thereof.

Error. Reversed.

FAIRCLOTH, C. J., dissents, citing *Alspaugh v. Winstead,* 79 N. C., 526; Eaton's Forms, 588.

Cited: McLamb v. McPhail, 126 N. C., 220; *Best v. Dunn, ib.,* 561; *Cantwell v. Herring,* 127 N. C., 84.

(503)

G. D. HODGIN v. PEOPLES NATIONAL BANK.

(Decided 19 December, 1899.)

Petition to Rehear case Reported 124 N. C., 540.

1. Rule 53, Clark's Code, p. 711, explained as more particularly intended for the guidance of the justice who orders the rehearing.

2. When a rehearing has been ordered, and a manifest error is made to appear, the Court will correct it.

3. Upon the dissolution of a partnership by the death of one of its members, the surviving partner is the legal owner of its assets, which he holds in trust, first to pay the debts of the partnership, and then for the benefit of the estate of the deceased partner.

4. When the defendant bank knew that the plaintiff was the only surviving partner of a firm, and that he was making deposits as such, it had no right to apply them to the payment of a debt created by the partnership before its dissolution, without the consent of the depositor.

Holton & Alexander and Shepherd & Busbee, E. E. Gray and Chas. Price for petitioner.

Glenn & Manly, Jones & Patterson, A. H. Eller and Watson, Buxton & Watson contra.

FURCHES, J. This is a petition to rehear. The same case was before the Court at February Term, and is reported in 124 N. C., 540, and it is now contended for defendant that the case should not be reheard, for that to do so would violate the rules of practice prescribed by this Court in *Weathers v. Borders,* 124 N. C., 610; *Hudson v. Jordan,* 110 N. C., 250; *Tucker v. Tucker, ibid.,* 333; *Emry v. R. R.,* 105 N. C., 45; *Gay v. Grant, ibid.,* 478; *Watson v. Dodd,* 72 N. C., 240, and *Mullen v. Canal Co.,* 115 N. C., 15 where it is said that a case should not be reheard unless it shall appear that facts have been overlooked or some authority has been overlooked, or that the case has (504)

been decided hastily and without full consideration, or that the opinion contains a legal error. Some of the cases cited were decided before the adoption of Rule 53, Clark's Code, p. 711, and may have led to the adoption of that rule; and those decided since its adoption have been in conformity to this rule; and the cases cited may be found in Clark's Annotated Code, under that rule, except those cases that have been decided since that Code was published.

This rule as we understand it, was intended for the guidance of the justice who orders the rehearing. But we will admit that it has not always been observed in granting applications to rehear, as in *Comrs. v. Lumber Co.,* 116 N. C., 731, and other cases that might be cited. But after the rehearing has been granted and the case has been argued upon the rehearing and a manifest error is made to appear to the Court, is it contended that the Court should not correct the error because it was not pointed out on the former argument and not discovered by the Court on the former hearing? Is it contended that the Court is estopped to correct an error of *law* on a rehearing, even if it was *considered* and erroneously decided on the former hearing?

The writer of this opinion has probably been more pronounced than some of the other members of the Court in adhering to the terms of Rule 53, in granting rehearings, and he does not think they should be granted upon alleged errors of *law,* unless it manifestly appears to the justice granting the rehearing that there is such error. But when the rehearing has been ordered, and a manifest error is made to appear, it is the duty of the Court to correct it. This is frequently done by this and other appellate courts, in overruling former decisions when they are found to be erroneous, and stand in the way of a
(505) correct decision of the case under consideration. It cannot be less its duty to correct its own decision when found to be manifestly erroneous.

We have discussed this question at some length, upon the general question of rehearing cases, as it seemed necessary for us to do so on account of the serious contention that has been made against our considering the alleged errors, for the reason that they were considered in the former opinion of this Court. But, so far as the rehearing in this case is concerned, the petition to rehear complies with the requirements of Rule 53.

The petition to rehear alleges and undertakes to point out both errors of fact and errors of law, contained in the statement of facts, and questions of law in the opinion of the Court; and, by inadvertence the facts as they really exist were overlooked by the Court.

It is stated in the opinion of the Court, that: "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 debt only, and not upon the individual debt of L. L. Lunn at all."

The petitioner alleges that in this statement there was error; that as a matter of fact he contended that he was the sole owner of this fund, in trust, and had the right to pay it out to creditors of the firm as he chose, but that he had intended to pay out pro rata. And upon an inspection of the record this contention of the petitioner seems to be correct, and that the statement of the Court, inadvertently made, is not correct.

It is stated in the opinion of the Court "that there was a verdict in favor of the defendant," and the petitioner alleges that this is another inadvertent statement which is not correct. The petitioner alleges that as a matter of fact the jury found all the issues, except the eighth, and those agreed upon by the parties, for the (506) plaintiff. And upon an examination of the record it appears that the eighth issue is the only issue upon which the defendant claims that a judgment should be rendered in its favor. There are other errors alleged in the petition to rehear, to which we make no reference, and have only specially noticed these for the purpose of showing that the petition complies with the requirements of Rule 53.

The question then is: Is there error in the judgment of the Court rendered at the last term? And to save repetition and time we may say that every issue was found for the plaintiff, except the eighth, which the defendant claimed entitled it to the judgment of the court. And it was upon this issue that the court gave judgment for the defendant. This issue is as follows: "Were the said two sums as alleged in the complaint, amounting to $3,037.77, deposited with the said bank, to be held by the said bank, with knowledge that it was a trust fund, for the benefit of the creditors of Hodgin Bros. & Lunn?

Upon this issue, among other things, the plaintiff requested the Court to charge that if the defendant received these funds from the plaintiff, whom it knew to be the surviving partner of the firm of Hodgin Bros. & Lunn, though they were derived from the assets of the firm, still they were trust funds belonging to the plaintiff, held by him for the benefit of creditors. The Court declined to so charge, but charged the jury that, if the bank received these funds from the plaintiff as the survivor of the firm of Hodgin Bros. & Lunn, said funds belong to the plaintiff as trustee for creditors, and the bank, knowing these facts, would hold them in trust; but as they were derived from the assets of the firm of Hodgin Bros. & Lunn, the bank

had the right to apply them to the payment of the indebtedness of Hodgin Bros. & Lunn, unless they had been placed there by plain-
(507) tiff, and received by defendant, as a "special deposit"; and that, if the jury find that the $650 debt was made for the benefit of the firm, it (the bank) had the right to apply this fund to the satisfaction of that debt also.

So, after all, the eighth issue and charge of the Court upon that issue may be regarded as the "storm-center" of this case on the rehearing.

The plaintiff Hodgin testified: "I went to Mr. Blair, vice-president of the bank, and asked what was my duty. He said, collect the assets and pay debts in dividends. Again I told Mr. Blair, as the bank was creditors of Hodgin Bros. & Lunn, I wanted to deposit assets with *him* in order that *he might* see that the funds were properly applied." This evidence was not contradicted or disputed, though Mr. Blair was afterwards examined as a witness in behalf of the defendant. And, what is a little singular, the plaintiff contends that this evidence is in his favor, while the defendant contends that it is in its favor. We do not see that it is very material to either side, except that it emphasizes the fact that the defendant received this fund from the plaintiff, knowing that he was making the deposit as the surviving partner of the firm of Hodgin Bros. & Lunn. And this, to our minds, is the turning point in the case.

It was held in the former opinion (124 N. C., 540), that the defendant had no right to apply this fund to the payment of the $650 note of L. L. Lunn, and that there was error in the judgment appealed from, to that extent; and as the petition to rehear alleges no error in that part of the opinion of the Court, it is not necessary to notice this debt further, and we will not do so.

The question then is: Was the judgment of this Court at the former term erroneous as to the other debt due the defendant by the firm of Hodgin Bros. & Lunn? We are of the opinion that it was.

(508) The learned judge who tried the case below held that the plaintiff was the legal owner of this fund, and that he held it in trust for the payment of the debts of the dissolved copartnership of Hodgin Bros. & Lunn. This was correct. But he further held, that, when he deposited it with the defendant, the defendant then had the right to apply it to the payment of the debt due to it by the dissolved copartnership "unless he placed it there as a *special deposit.*" In this instruction there is error. It seems to us that the learned judge did not distinguish the difference between a deposit of a special fund, known to be such by the defendant, and a special deposit.

A special deposit cannot be checked upon because it does not belong to the bank. It remains the property of the depositor and must be returned in specie, that is, the same thing deposited must be returned to the owner. And, if it is lost or stolen without the negligence of the bank, it is the depositor's loss. But this is not so in cases of a general deposit or in cases of a general deposit of a special fund or of a fund for a special purpose, where the facts are known to the bank. *Bank v. Armstrong,* 15 N. C., 515.

In this case the facts were all known to the defendant bank at the time these deposits were made. It knew that Lunn was dead; that the plaintiff was the only surviving partner of the firm, and that he was making the deposits as the surviving partner. And knowing these facts, the bank was in law bound to know that the plaintiff was the owner of these deposits and that he held them in trust for the payment of the debts of the dissolved copartnership. *Wisel v. Cobb,* 114 N. C., 22. And, knowing these facts, it had no right to apply them to the payment of a debt, created by the partnership before its dissolution. Bates Law of Partnership, sec. 720; Story on Partnership, sec. 348; *Case v. Abell,* 1 Paige, 398; *Nelson v. Hayner,* 66 Ill., (509) 487; 17 Am. and Eng. Enc., 1154. It is thus seen that the plaintiff was the owner of these deposits, though he held them in trust for the benefit, first, to pay debts of the partnership, and then for the benefit of the estate of the deceased partner. And it is only where the depositor stands in the same relation to the bank as the debtor, and deposits funds that belong to him and held by him in the same right as the debtor, that the bank has a right to appropriate and apply the deposits to the payment of a debt due to it. There must be a mutuality between the debtor and creditor and between the debt and the fund deposited. If the fund is a trust fund, it can not be applied by the bank to the payment of an individual debt. Morse on Banks and Banking, 334; *Galbrath v. Tacy,* 28 L. R. A., 130, and note; *Uillell v. Gafney,* 3 Cal., 350; *Russell v. McCall,* 121 N. Y., 437; and other authorities might be cited but we do not deem it necessary to do so.

Upon examination we do not think that *Jordan v. Bank,* 74 N. Y., 467, and Morse on Banks and Banking, sec. 325, sustain the defendant's contention that it had the right to make this application; and that, if they are so construed, this construction puts them in conflict with all the other authorities we have consulted.

It was contended for the defendant that the case of *Simpson v. Ingham,* 2 Barron & Cress., 65, is directly in point for the defendant. But upon examination of that case it will be found that it has no application to this case. There, as will appear by examination, two

banks in England had dealings with each other, one in London and the other in the country. They were private banks, copartnerships, not corporations, and therefore all the partners were liable. One of the partners of the country bank died, causing a dissolution of the
(510) partnership. The other partners continued the business, and continued to deal with the London bank. The new firm drew upon the London bank, and also made deposits in that bank. When the deposits were made by the new bank, the business of which was carried on by the surviving partners of the old bank, the London bank at first entered them to the credit of the account of the old bank, which was largely indebted to the London bank at the dissolution of the old country bank. But before the London bank had furnished the country bank with a statement of its account, it changed the entries on its books, and placed the deposits, made by the new country bank, to its own credit. To this, the parties bound for the liability of the old bank to the London bank objected, and contended that inasmuch as the London bank had at first credited the old bank with these deposits, it could not afterwards change these entries and credit them to the new bank. And this is the question presented and decided in the case of *Simpson v. Ingham*. The Court held that, as the bank had not notified the new bank of this application, it had the right to make the change and apply the deposits of the new bank, which had made them. So, it is plain to be seen that *Simpson v. Ingham* does not in any way present the point involved in this case; nor does the decision in that case bear upon the case now under consideration in the most remote degree.

While it is said, and truly said, that a court does not like to overrule itself, yet it should do so at the earliest moment, when it is manifest that it has been in error. Upon a careful review of the case and the authorities, we are satisfied we fell into error.

There was error in the trial below, as pointed out in this opinion, for which the plaintiff was entitled to new trial upon the debt
(511) of Hodgin Bros. & Lunn, as well as upon the individual debt of L. L. Lunn. It is so ordered now.

New trial.

CLARK, J. dissenting. This is a rehearing of the case decided at the last term, 124 N. C., 540. Neither a single fact nor a single authority is alleged to have been overlooked. Indeed, no new authority is cited for the rehearing. The case stands precisely upon the same facts and authorities as upon the former hearing, and the Court has repeatedly said that in such case the petition for rehearing will not be allowed, but will be dismissed. *Weathers v. Borders*, 124 N. C., 610; *Hudson v. Jordan*, 110 N. C., 250; *Tucker v. Tucker, ibid.*, 333;

Emry v. R. R., 105 N. C., 45; *Gay v. Grant, ibid.,* 478; *Watson v. Dodd,* 72 N. C., 240; *Mullen v. Canal Co.,* 115 N. C., 15, and numerous other cases, some of which are cited in *Weathers v. Borders, supra,* at last term. Not only does this case come within the ruling in *Weathers v. Borders* in that no new fact or authority has been cited, but, on the contrary, there was an important fact and a direct authority overlooked which went to support the decision of the Court at last term, and which are additional reasons why that decision should be sustained.

The following fact appeared in the record, though it was not deemed necessary to advert to it in the former decision of the case: "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," and (among other things) said to him, "The firm is owing you, and I want to deposit the assets with you, that you may see they are properly applied. Thereupon, the plaintiff made his deposits in the defendant bank, and they were entered as deposits of Hodgin Bros. & Lunn"—the style of the indebtedness owing to the bank. This was tantamount to an agreement to deposit the collections by the surviving partner in the bank, so that the (512) bank might have it in its power to apply the same to the indebtedness due to it by the firm. It was certainly calculated to prevent the bank from suing to recover its debt, when the surviving partner promised to collect the assets and place them in the bank so that the bank might see to their application, and made such deposit in the same style—"Hodgin Bros. & Lunn"—in which the indebtedness to the bank stood.

Then there is an express authority, not called to the attention of the Court at last term, which sustains the former opinion of the Court (and no authority whatever is shown to the contrary). In *Simpson v. Ingham,* 2 Barn. and Cres., 65, it is said: "Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor (in that case, as in this, the continuing to deposit in a bank in the name of the old firm), and the latter joins the transactions of the old and new firm in one entire account (as was done here), then the payments made from time to time must be applied to the old debt." It is further said in the same case that if the deposits had been entered in the pass-book merely in the name of the old firm, and the surviving partner had not objected, the deposits would have been applicable to the old debt, though the surviving partner or the bank, before such deposits were entered, could have elected to place it to the credit of the sur-

viving partners or new firm. But here the case is still stronger for the bank, since it not only entered the deposits, made by the surviving partner, to the credit of the old firm, but did so at the request of the surviving partner, for the avowed purpose that the bank, which he said the firm was owing, "might see to the application of the deposits."

(513)

SECOND APPEAL (FORSYTH COUNTY).

The Supreme Court having granted a new trial in this case, partial in effect, at February Term, 1899, (124 N. C., 540), the new trial was had below, and this second appeal by plaintiff comes up. In the meantime, upon a petition to rehear the decision at February Term, 1899, filed by plaintiff, a new trial, out and out, is awarded at the present term; this renders nugatory the trial below, from which this second appeal is taken.

Holton & Alexander for appellant.
Glenn & Manly and Jones & Patterson for appellee.

FURCHES, J. This Court at the present term has granted a rehearing in this case (in the appeal to February Term, 1899) in which a new trial has been awarded to the plaintiff. This opinion of the Court renders the trial from which this appeal was taken nugatory and of no effect, and makes it unnecessary for us to examine or pass upon the alleged errors in this appeal. The appeal, for the reasons stated, is dismissed.

Appeal dismissed.

(514)

R. W. KING v. M. M. STOKES AND WIFE, L. M. STOKES.

(Decided 22 December, 1899.)

Construction of Deed—Rule in Shelley's Case.

1. A deed of conveyance, after reservation of life estate to grantors, conveyed unto Alfred May during the term of his natural life, and after his death to his wife, the said Ida Eugenia and her children, a tract of land to have and to hold unto them, the said parties of the second part, their heirs and assigns forever. *Held*, that said deed conveyed to Ida Eugenia and her children a remainder in fee as tenants in common.

(2) That the rule in *Shelley's case* had no application to the terms of this conveyance.

(3) That the word "*heirs*" in the habendum helps out the estate limited over and makes it an estate in fee.

CONTROVERSY WITHOUT ACTION, upon case agreed, involving the construction of a deed referred to in the opinion, submitted to his Honor, *Moore, J.*, at April Term, 1899, of the Superior Court of PITT County.

His Honor decided that the deed in controversy from Shadrack Wooten and wife to Alfred May and Ida Eugenia, his wife, conveyed to them a fee simple estate, which they could convey and had conveyed to R. L. Davis, under whom the defendants claimed.

The plaintiff excepted, contending that the remainder in fee was limited to Ida Eugenia and her children.

Judgment for defendants. Appeal by plaintiff.

No counsel for appellant.
Jarvis & Blow for appellee.

FAIRCLOTH, C. J. Upon the agreed facts we are asked to construe a deed included in the record. The material parts are that Shadrack Wooten and wife, reserving a life estate, conveyed (515) as follows: "Unto Alfred May during the term of his natural life, and after his death to his wife, the said Ida Eugenia, and her children," the following tract of land . . . "to have and to hold unto them, the said parties of the second part, their heirs and assigns forever." The question submitted is: "Did the deed convey to said Alfred and wife a fee simple title to the land therein described, which they could alien and convey in fee?"

The plaintiff claims by mesne conveyances from said Alfred May and his wife. The plaintiff in his argument by counsel relies upon the rule in *Shelley's case*. Coke stated that rule thus: "That when the ancestor, by any gift or conveyance, taketh an estate of freehold and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word heirs are words of limitation of the estate, and not words of purchase." The case does not come within that rule because the word "heirs" means heirs general, and if children could be construed to mean heirs under this deed, they would not be the heirs of the first taker, but her heirs, as it says "her children." The rule is one of law, and it matters not what the ancestor intended, if he uses words embraced by the rule. But when he uses language less general than the rule requires, as

"the said Ida Eugenia and her children," then the allusion is to a class of persons intended by the grantor to take the estate, without connection with the first taker of the freehold. In such cases the intent and meaning of the ancestor are to be considered, and the rule relied on by the plaintiff has no application.

The word "heirs" in the habendum does not affect the question. That word only helps out the estate limited over, and makes it an estate in fee.

In *Gay v. Baker,* 58 N. C., 344, the conveyance was in trust (516) for a woman and her children, and there was nothing on the face of the deed to show a different intention, and the mother and children were declared to be tenants in common. The same conclusion was declared in a devise in other cases. *Moore v. Leach,* 50 N. C., 88; *Hampton v. Wheeler,* 99 N. C., 222.

We are of opinion that said deed conveyed to Ida Eugenia and her children a remainder in fee as tenants in common.

Judgment reversed.

Cited: Darden v. Timberlake, 139 N. C., 182.

MARY K. CREWS ET AL. v. W. L. CANTWELL

(Decided 22 December, 1899.)

Practice—Province of Jury—Issue—Burden of Proof.

1. Where the issue submitted to the jury is as follows: Is the defendant indebted to the plaintiff, and if so, in what sum? The burden of proof is upon the plaintiff, and must be passed upon by the jury, and the Court can not direct an affirmative finding, no matter how strong the evidence in support of such finding.

2. Where there is an admission in the answer that the defendant had received money belonging to plaintiff, and had retained a part as commission, according to an agreement with the plaintiff, the burden of proof is shifted, and rests upon the defendant.

APPEAL from justice's court, tried before *Moore, J.,* at May Term, 1899, of the Superior Court of WILSON County.

One of the plaintiffs testified that the defendant, as agent of plaintiffs, had sold a house and lot for them for $2,000, and had wrongfully retained $100 as commissions. The defendant offered no evidence.

The issue submitted was this:

Is the defendant indebted to plaintiffs, and if so, in what (517) sum?

After argument of plaintiffs' attorney to the jury, his Honor, without hearing from defendant's attorney, stated that he saw nothing for the jury to pass upon, and that he would instruct the jury to find, Yes, $100.

In deference to this intimation, defendant's counsel said he could not resist the verdict. It was rendered accordingly, and from the judgment defendant appealed.

Deans & Cantwell for appellant.
C. C. Daniels for appellee.

MONTGOMERY, J. This action was commenced in a court of justice of the peace, and was for the recovery of $100, and interest, of the defendant. The allegations of the plaintiff were that the defendant was authorized by the plaintiff to sell their house and lot in Wilson at the net price to them of $2,000; that he sold the property for $2,000, the purchase money being paid by notes for $1,800 and $200 in cash, and retained $100 out of the cash payment, claiming the same as his commission for making the sale, and that he had no right to retain the same. The defendant's defense, in the language of the return to the appeal of the justice of the peace, was that he "denied the right of the plaintiff to recover that amount, on the ground of an agreement that he might sell the property (a house and lot in Wilson) for $100 less than the price obtained from it, and claimed that he was entitled to claim $100 as his part of the purchase money for his services in the transaction and sale, as agent of plaintiff."

In the trial in the Superior Court, the defendant tendered issues as to whether the plaintiff authorized the defendant to sell the property for $1,900, and as to whether, if the defendant was (518) not entitled to all sums over and above the selling price agreed on, he was entitled as a commissioner for making a sale of the property, and to what was he entitled as such commissioner? His Honor refused to submit those issues, but submitted one in these words: "Is the defendant indebted to the plaintiff, and if so, in what sum?" The issue submitted was sufficient, for under it every phase of the defendant's contentions could have been heard and passed upon under proper instructions from the court.

The only witness examined was J. E. Brothers for the plaintiff, and parts of his testimony tended to prove the contentions of the plaintiff. His Honor, after argument by plaintiffs' counsel, and without hearing argument for defendant, said that he saw nothing

for the jury to pass upon, and that he would instruct them to find the issue "yes." It is stated in the case "that in deference to this intimation the defendant's counsel said that he would not resist the verdict, and it was rendered accordingly, and from the judgment the defendant appealed." In the plaintiff's brief it is argued that that was not an *exception* to his Honor's instruction. To be sure, the word *exception* was not used, but it certainly amounted to a protest against the course pursued by his Honor, and was as significant as if the word exception had been used. In the brief of the plaintiff's counsel, the ground is taken that upon the pleadings the burden of proof was put upon the defendant to show that he had a right to retain the $100, as his commission for making sale of the property, as he had admitted in his answer that he had received the $200 cash payment for the sale of the plaintiff's property, and that he had only paid over to the plaintiff $100 of it. We are inclined to the opinion that that position was a correct one, but the case was tried, as appears from the record, on the theory that the burden of proof was (519) on the *plaintiff*, for the only issue submitted was in that view of the case, and the plaintiff went forward with the duty of producing her evidence. The instruction, then, of his Honor was erroneous, for as the burden of proof was assumed by the plaintiff the Court could not withdraw the issue from the jury. *Bank v. School Comrs.*, 121 N. C., 109. In that case, Justice FURCHES, delivering the opinion of the Court, said: "But no matter how strong and uncontradictory the evidence is in support of the issue, the Court can not withdraw such issue from the jury and direct an affirmative finding."

New trial.

Cited: Neal v. R. R., 126 N. C., 648; *Mfg. Co. v. R. R.*, 128 N. C., 285; *Bessent v. R. R.*, 132 N. C., 945.

LOUISA M. DANIEL v. J. W. CROWELL, SHERIFF.

(Decided 22 December, 1899.)

Partnership—Individual Creditor of One Partner—Creditors of the Firm—Mortgage by One Partner of his Partnership Interest to Secure his Individual Debt.

1. Creditors whose goods constitute the assets of a firm, or kept the business running, should be preferred to a mortgagee, under a mortgage made by one of the firm to secure an individual debt, even though the partnership debts are later in date than the mortgage.

2. Such mortgage passes only the interest of the mortgagor in the firm, and that interest in the surplus after payment of partnership debts, and where the partnership is insolvent there is no surplus for the mortgagee.

CIVIL ACTION against the defendant, sheriff of Wilson County, for levying on and selling goods claimed by plaintiff, tried before *Moore, J.*, at May Term, 1899, of WILSON Superior Court, (520) a jury being waived.

The plaintiff claimed a half interest in the goods under a mortgage made to her to secure an individual debt due her from the mortgagor, one of the firm of Carraway & Batts.

The defendant levied executions in his hands in favor of general creditors of the firm upon the whole stock, and sold the whole, after allotting to each partner his personal property exemption, and applied the proceeds to the satisfaction of the executions.

The debt due plaintiff and secured by the mortgage of Carraway to her of his interest in the firm of Carraway & Batts, dated in 1886, amounted to $1,500. The execution sales made in 1887 amounted to $1,440.

His Honor decided the plaintiff was entitled to receive $720, one-half of the fund, and rendered judgment accordingly.

Defendant excepted and appealed.

Shepherd & Busbee and J. E. Woodard for appellant.
C. C. Daniel for appellee.

CLARK, J. On April 17, 1886, Carraway, of the firm of Carraway & Batts, executed a mortgage to plaintiff upon his entire interest in the stock of goods, wares and merchandise of the firm. There was no evidence that the other partner assented to this mortgage. On December 28, 1886, the firm made a general assignment for benefit of creditors in which the trustee therein named was directed to prefer the plaintiff's debt, but that assignment was set aside at instance of creditors as fraudulent and void. On December 30, 1886, Carraway made another mortgage to plaintiff embracing the entire interest of the mortgagor in the firm assets of the late firm of Car- (521) raway & Batts. On January 22, 1887, the defendant sheriff, under executions in favor of the creditors of the firm, seized their stock of goods and merchandise and sold them, first setting apart the personal property exemption of each of the partners.

This is an action by the plaintiff to recover one-half of the proceeds of the sale as applicable to her debt. The plaintiff took no

steps to wind up the partnership, and the case of *Bank v. Fowle,* 57 N. C., 8, is exactly in point. "Where the interest of one partner in the property of the firm is assigned by him as security for his individual debt, and the assignee permits the business to go on in its ordinary course, such security becomes subject to the fluctuations of the business, and, upon the subsequent dissolution, is only entitled to what remains to such partner after the payment of the debts of the firm." This is approved in *Wilson v. Lineberger,* 83 N. C., 524.

In 1 Bates on Partnership, sec. 186, it is said: "But his (the partner's) interest, mortgaged or sold, is subject not only to existing liabilities, but also to subsequent equities, and the claims of subsequent creditors and the fluctuations of business. *Hence, though the partnership debts are later in date than the mortgage or assignment* of the share, yet the mortgagee gets only the interest in the surplus *as of the date of its ascertainment or of the foreclosure,* and not as of the date of its execution or default. . . . Hence, if the title of the property is subsequently conveyed as a partnership act . . . the second sale conveys a title discharged of all lien or right under the previous individual act of mortgaging or assigning a separate share." In support of the above the author cites authorities from New York, New Jersey and other states, among them the North Carolina cases of *Bank v. Fowle, supra,* and *Burbank v. Wiley,* 79 N. C., 501.

This principle has been recently recognized in *Millhiser v.*
(522) *Pleasants,* 118 N. C., 242, in which the Court says: "The rights of Pippin in all the partnership matters, both in its *continuance and after its dissolution,* accrued on the formation of the partnership with Thomas, and no assignment by Thomas of his interest in the goods of the partnership could abridge or destroy those rights. Jones on Chat. Mortgage, sec. 45."

See also, 17 Am. and Eng. Ency., 968: "And a sale under an attachment against the firm will pass to the buyer a title unincumbered by any lien placed by a partner upon his interest. This rule applies as well as debts incurred and transfers made *after* the sale or encumbrance by one partner as before, *the balance at the time of the winding up and accounting, or the foreclosure,* being all that the lien against, or the transfer by, the partner can act upon."

Indeed, it is consonant to equity and justice that the creditors whose goods constitute the assets or kept the business running should be preferred to the mortgagee, an individual creditor of one of the partners.

The mortgage to plaintiff passed only the interest of Carraway in the firm, and that interest is the surplus after payment of partnership debts. The partnership being insolvent, there is no surplus

subject to the mortgage and, upon the facts found, judgment should have been entered against the plaintiff for costs.

Reversed.

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(523)

J. B. WHITE v. JOSEPH TRIPP.

(Decided 22 December, 1899.)

Custom of Keeping Books—Evidence—Credit, to Whom Given—Statute of Frauds, Code, Sec. 1552.

1. In a conflict of evidence, it is admissible to prove the custom of keeping books in that section where goods are furnished at the request of a landlord to his tenant—as corroborative evidence.

2. The jury was properly instructed, that if the defendant authorized the selling of the goods to his son, the plaintiff could recover, although they were charged to the son, J. B. Tripp (Joseph Tripp's surety.)

3. The liability of the defendant depended upon his agreement with the plaintiff, and not upon the manner in which the plaintiff stated the account on his books.

4. If the goods were furnished to the son upon the promise and upon the credit of the father, the statute, Code, sec. 1552, did not apply, otherwise, if the son was the principal debtor, and the father merely surety.

CIVIL ACTION for goods furnished, tried before *Moore, J.*, at March Term, 1899, of the Superior Court of PITT County, on appeal from justice's court.

The plaintiff testified that he had furnished the goods to J. B. Tripp, son and tenant of defendant, upon the express direction of defendant, before the delivery, and would not have furnished them without, and had refused to do so. That the goods were charged on day-book to J. B. Tripp, to show who got them. On the ledger they were charged to J. B. Tripp, followed by an entry in parenthesis: (Joseph Tripp, surety), and there was evidence, excepted to by defendant, that this was the custom in that section of keeping the books, when goods were furnished to the tenant by direction of the landlord.

The defendant testified that he made no such agreement with (524) the plaintiff, and denied all liability for the goods furnished to his son.

The charge of his Honor, excepted to by defendant, appears in the opinion.

Verdict and judgment for plaintiff. Appeal by defendant.

Jarvis & Blow for appellant.
Aycock & Daniels and J. L. Fleming for appellee.

FAIRCLOTH, C. J. The verdict settles the question of debt in favor of plaintiff unless some error was committed during the trial. The plaintiff testified in favor of his claim and the defendant's testimony was in conflict with the plaintiff's. Each side introduced other witnesses in support of his statement, all of which was considered by the jury. The defendant insisted that his promise was void (Code, sec. 1552), as a promise to pay the debt of another. The plaintiff was allowed to prove by the defendant's witness the custom of keeping books in that section, where goods are furnished at the request of a third party, when the third person is a landlord of him to whom the goods are to be furnished, and the defendant excepted. The competency of this evidence is the principal question in the case. We think the evidence was corroborative, and in that view competent. The plaintiff had testified positively, and the defendant's evidence tended to impeach the plaintiff's testimony, and the usage and method of keeping accounts in such cases were circumstances which might aid the jury in arriving at a just conclusion. Such custom and usage have been held competent. 1 Greenleaf Ev., secs. 116 and 118; *Harrison v. Hall,* 124 N. C., 626. His Honor told the jury that, if the defendant authorized the selling to the son, the plaintiff could recover, although the goods were (525) charged to J. P. Tripp in the manner stated in the case. He also charged the jury on the law of principal and agent, and that if the credit was given to J. B. Tripp, with Joseph Tripp as surety, then the defendant would not be liable. There is nothing in these instructions of which the defendant can justly complain. The promise, as the jury have found it to be under the charge, is not required to be in writing. *Neal v. Bellamy,* 73 N. C., 384.

The liability of the defendant depends upon his agreement with, or promise to, the plaintiff, and not upon the manner in which the plaintiff stated the account on his books. The latter was evidence, properly before the jury, under the circumstances, and for the purpose already stated.

Affirmed.

Cited: Sheppard v. Newton, 139 N. C., 536.

GEORGE W. WILSON ET AL. v. ROBERT WILSON.

(Decided 22 December, 1899.)

Title to Land—Adverse Possession—Tenant—Parol Gift.

1. Thirty years adverse possession will take the title out the State, and such possession need not be continuous, nor need there be any connection between those holding the land adversely.

2. Title being out of the State, twenty years continuous adverse possession by a party, and by those under whom he claims, under known and visible boundaries, will ripen his title.

3. Possession by a tenant and those claiming under him is not adverse to the landlord nor to those claiming under him.

4. While a *parol gift* of land will not convey title, it rebuts the idea of tenancy, and possession under it becomes adverse, and will ripen the title, if continued twenty years, the title being out of the State.

ACTION for the recovery of land, tried before *Coble, J.*, at (526) Spring Terrm, 1899, of RUTHERFORD Superior Court.

The plaintiffs introduced no paper title, but relied upon possession to show title out of the State, and in themselves. The case turned upon the point whether the possession of Berry Wilson, under whom the plaintiffs claimed, was adverse or not. The plaintiffs contended that their father, Berry Wilson, under whom they claimed as heirs at law, entered under a parol gift from his father, Robert Wilson, and that their title had ripened by adverse possession.

The defendant contended that Berry Wilson had entered as tenant of his father, Robert, and that Berry Wilson's possession was not adverse, neither was that of the plaintiffs. The evidence was conflicting as to the character of Berry Wilson's entry, whether under a parol gift, or as tenant of his father.

The character of Berry Wilson's entry was made by his Honor as a crucial test in the case.

Defendant excepted. Verdict and judgment for the plaintiffs. Appeal by defendant.

M. H. Justice for appellant.
S. Gallert for appellee.

FURCHES, J. This is an action for the possession of land; verdict and judgment for plaintiff, appeal by defendant. There is no state-

ment of the case on appeal, and the judgment must be affirmed, unless error appears on the record proper.

There are several exceptions taken to the admission of evidence, which can not be sustained; and, while they have all been considered, we do not deem it necessary or profitable to the parties or the profession to discuss them in this opinion.

There are five prayers for special instructions asked by the
(527) defendant. The first three were refused, the fourth modified and given as modified in the general charge, and the fifth was given as asked. As the refusal to give these instructions, as asked, is not assigned as error, they are deemed to have been abandoned. *State v. Blankenship,* 117 N. C., 808; *McKinnon v. Morrison,* 104 N. C., 354. But although they are presumed to have been abandoned, we have examined them and find no error. The first three should have been refused, the fourth was properly modified and given in the general charge, and the fifth was given as asked.

The plaintiffs offered no paper title to the land in dispute. They relied upon adverse possession of thirty years to take the title out of the State, and 20 years adverse possession in themselves, and those under whom they claim, to perfect their title. And what was peculiar about the question of adverse possession in the plaintiffs is that their ancestor was put in possession by his father, Robert Wilson. The plaintiffs claim under a *parol gift,* while the defendant claims that the plaintiffs' ancestor took possession of the land as a tenant of his father, Robert. Upon these contentions, it may be said the rights of the parties were made to depend, though there were some other question presented on the trial of the case.

There was evidence in support of both contentions sufficient to carry the case to the jury, and it is not within the province of this Court to pass upon the weight of the evidence. As there was sufficient evidence to carry the issue to the jury, their verdict must stand unless there be error in submitting the issue to them. We have seen there was no error committed in receiving improper evidence or in rejecting proper evidence. And we have read the very full and exhaustive charge of the court, and find no error in that. The court distinctly charged the jury that if Berry Wilson, the father of the plain-
(528) tiffs, entered upon and took pssession of the land as the tenant lessee of his father, Robert Wilson, they could not recover, though they may have held this possession for 20 years or more; that to enable the plaintiffs to recover they must show by the greater weight of evidence that their father, Berry, did not enter or hold the possession as tenant, but that he entered and took possession of the

land under a *parol gift,* and held the land and possession as his own, adverse to the claims of any one; that the parol gift conveyed no title to the land, but it rebutted the allegation, or idea of tenancy, and put the statute in operation, which in 20 years gave the plaintiffs title.

It seems to us there was nothing in this charge that the defendant can complain of. It may be that it went further, in placing the burden of proof on the plaintiffs, than was authorized by law. *Bryan v. Spivey,* 109 N. C., 57, on p. 69, where it is held that actual possession is presumed to be *adverse,* and will be so held unless the contrary is made to appear. But as this case showed that Berry, the father of the plaintiffs, had been put into possession by his father Robert; and as the plaintiffs showed no paper title from Robert, we are not prepared to say but what the Court was correct in placing this burden on the plaintiffs. But if there was error in this respect, it was in favor of the defendant, and he has no right to complain.

As no error has been pointed out by the exceptions or assignments of error, and as we see none, the judgment is

Affirmed.

Cited: Hicks v. Kenan, 139 N. C., 338.

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(529)

W. G. B. GARRETT v. A. J. REEVES AND T. L. FRANCIS ET AL.

(Decided 22 December, 1899.)

Promissory Note—Payments by Maker—Endorser—Surety—Act 1827, The Code, Sec. 50—Statute of Limitations.

1. A payment by the principal on a note, before the bar of the statute, operates as a renewal as to himself, the sureties and endorsers.

2. The Act of 1827, Code, sec. 50, renders an endorser liable as surety.

3. Where the payee, before maturity, endorses and transfers the note, and the maker makes successive payments, the first before the bar of the statute as to the endorser, and each succeeding one within three years of the preceding one, the liability of the endorser, as well as that of the maker, is renewed at each payment.

4. A payment made by the maker, after the bar of the staute, operates as a renewal as to himself only.

CIVIL ACTION upon a promissory note against the makers and endorser, tried before *Coble, J.,* at Fall Term, 1899, of the Superior Court of HAYWOOD County.

The note was payable twelve months after date, March 20, 1886, to defendant Francis, and before maturity was endorsed and assigned to another, who transferred it by endorsement to the plaintiff. A number of payments were made upon it by A. J. Reeves, the principal maker, beginning with April 21, 1887, and ending December 23, 1896. Three years had not elapsed between any two successive payments. This suit was commenced September 12, 1898. No defense was made to the action, except by Francis, who pleaded the statute of limitations. His Honor held that the action was barred as to him. Verdict and judgment accordingly. Plaintiff excepted and appealed.

(530) *Smith & Valentine and Moody & Welch for appellant.*
W. T. Crawford and G. S. Ferguson for appellee.

FURCHES, J. On the 20th day of March, 1886, A. J. Reeves, Mrs. L. McD. Reeves, K. Reeves, and W. T. Reeves, made and executed their promissory note under seal to the defendant T. L. Francis (therein called Leroy Francis), for the sum of $650, due 12 months after date. Soon after the execution of the note, Francis, for valuable consideration, sold the same to J. P. Herren, and endorsed it in blank by writing his name across the back of it, and Herren sold and transferred the note to the plaintiff, and endorsed it in the same way that Francis endorsed it to him. Various payments have been made on said note by the defendant A. J. Reeves, who seems to have been the principal therein, to the plaintiff, Garrett. These payments have been made at different times, commencing within less than three years from the date of the note; and this first payment was followed by other payments, so as not to make as much as three years intervene between the date of any two of the payments. None of the defendants file any answer or make any other defense to the plaintiff's action, except the defendant Francis. He filed an answer in which he admits that the note was given to him by his co-defendant Reeves; that he sold and assigned the same to Herrin, and endorsed the same in blank by writing his name on the back of the note, and pleads the statute of limitations.

The sole question involved is: Did these endorsed payments arrest the operation of the statute of limitations, and prevent it from becoming a bar to the plaintiff's action, as against the defendant Francis? The court held that they did not.

It is not contended but what these payments prevented the statute from becoming a bar to the plaintiff's action, as against A. J.

Reeves the principal, and party making the payments. And (531) it is held in *Green v. Greensboro College,* 83 N. C., 449, cited and approved in *LeDuc v. Butler,* 112 N. C., 458, and in quite a number of other cases, that a payment made by the principal, before the action is barred, operates as a renewal as to all the obligors—sureties as well as principals. This now seems to be the settled law in this State.

But the defendant Francis says that he is not a surety, but an endorser, and, for this reason the doctrine announced in *Green v. Greensboro College, supra,* does not apply to him; that the payments made by the principal debtor, Reeves, did not affect him, and that he stands on the same footing as if no such payments had been made; and that the statute barred any action against him after the lapse of three years from the time the note fell due.

This would certainly have been so, before the statute of 1827 (Code, sec. 50). And it is now to be considered what effect this statute has upon the case, if any.

This statute provides that: "Whenever any bill or negotiable bond or promissory note shall be endorsed, such endorsement, unless it be otherwise plainly expressed therein, shall render the endorser liable as surety to any holder of such bill, bond or promissory note, and no demand on the maker shall be necessary, previous to an action against the endorser: *Provided,* that nothing herein shall in any respect apply to bills of exchange, inland or foreign."

If this statute is construed to mean what it plainly says, "that any such endorser shall be liable as *surety to any holder*" of the endorsed note, it would seem that the doctrine of *Green v. Greensboro College, supra,* applies, and that the statute of limitations does not bar the plaintiff's action against the defendant Francis. The plaintiff is the *holder* of the note, and the defendant Francis is the *endorser* of the note. This doctrine that an *endorser* becomes (532) a surety to the holder of the note, seems to be expressly held in *Johnson v. Hooker,* 47 N. C., 29, where the Court, PEARSON, J., delivering the opinion, says: "The act of 1827, Revised Statutes, ch. 13, sec. 10, (now Code, sec. 50), makes an *endorser liable to the holder of a note as surety. The effect is to put him on the footing of a maker of the note, and to make him liable to the holder, the same as if his name was on the face of the note instead of being on the back.*" If this opinion, which seems to be fully authorized by the language of the statute, is to be considered a correct construction of the statute of 1827 (Code, sec. 50), it would seem that the defendant Francis

stands in the same relation to the plaintiff as if he were one of the original makers of the note.

In *Bank v. Lumber Co.*, 123 N. C., 20, and in *Moore v. Carr, ibid.*, 425, it is held that an endorser is a surety on the note to the holder. And in *Moore v. Carr* it is held that payments made by the principal debtor arrest the operation of the statute of limitations as to the endorser; but, in that case, the endorsement was made before the note was delivered to the payee. And it is contended that this fact distinguishes that from this case. The distinction is attempted to be drawn upon the ground that, in that case, there was "a community of interest between the defendants"; while, in this case, there is no community of interest between the defendant Francis and the original maker of the note; that by reason of this "community of interest" any payment made by the principal debtor tended to discharge the debt, and inured to the benefit of the endorser. This idea is advanced, and the same language and argument used, in some other cases, discussing the effect of the act of 1827. But we do not know what is ment by a "community of interest" unless it means that they (533) were all interested in having the debt paid. This is what we would take it to mean. It cannot mean that their interests were equal. If it is given this meaning, it would exclude sureties from the effect of a payment made by the principal debtor, and this would destroy the doctrine held in *Green v. Greensboro College, supra,* and the other cases where the same doctrine is held. But this community of interest, in cases of principal and surety and in cases of principal and endorser before the note is delivered to the payee, must be a "community of interest" in the sense of meaning we have given this language. For their interests are not equal, nor "of the class" any more than that of the defendant Francis. Every surety on a note is interested in the principal's paying the note, because that discharges him from liability. But the surety and principal debtor are not only not equally interested, but they are not "in the same class" of liability. If the surety pays the debt, he has recourse on the principal debtor. But if the principal pays the debt, he has no recourse on the surety. And to hold that this inequality destroys the "community of interest" would be in effect to overrule *Moore v. Carr,* and to destroy the doctrine of *Green v. Greensboro College.* If the endorser pays—that is, if Francis pays—he has recourse on all the original makers of the note; but they would have none upon him. It is admitted that the statute of 1827 (Code, sec. 50), does not affect the liability, as between makers and endorsers. It does not claim to do this, but to make the endorser a surety to the holder of the note.

This is what we think must be understood by the term "community of interest"—that the endorser is bound as *surety,* and is interested, in common with the other parties, in the principal debtor's paying the debt.

The case of *Wood v. Barber,* 90 N. C., 76, was cited and relied on by the defendant. But when we come to examine that case, we find that it was an action on a partnership debt, out of date, when one of the partners made a payment, after it was barred; and (534) it was claimed by the plaintiff that this payment revived the debt as to all the partners. But the Court held that under sec. 171 of The Code, the payment did not have the effect to revive the debt as to any of the partners, except the one making the payment. So it is seen that that case does not bear upon the question under discussion in this case.

The case of *LeDuc v. Butler,* 112 N. C., 458, was cited and relied on by the defendant Francis; and there is a discussion of the liability of endorsers and the effect of a payment to an *endorsee* by the *payee* who had endorsed the note. But it does not seem that the question was presented as to what effect a payment made by the principal debtor would have upon the running of the statute of limitation, upon an endorser, as the defendant Butler, who pleaded the statute of limitations in that case, was one of the *original* signers and *makers* of the note sued on. It is true that there are expressions used by the learned judge who wrote the opinion that are favorable to the contention of the defendant. But as they were not presented by the facts of the case, they do not have the character and force of a precedent. It is admitted in this discussion of that case that *Johnson v. Hooker, supra,* is authority against the position taken by the defendant in this case. It is also said in the discussion of that case (*LeDuc v. Butler*): "A clear distinction is marked in all these cases, except possibly the last, between the surety and the endorser in their relations to each other, while, as to the holder, their liability was the same." This is what we contend for in this case—that, "as between the endorser and the holder," that is, as between the plaintiff, the holder, and the defendant Francis, the endorser, the relation between them is the same as if the defendant Francis had been one of the original sureties. (535)

A review of the cases will show that the opinions of the Court have not always been in harmony upon this question. But the most direct expression of the Court that we have seen is the case of *Johnson v. Hooker,* and that is with the plaintiff.

It seems to us that at least some of the cases cited for the defendant are based on *Good v. Martin,* 95 U. S., 90, cited in *Hoffman v. Moore,* 83 N. C., 313, which is put upon the general doctrine of commercial law, in which our statute of 1827 was not (as a matter of course) taken into consideration. And this Court in some of its discussions of this question, we are inclined to think, have not given that consideration to the statute of 1827 that it was entitled to.

We are unable to see how the statute (Code, sec. 50), when construed in the light of the doctrine of *Green v. Greensboro College, supra,* can be held to relieve the defendant Francis from liability in this action.

This opinion does not conflict with *Moore v. Carr,* or *Bank v. Lumber Co., supra.* It only makes an application of section 50 of The Code, not involved in either of these cases.

There is error. New trial.

FAIRCLOTH, C. J., dissenting. The question in this case is presented by the second issue: "Is the plaintiff's right of action barred by the statute of limitations as to the defendant T. L. Francis?" The jury answered, "Yes," under the instruction of the Court.

Stripped of unnecessary words, the following are the facts stated in the case, and the record: On the 26th of March, 1886, A. J. Reeves and L. D. McD. Reeves, as principals, and K. Reeves and W. T. Reeves, as sureties, executed and delivered their note under seal, payable to T. L. Francis 12 months after date, for value re-
(536) ceived. After the note was delivered and before it became due, the payee endorsed said note for value to defendant Herrin, who endorsed it to the plaintiff. Several payments were made by the maker, A. J. Reeves, the last payment being made on December 23, 1896. No payment was made except by the principal maker, A. J. Reeves. This action was commenced on September 12, 1898. It is conceded that plaintiff's right of action is barred as to defendant Francis by the lapse of time, unless the payment made by the maker, after the bar was complete, restores and revives the liability of Francis, the payee and endorser for value. The majority of the Court hold that said payment had that effect. The question turns upon the proper construction of the act of 1827, chapter 2, Code 50, which reads as follows: "Whenever any bill or negotiable bond or promissory note shall be endorsed, such endorsement, unless it be otherwise plainly expressed therein, shall render the endorser liable as surety to any holder of such bill, bond or promissory note; and no demand on

the maker shall be necessary previous to an action against the endorser." Upon the present and all similar state of facts my contention is:

1. That since the passage of said act, the orginal obligors, the accommodation endorser or endorsers, and the payee endorser and subsequent endorsers are all sureties to the final endorsee, and that he may sue any one of them without alleging demand on any other one.

2. That whilst the above is true, the act of 1827 goes no further, and does not affect the relations and rights of the parties *inter se,* but leaves them to be worked out as they were prior to the passage of the act.

These propositions I gather from the authorities and from my reading of the statute. The principal debtor delivers his note for value received and his sureties stand for him. The endorsement before the note is delivered is without consideration, and (537) is intended to strengthen the security for the accommodation of the maker of the note. These, as to the payee, constitute one class of joint debtors, with all the rights of contribution, etc., among those who have a community of interest.

The endorsement by the payee is for a consideration, the sale of his property, and the act of 1827 makes him liable as surety, unless he guards himself in some way, such as *without* recourse or the like and he and subsequent endorsers, (all sureties to the final endorsee) constitute a different class of debtors, with no common interest whatever with the original maker of the note. They are only supplemental sureties. Before the act, the holder had much difficulty in collecting from endorsers, guarantors, etc. It devolved upon him to show diligence, demand before suit, presentation at the specified time and place, etc., and it often resulted in the loss of his claim. I think the Legislature intended to save the holder from such risks, and did not intend to allow the maker, who alone has received benefit, by his own *act* to impose on the (payee) endorser a liability, against which he was protected by a statute of limitations. The construction of the act of 1827 was a serious question with this Court soon after its passage, and its construction has been followed until now.

It is a plain principle that those who have engaged in a common hazard should share in the loss consequent upon it, and on this principle is founded the obligation of contribution among cosureties. But I do not think that the Act of 1827 establishes the order of their liabilities as arranged among themselves. Those liabilities are to be determined by rules independent, of and in force prior to, the act.

In *Williams v. Irwin,* 20 N. C., 74, it was held that since the act of 1827, the endorsee could maintain an action against (538) the endorser without averring or proving any demand on the maker. In the opinion, RUFFIN, C. J., turns his attention to the language of the act under consideration: "The expression, 'liable as surety,' has no definite legal sense, nor any established signification in common parlance. Whenever one person is liable for the debt of another, by whatever means, or in whatever form the liability is created, the person is in law a surety; and, perhaps, in popular language, is said to be *liable as surety* for the other. But the extent of the liability, its nature, whether immediate or remote, positive or conditional, legally depends upon the terms and nature of the engagement. It may be by recognizance, by bail-bond, obligation note, guaranty, endorsement and otherwise, in the same or a separate instrument. But 'liable as surety' is not the phraseology of the law; and in either of those cases the surety is said to be liable for the debt as cognizor, obligor, maker or endorser. It is therefore hazarding something to change the responsibility of an endorser upon language so vague and unsatisfactory." He then enumerates the difficulties in collecting from an endorser before the statute, and says: "Perhaps those were all that were in the contemplation of the Legislature. . . . This will be carrying the act far enough for all the purposes of justice. . . . And the holder can lose his money only by such delay as will bar him by force of the statute of limitations."

The next case was *Ingersoll v. Long,* 20 N. C., 295, which approves the last case cited, and GASTON, J., remarked on the act of 1827: "That the object of the act in declaring the endorser liable as surety was not to bind him as though he had signed the note with the maker as surety—not to make him liable to the endorsee if the endorsement were made without consideration—nor to deprive him of the protection which the acts of limitation had extended to endorsers."

In *Topping v. Blount,* 33 N. C., 62, it was held "that the (539) contracts of the obligor and the endorser are in their nature several, and no act of the former can change the latter. The act of 1827, indeed, says the endorser shall be liable as surety to the holder; . . . but it has been for some time settled that the sole purpose of that act was to turn the implied conditional contract, between the endorser and holder, into an unconditional one; and that it was not intended to charge the endorser, as if he had executed the bond as coöbligor, or upon an endorsement without consideration, or to deprive him of the benefit of the statute of limitations, by exposing

him to stale demands, kept alive, perhaps, by collusion between the obligor and the holder."

I have freely quoted from the above cases to show that the endorsers in the present case constitute one *class* of debtors and that the original obligors constitute another *class,* separate and distinct from the first, and that there is no community of interest between the two classes, although they are all conditionally liable to the endorsee by force of the act of 1827.

I must admit that I have found no case on *all fours* with the present, i. e., where the facts are the same, but all the expressions of the Court for 60 years, as to the meaning of the act, are uniform in support of my position.

If this is true, can the act of one member of one *class* impose a liability on a member of another *class,* or deprive him of his protection by the lapse of time after the statute of limitations has run long enough to bar the plaintiff's right of action? I think not.

Where a payment is made upon a claim, before it is barred by the lapse of time, by one of several obligors of the same class, it becomes the legal act of all, and arrests the operation of the statute as to them, but does not revive the liability of others of a different class. The rule that payment by one of the same class binds (540) all of that class is founded upon the community of interest among those of that class. *Wood v. Barbour,* 90 N. C., 76; 2 Greenleaf Ev., sec. 444. Where one surety makes a payment on a note after the bar of the statute has arisen, it does not revive the debt against the cosureties. *Long v. Miller,* 93 N. C., 227; *Green v. Greensboro College,* 83 N. C., 449. "Part payment of a note by the payee who had endorsed it will not repel the bar of the statute of limitations as against the maker, the statute, Code sec. 171, confining the act, admission or acknowledgment as evidence to repel the bar to the associated partners, obligors and makers of a note." *LeDuc v. Butler,* 112 N. C., 458. This principle is recognized and distinguished in *Harper v. Edwards,* 115 N. C., 248.

This case rests upon The Code, sec. 171, and is equally applicable to a copartnership or makers of a note. It also draws the distinction as to different classes, and the absence of a community of interest and the consequences, as I have already stated.

If then, the endorser in one class, by his act, can not deprive the maker of his statutory protection against the holder, on what principle can the maker, by his act, deprive the endorser for value of his protection? Common reasoning is against the proposition.

I can not agree or admit that *Johnson v. Hooker,* 47 N. C., 29, is an authority against the defendant, but quite the contrary. That was an action by the holder against an *accommodation endorser* without consideration, for the benefit of the maker, and before the note was discounted or delivered to the holder. Of course, the language quoted from Judge Pearson referred to the endorser, who was the defendant, and whose liability was being considered. That is my argument, that such an endorser does not belong to the same
(541) *class* as a payee who endorses for a valuable consideration and becomes thereby a surety to the holder, by force of the statute of 1827.

For these reasons I think his Honor's instruction to the jury on the second issue was right, and that his judgment should be affirmed.

Cited: Luton v. Badham, 127 N. C., 105.

R. H. MINCEY ET AL. v. C. C. FOSTER ET AL.

(Decided 22 December, 1899.)

Specific Performance of Contract.

1. Plaintiffs may not demand specific performance of a contract, when they themselves are unable to perform their part of it.

2. If the plaintiffs had made good their title to land, which was defective at the time they covenanted to convey to defendant upon payment of the agreed price, before suit brought, or even before the decree, a court of equity would have enforced specific performance, provided the delay had not materially altered the situation of the parties.

CIVIL ACTION to enforce the payment for the mineral interest of land, contracted to be conveyed to defendant upon payment of the price agreed, tried before *Starbuck, J.,* at Spring Term, 1899, of MACON Superior Court, upon exception by defendant to the report of referee. The exception was sustained, and judgment rendered in favor of defendant. Plaintiffs appealed.

The exception and judgment appear in the opinion.

J. F. Ray for appellants.
G. S. Ferguson for appellee.

DOUGLAS, J. This is a civil action in which the vendors (542) seek to enforce specific performance of a contract for the sale of certain mineral interests. It appears that the plaintiffs first contracted to sell to the defendant Foster, at the price of $7,000, several tracts of land with full covenants of warranty, stating, however, in the contract that one 30-acre tract was sold "subject to the mineral rights of H. S. Lucas," and another of equal size subject to the mineral rights of J. H. Mincey. This agreement was not signed by the defendants or either of them, and appears to have been in the nature of an option. The defendant Foster declined to take the land. Subsequently, the plaintiffs executed another agreement or option to sell to the said Foster, for the sum of $3,500, all the mineral interests in the several tracts of land mentioned in the first agreement. This agreement, referred to as Exhibit "C," covenanted to warrant the title, and contained no exceptions or reservations of mineral interests, but referred to the first contract for a description of the land. It was not signed by Foster, who, however, soon thereafter wrote a letter practically amounting to an acceptance of the option. Foster refuses to pay, on the ground that the plaintiffs can not give him a good title to the mineral interests, which they agreed to convey. The judgment of the court below is as follows:

The Court finds that by the "contract or option" mentioned in the letter, set forth in the third paragraph of the report, the defendant Foster was referring to the contract marked Exhibit "C." The findings contained in said paragraph as to the "primary consideration" and "real consideration of the promise to pay" are overruled. The Court finds that Foster in said letter merely promises to send his check for the purpose of making the $500 payment, provided and stipulated for by said contract, Exhibit "C."

The Court is of opinion that the plaintiffs in this suit must re- (543) cover, if at all, upon the contract, Exhibit "C," and that the question as to said letter whether it is sufficient as a memorandum under the statute of frauds is to bind defendant Foster to said contract. While the Court is of opinion that the letter is a sufficient memorandum as to the defendant Foster, it is also of opinion that plaintiffs are not entitled to recover, by reason of want of title to so great a portion of the mineral interests in value as found in the sixth paragraph of the report.

All exceptions, except in so far as herein sustained, are overruled.

It is adjudged that the plaintiffs take nothing by their suit; that the defendants go without day, and recover the cost of the plaintiff

and sureties on the prosecution bond, except the compensation herein allowed the referee.

We see no error in this judgment. The plaintiffs are in the untenable position of asking for a specific performance when they themselves are unable to comply with their part of the contract. Their contention that Foster accepted the second option with knowledge of their want of title, and is bound thereby because it referred to the former option, can not be maintained. The contract, Exhibit "C," is executory in its nature, and referred to the option, Exhibit "A," for the sole purpose of identifying the land. The plaintiffs agreed in substance to convey to Foster a good and sufficient title to the mineral interests upon the happening of a future contingency, to wit, the acceptance of the option and the payment of the purchase money. The mere fact that the plaintiffs did not have a good title when the option was given does not necessarily affect the transaction, as both they and the defendants might have contemplated a perfection of the title before the day of payment. If the plaintiffs had made good their title before the bringing of the action, or even before the decree,

(544) a court of equity would have enforced specific performance, provided the delay had not materially altered the situation of the parties. 2 Story Eq. Jur., p. 101, sec. 777; Fetter on Eq., pp. 277, 278; Bishpham's Prin. Eq., sec. 380. But as they are unable to do so, and the deficiency is relatively so large, we see no equity calling for specific performance. The judgment is

Affirmed.

W. E. WHITE ET AL. v. GRANVILLE FOX, JERRY FOX AND L. H. WISE, ADMINISTRATOR OF E. W. ROWE.

(Decided 22 December, 1899.)

Note for Value of Growing Timber—Damage to Land.

1. A plaintiff can not sue for the possession of a note, and recover the value of growing timber for which the note was given.

2. Where a person in adverse possession of land sells the growing timber, which is cut and removed, and the purchaser gives his note for the price to the person in possession, who is afterwards evicted by the true owner, the latter can not maintain an action for the note, nor for the severed timber. His remedy is an action in the nature of trespass for damage done to his freehold, against the party who did it.

CIVIL ACTION for a promissory note, tried before *Allen, J.*, at Spring Term, 1899, of ALEXANDER Superior Court. His Honor adjudged upon the pleadings and evidence that the plaintiffs could not recover. The plaintiffs excepted and appealed. The case is stated in the opinion.

Armfield & Turner and W. C. Newland for appellants.
T. M. Hufham, A. L. McIntosh and J. L. Gwaltney for appellees.

MONTGOMERY, J. After the evidence was all in and the (545) argument of counsel concluded, his Honor intimated the opinion that, upon the complaint, it appeared that the action was for the note mentioned in the complaint, and not for damages to the freehold, and that the plaintiffs could not recover. The plaintiffs insisted, however, that the case should go to the jury, which being done, the Court instructed the jury to find in answer to the first issue, that the land was the property of the plaintiffs; in answer to the second issue, that Granville Fox and E. W. Rowe caused to be cut and severed from the land the timber grown thereon, and in answer to the fourth issue, that the plaintiffs were not the owners of and entitled to, the possession of the note in controversy. The first and second allegations of the complaint contain statements of the death of Rowe, and the appointment of the defendant Wise as his administrator, and of the plaintiffs' ownership of the lands; and the balance of the complaint is as follows:

"3. That during the fall and winter of 1894-5 the testator, E. W. Rowe, being in possession of the plantiffs' land above described, unlawfully and without right, undertook to cut and remove, and did cause to be cut and removed by the defendant Granville Fox, all the marketable timber then growing and standing upon the plaintiffs' land, so that said land was stripped of its timber, and rendered almost valueless. That as the plaintiffs are informed and believe, the defendant Granville Fox and said E. W. Rowe made and entered into contract whereby the said Granville Fox agreed to pay said Rowe the sum of $212, and gave his promissory note to said Rowe for said sum. That plaintiffs are informed and believe, and so allege, that the sole consideration of the note aforesaid was the timber belonging to plaintiffs which was unlawfully sold to him by said E. W. Rowe.

"4. The plaintiffs further allege, upon information, and belief, that the testator of defendant Wise in his lifetime pledged the said note to Jerry Fox as collateral security, or to (546)

indemnify him against loss as bondsman on a defense bond in an action wherein the parties to this action sought to recover said lands, and in which they recovered the same, and that said note is now in the hands of said Jerry Fox. That said Jerry Fox took said note with full notice of the fact that it was given for plaintiffs' timber, and with full notice of plaintiffs' rights.

"5. That the plaintiffs immediately after the termination of the action wherein they were declared to be the owners of said land, and wherein the possession of said E. W. Rowe was declared to be wrongful, gave notice to the maker of said note not to pay the same to any one, and to said Jerry Fox not to collect the same."

After a careful reading and consideration of the complaint, we are of the opinion that his Honor's conclusion as to the nature of the action, and his instructions to the jury, were correct.

If the action had been for damages to the freehold it was necessary that the injury should have been alleged to have been committed by Rowe, who was in adverse possession of the land, and who sold the timber therefrom to Granville Fox. But that is nowhere intimated in the complaint, in so far as a specific charge to that effect is made against Rowe as a foundation for the action, and nowhere in the complaint is there an allegation of the *amount* in dollars and cents in which the land has been damaged. It is nowhere stated in the complaint that the amount of damage to the land was equal to, or more or less, than the amount of the note. On the other hand, the complaint does show distinctly that the note was the specific thing sued for; and while the prayers for relief at the end of the (547) complaint can not affect the cause of action set out in the complaint by confining the plaintiffs to the relief prayed for, yet, in this case, it is significant that all the prayers for relief are concerning the possession of this note and the collection of it for the benefit of the plaintiffs, while there is no demand for damages for injury to the land. This case does not fall under the principle of equity announced by the Court in the case of *Ijames v. Gaither,* 93 N. C., 358.

The plaintiffs, in their complaint, seek no such relief, and there is not a word in reference to the principle in *Ijames v. Gaither, supra,* in the brief of the appellants' (plaintiffs') counsel. Every contention of the plaintiffs is purely legal and for the possession of the note, and an insistence that upon the face of the complaint there is a sufficient allegation for damages. If, in the former suit of the plaintiffs against Rowe for the possession of the land, in which the plaintiffs recovered judgment for the possession of the land and for their costs, the defend-

ant Rowe, and Jerry Fox, the surety on Rowe's bond for costs, had been insolvent and unable to respond to the payment of the costs, then, in equity the note which Rowe had put into the hands of Jerry Fox to indemnify him against loss, if any he should sustain, by reason of his having signed Rowe's bond for the costs, could have been reached by the plaintiffs for their benefit to the extent of plaintiffs' costs, under the principle enunciated in *Ijames v. Gaither, supra.* The note was put in the hands of Jerry Fox, not to indemnify him against loss on account of any alleged connecton of Jerry Fox with the alleged injury to the land, for he had no connection with it, but simply to indemnify him against loss by reason of his having signed defendants' bond for costs and damages in the land suit, under section 237 of The Code.

Was his Honor's ruling then, that the note could not be (548) recovered, correct? We are of the opinion that it was. Rowe was in adverse possession of the land from which the timber had been cut and severed. He sold the timber to Granville Fox and took notes therefor with Jerry Fox as security, one of which notes is the one in controversy. The plaintiffs could not have recovered the timber after it was severed from the land, for, if they could, then it would follow that they could recover the value of the same from any person to whom it might have been sold; and such a rule would make every purchaser from a person in possession, and claiming the land as his own, a guarantor of that person's title. Such a rule can not be the law. In *Brothers v. Hurdle,* 32 N. C., 490, the defendant had been the plaintiff in a suit for the possession of a tract of land, and when put in possession found thereon growing crops, and crops gathered and stored in the cribs; he took possession of both. In a suit in *trover* by the defendant in the action in ejectment for the gathered crops, the jury found, under the instruction of the Court, that the plaintiffs should recover the value of the severed crops. The instruction was sustained by this Court. In the opinion in that case the Court said: "If the defendant had a right to take the specific articles, he would for the same reason be entitled to recover their value in *trover* against the plaintiff or any one to whom he might have sold them. The amount of which would be where one, who has been evicted, regains possession, he may maintain *trover* against every one who has bought a bushel of corn or a load of wood from the trespasser, at any time while he was in possession . . . There is no authority for it in our Reports, the invariable practice having been to bring trespass for mesne profits and for damages if there has been any destruction to the freehold." And the Court

(549) further said in the same opinion, after drawing the distinction between the wrongful act of a tenant in cutting and severing trees, or disposing of crops, or one having a particular estate, and one in possession of land claiming the property as his own: "But where one who is in the adverse possession gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not become the property of the owner of the land, for his title is divested—he is out of possession, and has no right to the immediate possession of the thing, nor can he bring any action till he gains possession. Then, by the *jus postliminii* or fiction of relations, he is considered as having been in possession for the purpose of bringing trespass *quare clausum fregit* with a *continuendo* from day to day, in which he recovers the value of the *mesne* profits and damages for the injury done to his freehold by the severance of any part of it, or for any other injury consequent to the breach of his close."

The same principle is applied in the cases of *Ray v. Gardner,* 82 N. C., 454; *Faulcon v. Johnston,* 102 N. C., 264; *Howland v. Forlaw,* 108 N. C., 567. If the timber, then, could not have been recovered by the plaintiffs, nor a purchaser of the same have been made to account for its value, certainly the note for which the timber was given can not be recovered—the principle is the same.

There was no error.

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(550)

JAMES MORRIS AND WIFE MAMIE, G. G. EAVES AND WIFE, CATHERINE, v. E. H. HOUSE.

(Decided 22 December, 1899.)

Sale of Real Estate for Assets—Infant Heirs—Docket Entries—Lost Papers—Lapse of Many Years—Presumption.

In a proceeding instituted by an administrator, in the old County Court to sell land for assets, in which proceeding the papers are lost and can not be found, but the case appears on the docket of March Term, 1864, in the name of the administrator against the heirs at law (without naming them) of his intestate, and the docket entries show an order of sale, report of sale, and confirmation of the report, it will be presumed, after the lapse of more than thirty years, and in absence of proof to the contrary, and where the interests of third parties have intervened, although two of the heirs were infants, that the court had jurisdiction of the parties, and the order of sale valid.

MORRIS *v.* HOUSE.

CONTROVERSY WITHOUT ACTION, under section 567, of The Code, submitted to *Starbuck, J.*, at Spring Term, 1898, of the Superior Court of McDOWELL County.

Upon the agreed statement of facts, his Honor decided in favor of plaintiffs, and defendant appealed.

No counsel for appellant.
E. J. Justice for appellee.

FURCHES, J. This is a controversy without action, submitted under section 567 of The Code. The following is a statement of the facts agreed upon by the parties.

1. John Carson, Sr., was the owner of a large tract of land in McDowell County, and devised the same to his sons, J. Logan Carson and George M. Carson.

2. J. Logan Carson and George M. Carson conveyed to their brother, William M. Carson, a one-third undivided interest in said land, in trust for the benefit mentioned in said deed of trust. (551)

3. William M. Carson, in pursuance of the power contained in said trust deed, conveyed one-third undivided interest in certain of said tract of land to his two sons, John Carson, Jr., and William L. Carson.

4. William L. Carson died intestate in 1862 at the age of about twenty-one years, and his real estate descended to his heirs at law.

5. The heirs at law of William L. Carson were the following brothers and sisters of the whole or half blood, to wit: John Carson, George S. Carson, Mrs. E. A. Motz, Mrs. Matilda Ervin, Mrs. Catherine Gowan; and the following children of his deceased sister, Mrs. Martha Burgin, to wit: Mrs. Mamie Morris and Mrs. Catherine Eaves.

6. Mrs. Catherine Eaves inherited, by descent, from William L. Carson, one thirty-sixth interest in the lot of land in controversy, and which is hereinafter described.

7. That the following entry appears on the minute docket of the County Court for McDowell County, on September 21, 1863, to wit:

"Ordered by the court, that John Carson be appointed by the Court administrator upon the estate of William L. Carson, and that he give bond in the sum of $2,500.

"Bond executed, with R. C. Burgin surety thereto, which is accepted by the court, and he was duly sworn and letters issued to him therefor."

On the minute docket of said court is also the following entry:

"Wednesday, March 23, 1864—John Carson, Administrator, etc., against the Heirs at Law of William L. Carson.

(552) "Petition for Sale of Land to Pay Debts.

"It appearing to the satisfaction of the Court that the personal estate of William L. Carson, deceased, is insufficient to pay the debts and charges of administration:

"It is therefore ordered, adjudged and decreed that his administrator, John Carson, have license to sell the real estate of William L. Carson, which is specified in the petition, in order to pay such of the said debts and charges of administration as the personal estate be insufficient to discharge.

"It is further ordered and decreed that the said John Carson, after forty days advertisement at the courthouse door in the town of Marion, and at three other public places in the county of McDowell, proceed to sell the land at the courthouse door aforesaid to the bidder at public auction, on a credit of 12 months, taking bond with approved surety for the payment of the purchase money, and report in writing to the next term of this court."

On May 5, 1864, an order appears on said docket in the following-entitled case, of which the following is a copy:

"John Carson, Administrator, etc., and Others, *ex parte*—Petition to Sell Real Estate to Pay Debts.

"It appearing to the satisfaction of the Court that the personal estate of William L. Carson deceased is insufficient to pay his debts and charges of administration:

"It is therefore ordered, adjudged and decreed that his administrator, John Carson, have a license to sell the real estate of the said Willian L. Carson, which is specified in the petition, in order to pay so much of the debts and charges of the administration and as the personal estate may be insufficient to discharge.

"It is further ordered and decreed that the said John Car-
(553) son, after forty days advertisement at the courthouse in the town of Marion, and at three or more public places in the county of McDowell, proceed to sell said land at the courthouse door aforesaid to the highest bidder at public auction, on a credit of 12 months, taking bond with approved surety for the payment of the purchase money, and report to this court."

On September 25, 1866, there was made upon the said minute docket of the said County Court of McDowell an entry which is as follows:

"John Carson, Administrator, etc., and Others, *ex parte*—Petition to Sell Real Estate Debts.

"This cause coming on to be heard, and it appearing that John Carson, administrator of William L. Carson, on the 20th day of September, 1864, in obedience to a former order in this cause, sold the land described in the petition of Caleb Motz, on a credit of 12 months, at the price of $1,058, and that he took bond with good security for the payment of the purchase money, and the said sale appearing to be reasonable:

"It is therefore ordered, adjudged and decreed that the said sale be in all respects confirmed.

"It is further ordered, adjudged and decreed that the said John Carson proceed to collect said bond, and that he apply a sufficiency of the proceeds thereof to the payment of such debts and charges of the administration as the personal estaate may have been insufficient to discharge; and he is to report to this court any surplus which may remain in his hands after the payment of the same, to the end that the said surplus may be applied under the direction of this court for the benefit of the heirs of the deceased, according to the act of Assembly."

8. That no papers relating to the administration of Wil- (554) liam L. Carson's estate, or to the sale of the land belonging thereto, can be found, if any ever existed, and no entry in reference thereto, other than what is copied in full above, appears on any of the court records of McDowell County.

9. That John Carson, on the 15th day of July, 1873, executed to Caleb Motz a deed; and Caleb Motz executed to John Carson a deed bearing date July 16, 1873.

It will be seen from the facts agreed that the County Court of McDowell, at March Term, 1864, made an order authorizing a sale of the lands of W. L. Carson for assets to pay debts. It appears to have been made in an action of "John Carson, administrator, etc., against the heirs at law of W. L. Carson." It appears that at May term of the same court, another order was made in similar, if not the same terms, authorizing a sale of the intestate's lands for assets to pay debts. This appears to have been an action styled "John Carson, administrator, and others, *ex parte*."

At September Term, 1866, the administrator made a report of sale to Caleb Motz at the price of $1,048, when said report was confirmed in these words: "It is therefore ordered, adjudged and decreed that the said sale be in all respects confirmed." No other papers con-

nected with this proceeding to sell land, nor with regard to the administration or settlement of W. L. Carson's estate, can be found.

The plaintiffs contend that these orders of sale are void, and that the sale made under them is also void, and conveyed no title to the purchaser. And, as it is admitted that they were minors at that time; that they were married before they were 21 years of age, are now and have been under the disability of coverture ever since their marriage; that no statute of limitation had run against them, that they are entitled to recover.

This presents the question as to whether these orders of sale (555) were void, as claimed by the plaintiff, or not.

It was claimed on the argument for the plaintiffs (and we are not furnished with any argument or brief for defendant), that the sale was made under the second order (May Term, 1864), which order is styled "John Carson, administrator, etc., and others, *ex parte*," and the report of sale is styled "John Carson, administrator, etc., and others, *ex parte*," and the plaintiffs contend that this of itself shows that they were not parties. We do not assent to this proposition, though the better and more regular way would have been to make the heirs at law of the defendant's intestate parties-defendant, yet we do not say that this was absolutely necessary in order to bind the heirs and convey the title. It has been held that it was not. *Harris v. Brown,* 123 N. C., 419, and *Ex Parte* Avery, 64 N. C., 113.

But it appears, by the facts agreed, that there was an order authorizing this sale, at March Term, 1864, in a case of John Carson, administrator, against the heirs at law of his intestate, W. L. Carson. And no reason has been assigned, and we can see none, why he should have brought another action returnable to the next term of the same court for the same purpose, when he had already obtained an order of sale at the previous term; and we do not believe he did. How this second order happened to be made, we do not positively know. But as we see no reason for making it, and no sale having been made under it, a bungling clerk, in time of the war, when he was thinking more about that than about the duties of his office, brought it forward on his docket and inadvertently styled it "John Carson, administrator, etc., and others, *ex parte.*" If this was not the case, or if this is not an explanation of the second order, as we think it is, the entry "John Carson, administrator, etc., and others, *ex parte*" strongly sustains the view that the *heirs at law* of W. L. Carson were made plaintiffs with the administrator. It shows that some others were parties besides the administrator, and (556) who could have been these *other parties* but the heirs at law

of his intestate, W. L. Carson? It was not necessary that any one but the administrator and the heirs at law of W. L. Carson should have been parties.

But if the administrator had two orders to sell, one of which authorized the sale and the other did not, and he made the sale and reported it in the wrong case, can it be contended that the sale is void on that account? The administrator was an officer of the court in making this sale, and while it would have been irregular for him to report the sale as having been made under one order when it was made under another, yet this irregularity does not make the sale void. Suppose an officer has two capiases for the arrest of B, one of which is valid and the other is not, and he makes the arrest, and, in making his return, by mistake or inadvertence, he makes it on the wrong paper—the bad capias—will it be contended that he had no authority to make the arrest, and is liable for damages for false imprisonment? We think not.

It is true that the entries and judgments that can now be found do not show who were parties except the administrator, John, and the *heirs at law* of W. L. Carson, in one entry, and John Carson, administrator, etc., *and others,* in the other entry. But these entries were made *thirty-five years* ago, and all the papers connected with the case are lost and can not be found. It is probable that, if they could be found, they would show that the proceeding was regular; and as this might appear to be so if we had the papers, the law *presumes* that it is so. The County Court at that time had jurisdiction of the subject matter—had power to order the sale of real estate for assets—and sufficient appears to show that it had the matter before it on petition, and that it took jurisdiction and ordered the sale. The jurisdiction of the parties and the regularity of the proceeding will be presumed unless the contrary is plainly shown, where the matter has stood as long as this has, and (557) the rights of third parties have intervened, as they have here.

In *Sledge v. Elliott,* 116 N. C., on p. 717 (a case from the same county), it is said that, "After it has remained unimpeached for nearly thirty years, the burden of overcoming a presumption of fairness and regularity in the original record rests upon any one who seeks to disturb a title founded on it." The case of *Sledge v. Elliott* is very much like this, and, as we think, the opinion was put upon solid ground.

In *Adams v. Howard,* 110 N. C., 15, the administrator got a license to sell land for assets in 1860, and sold a part of the land. After 1866 he sold other lands, and it was contended that he had

no right to sell under that order, and steps were taken to get another order, and another order was obtained, in the nature confirming the sale. But this was attacked for irregularity, and the Court held that the second order was not necessary; that the first order authorized the sale. The case further states "that after a lapse of 20 years, the appellants ask to set aside the sale for irregularities without showing that they have been at all prejudiced by them."

The case of *Hare v. Holloman,* 94 N. C., 14, is very much like the case under consideration: An action for possession of land that had been sold by an administrator for assets, where the sale is attempted to be avoided. There, the record had been lost or destroyed, as in this case. In that case the Court say: "Not only do these entries show the special facts which they recite, but by aid of the maxim *omnia presumunter rite esse acta,* they furnish inferential evidence of the regularity of that precedent action, upon which the validity and efficiency of what those entries show to have been done by the Court were dependent. This rule is indispensable when, (558) as in the present case, the original papers in the case have been burned or lost. . . . It is therefore a reasonable inference that the petition did set out the names of the others as well as the name of one of the defendants to whom as a class the land descended."

In *England v. Garner,* 90 N. C., 197, it is said: "If he was an infant this fact did not render the judgment as to him absolutely void. It was irregular, and might, upon proper application, have been set aside, not however, to the prejudice of bona fide purchasers, without notice."

It is also said in *Hare v. Holloman, supra*: "We should be reluctant to disturb titles acquired under the former practice, universally recognized and acted on in this State, thus introducing distrust and confusion in regard to the tenure of estates, and the loss of confidence in the judicial action of the courts, the mischievous results of which can hardly be foreseen, and we could do so only under clear and cogent convictions of error entering into them."

It being shown that the court had jurisdiction of the subject matter —the right to order a sale of land for assets; that it had a petition before it for that purpose, and that it acted upon the petition and made the order, it must be, and it is presumed, in the absence of proof to the contrary, that the proceeding was regular, and the court had jurisdiction of the parties. The administrator having the authority to sell under one or both of these orders, it made no difference under which he reported the sale. At most, this was only an irreg-

ularity for which this Court, *thirty-five* years afterwards, will not declare the order of sale void when the interests of third parties are involved, and when it is not shown that any one has been damaged, and when it is not shown but what every dollar was necessary to pay debts, and no fraud has been alleged.

We can not thus jeopardize title to land where parties have (559) been holding thirty years and more. To allow such parties, now, to be turned out of house and home because some old record can not be found that has been accidentally or purposely destroyed, thereby enabling some remote heir to claim the land, would not be just.

There is another question presented by the case agreed which seems not to have been considered in the judgment of the court, but which we think we ought to pass upon; that is, the sufficiency of the description in the deed. And we do not see why this is not sufficient to enable the parties to locate the land. It would seem that the 640-acre grant, upon which the town of Marion is located, might be identified. And if it is located, it would seem that the 400-acre tract, which is a part of the 640-acre tract, might also be located, by getting the deed to the part theretofore sold off of the 640-acre tract, and locating that boundary. It seems to us that a surveyor might take these deeds and locate the 400-acre tract.

There is error, and the judgment is

Reversed.

DOUGLAS, J., dissenting. I can not concur in the opinion of the Court, because, to my mind, it conflicts with the express provisions of the Constitution of the United States, and of the State of North Carolina. Article XIV, section 1, of the amendments to the Federal Constitution, says: "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 17 of the Declaration of Rights, in our State Constitution, provides that, "No person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land." The phrase "law of the land" has been (560) repeatedly interpreted to mean "due process of law." The Supreme Court of the United States, in *Walker v. Sauvinet,* 92 U. S., 90, says: "A State can not deprive a person of his property without due process of law. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceed-

ings. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." It is too well settled to require any citation of authority that entire strangers are not bound by a judgment, and I presume it is equally settled that no judgment can be rendered without some form of action or special proceeding, which in this State must always be commenced by summons or attachment. Code, secs. 161, 287. It is true that under the old practice infants were sometimes brought into court, where a suit was already pending, by the appointment of a guardian *ad litem,* without personal service.

But this has nothing to do with the case at bar, as there is no pretense that any guardian *ad litem* was ever appointed for any one. It is absolutely essential from principles of natural justice, as well as of the highest public policy, that the rights of infants should be protected. Adults can protect themselves. No one is compelled to buy land at an administrator's sale, and in any event he can protect himself by a proper inspection of the record. A purchaser is a voluntary actor, while the infant, whose lands are taken without his consent or even his knowledge, is, at best, a passive sufferer. The power to sell land for assets is in derogation of the common law. Even now land descends to the heir, and the title which vests in him by operation of law remains in him until divested by due process of law. In this case it does not appear anywhere in the records of the court that the heirs at law of William L. Carson, or any (561) of them, ever became, or were made, parties to the proceeding under which the land was sold; nor is there even a recital to that effect. Even the general phrase "heirs at law of William L. Carson" appears only once in the title of the proceeding; and nowhere is the name of a single individual given as one of such heirs at law.

But it is said that, in the interest of innocent purchasers, the law must presume all things to have been rightly done. Innocent children are entitled to as much protection as innocent purchasers, too many of whom calmly close their eyes in the happy assurance that "where ignorance is bliss, it is folly to be wise."

Can the purchaser be said to have been an "innocent purchaser" in this case? John Carson, as administrator, deeded the land to Caleb Motz, on the 15th day of July, 1873, and on the following day Motz deeded back the same land to John Carson. I do not see how an administrator can ever be, in the legal sense of the term, an innocent purchaser at his own sale. Let us examine the cases cited by the Court, bearing in mind that in the case at bar there is no proof or even recital that these plaintiffs were ever served with process,

or became parties voluntarily or by the appointment of a guardian *ad litem*. The fact that the minute book in which the orders of sale are entered and in which the order appointing a guardian *ad litem* should have been entered, if ever made, contains no allusion to any such order, strongly tends to prove that no such guardian was ever appointed.

In *Harris v. Brown,* 123 N. C., 419, cited by the Court, the minor heirs were not asking any relief. It was the purchaser who was seeking to avoid the payment of the purchase money. In that case, this Court says: "In adversary proceedings, the parties are at arm's length, and each one fights for victory. In such cases, if minors are parties without guardian, general or special, it is irregular, (562) and on arriving at maturity they may reject or accept at their option. But in *ex parte* proceedings they *must be represented* by a guardian or next friend." In *Avery ex parte,* 64 N. C., 113, this Court held in express terms that "the heirs must be made defendants, and be represented by a duly constituted guardian *ad litem.*"

In *Sledge v. Elliott,* 116 N. C., 712, 716, it appeared that the clerk of the court had been appointed guardian *ad litem,* and the *decree recited* that service had been made upon *all* the parties.

In *Adams v. Howard,* 110 N. C., 15, it was held that the land was authorized to be sold under an order made in a proceeding where the infants were parties represented by a guardian *ad litem,* and that the fact that the license to sell, as renewed in a proceeding where the heirs were not made parties, did not *invalidate* the previous valid order. It was also shown that the adult heirs were present at the sale and offered no objection.

In *Hare v. Holloman,* 94 N. C., 14, the following entry appears upon the record: "L. C. Cowper is appointed guardian *ad litem* to the defendants, who accepts service of the petition and submits to a decree." As in all the cases cited by the Court it was shown affirmatively that a guardian *ad litem* had been appointed wherever the interests of minor heirs were affected, I do not see how they sustain the opinion of the Court. Personal service upon the infant might presume the appointment of a guardian *ad litem,* or the appointment of a guardian *ad litem* might presume service or take the place thereof; but surely one can not presume the other where neither is shown to exist. Every presumption must have some established fact to rest upon. Let us see what some other cases hold as to the effect of a judgment against infants, who are neither parties, (563) nor appeared by guardian:

In *Larkins v. Bullard,* 88 N. C., 35, (very much like the case at bar), the Court says: "The finding of the Court seems to go to the length of saying that, notwithstanding the order directing it to be done, the infant children of John Bullard were never in fact made parties to the action or any defense made for them; and if so, then, under the authority of *White v. Albertson,* 3 Dev. (14 N. C.), 241, the judgment against them was *absolutely void ab initio,* and it was proper to give them relief by directing the same to be vacated as to them."

In *White v. Albertson,* 14 N. C., 242, Chief Justice HENDERSON, speaking for the Court, says: "The only objection which has the appearance of solidity, is, that the defendants the heirs, were not made parties. If the fact be so, the judgment is *void;* for there can be no judgment but against one in Court. It is not according to the course of the Court to render judgment against one not brought into court."

In *Jennings v. Stafford,* 23 N. C., 404, GASTON, J., speaking for the Court, says: "But if what is offered as a judgment have merely the semblance thereof; as if it be rendered by a court having no jurisdiction of the subject matter, or against a person who *has not had notice* to defend his right, or if it order what the court has not power to order, so that upon its face the law can pronounce it null, it is not a judgment."

In *Doyle v. Brown,* 72 N. C., 393, Judge READE, speaking for the Court, lays down the rule in his usual, clear, concise and forcible manner, as follows: "Where a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but *void,* and it may be so *treated whenever and wherever offered* without any direct proceedings (564) to vacate it. And the reason is, that the want of service of process and the want of appearance are shown by the record itself wherever it is offered. It would be otherwise if the record showed service of process or appearance, when in fact there had been none. In such case, the judgment would be apparently regular, and would be conclusive until by a direct proceeding for the purpose it would be vacated. A plaintiff needs not to be *brought* into court; he *comes* in. A judgment is of no force against a person as plaintiff, unless the record *shows* him to be plaintiff. If the record shows him to be plaintiff, when in fact he was not, then it stands as where the record shows one to be defendant when he is not. In *both* cases the *record* is conclusive until corrected by a direct proceeding for that purpose."

This rule applies directly to the case at bar, as the record does not show that the infant heirs were either served with process or appeared by guardian. But it is said that only part of the record can be found. The answer is that what is found, the minute docket, does not tend to prove, even by recital, the fact of service or appearance. The mere fact that the minute docket contains both orders of sale and the decree confirming the sale, and yet makes no allusion to the appointment of a guardian *ad litem,* tends strongly to prove that no such guardian was ever appointed. My attention has never been called to any record where the professed parties were *affirmatively* shown by the record itself not to have been served with process or appeared. The absence of all proof, direct or by implication, of such fact is taken as at least tending to prove its want of existence, if not conclusive proof. *Armstrong v. Harshaw,* 12 N. C., 187; *Stallings v. Gulley,* 48 N. C., 344; *Condry v. Cheshire,* 88 N. C., 375. These well-considered cases also sustain the rule that where one has never become a party either by service of process or appearance, any judgment against him is absolutely void. The extent to which they have been cited and approved may be seen from Womack's (565) Digest.

For the reasons above stated, I am clearly of the opinion that the judgment of the court below should be affirmed. I fully share in the reluctance of the Court to disturb ancient titles after so long a lapse of time, but I am equally reluctant to deprive any one of his property without due process of law.

MONTGOMERY, J. I concur in the dissenting opinion.

Cited: Cochran v. Improvement Co., 127 N. C., 394; *Card v. Finch,* 142 N. C., 149.

ADAMS & REID (MEDICAL FIRM) v. SOUTHERN RAILWAY COMPANY.

(Decided 22 December, 1899.)

Railroad Accident—Injured Tramps—Medical Treatment—Conductor's Authority.

There are some emergency instances in which the conductor may engage a physician to attend the company's servants or passengers, when injured; but as to trespassers on its road, no such authority exists.

ACTION upon a medical bill determined, upon a case agreed, by *McNeill, J.,* at September Term, 1899, of GASTON Superior Court. Three tramps were injured by an accident while stealing a ride on defendant's road, and the plaintiffs, a medical firm, were summoned by the conductor to attend them. They rendered the service, and sent in their bill, which the defendant refused to pay. His Honor rendered judgment in favor of plaintiffs, and defendant appealed.

(566) *G. F. Bason for appellant.*
A. G. Mangum for appellee.

FAIRCLOTH, C. J. This action is to recover for professional services. On August 20, 1898, the defendant's freight train ran into a washout on the road, about 2:30 o'clock a. m. A few cars passed over the washout, but seven cars in the middle of the train went down, on which were some trespassers—men stealing a ride. The occurrence was a quarter of a mile from Gastonia, a station on the defendant's road. On the arrival at the station the conductor and engineer engaged the plaintiff's services to treat the injuries of some of the trespassers. At 9 o'clock a. m., after the services were rendered, the station agent, in response to an inquiry received from the superintendent from the defendant's road at Charlotte, N. C., 20 miles away, received the following: "Surgeons should understand we will not bear any expense in connection with injured tramps. (Signed) Rider, Superintendent."

This is not a question of negligence on the part of the defendant in causing the injury, but a question of the conductor's authority to employ the plaintiffs at the defendant's expense, under the circumstances. Therefore, *Pearce v. R. R.,* 124 N. C., 83, is not in point. The conductor has no authority to make contracts binding on his employer, outside of the scope of his employment, unless express authority is given or necessarily implied from his employment.

There are some emergency instances in which the conductor may engage a physician to nurse the defendant's servants or passengers when injured, but as to trespassers on the defendant's road no such authority is found to exist.

The subject is considered at length, and numerous authorities cited, in 6 Rapalge's Digest, 392, sec. 3, and in *anscom v. Railway Co.,* 20 L. R. A., 695, notes. These cases hold against the right of the plaintiffs to recover in this case.

Nothing in the record discloses the conductor's authority to (567) bind his employer, upon the facts agreed and presented to this Court.

Judgment reversed.

(568)

JOSIAH ASBURY AND WIFE MARY E. ASBURY v. CHARLOTTE ELECTRIC RAILWAY AND POWER COMPANY.

(Decided 22 December, 1899.)

Damages—Personal Injury—Negligence—Evidence—Judge's Charge.

1. The judge, upon the issue as to negligence, properly charged the jury that the burden of proof was upon the plaintiff to prove the affirmative of the issue by a greater weight of the evidence; and that if the evidence was evenly balanced, so that the jury could not decide whether or not the injuries were caused by the negligence of the defendant, they would answer the issue "No."

2. The judge properly refused to charge, as requested by defendant: "That if the jury are left *uncertain* by the evidence in the case as to how the injuries to the plaintiff Mary E. Asbury were caused, that is, whether they were caused by the negligence of the defendant or not, they will answer the issue 'No.'" This was in effect asking his Honor to charge that the evidence as to negligence must amount to certainty, that is, proof satisfactory to the jury beyond a reasonable doubt, which is not the rule in civil cases.

3. If the premature starting of the electric car, resulting in the injury of the female plaintiff, was occasioned by some act of omission or commission on the part of those in charge, there was negligence in the performance of duty.

4. Referring to the defense of contributory negligence, his Honor, in defining due care on the part of the plaintiff, said that it meant such care as an ordinarily prudent man would use, placed in "*like* or *similar*" circumstances. It was objected by defendant that the word *same* should have been used in the definition. The distinction is merely verbal—the idea is the *same*, sufficiently expressed.

5. The rule of "the prudent man" is applicable alike to females.

CIVIL ACTION for damages for personal injury received by *feme* plaintiff, while a passenger, by the negligence of defendant, tried before *Coble, J.*, and a jury, at Fall Term, 1899, of (569) MECKLENBURG Superior Court. There was no exception to the evidence. The exceptions to the charge of his Honor are noted in the opinion. Verdict for the plaintiff for $2,500. Judgment. Appeal by defendant.

Burwell, Walker & Cansler for appellant.
Jones & Tillett for appellee.

MONTGOMERY, J. This action was brought by the *feme* plaintiff to recover damages for injuries received by her, and alleged to have been caused by the negligence of the defendant. The particular allegation of the complaint is that the *feme* plaintiff was a passenger on one of the street cars of the defendant, and while she was in the act of disembarking therefrom, the servants and agents of the defendant, in charge of said car, negligently caused the car to be suddenly started forward, and that the said plaintiff, in consequence thereof, was thrown to the ground and injured.

The defendant denied the imputed negligence, and averred that plaintiff was negligent in assuming a dangerous position and in alighting from the car.

Issues were submitted to the jury upon the pleadings as follows:

1. Was the plaintiff injured by the negligence of the defendant, *as alleged in the complaint?*

2. Did the plaintiff Mary E. Asbury contribute to her injury by her own negligence?

3. What damages are plaintiffs entitled to recover?

The only evidence of the plaintiff as to the manner in which the *feme* plaintiff was injured was the testimony of herself. She said:

"I was sitting in the seat the wheels run in towards the front.
I got up to step off the car, and found that I could not step
(570) from the floor of the car to the step or running board that
was along the side of the car. There was an obstruction there, and I stepped upon it. I was holding on to the seat in front of me, and to the seat behind me. The obstruction I stepped upon, I suppose was a box for the wheels to run under. Just as I lifted my foot to step down from this obstruction to the running board the car moved, and it seemed to be a jerk of the car. There was no warning to me of the movement of the car. The conductor had not come and offered me assistance to get off. I was holding on at the time and was dashed to the ground when the car jerked. There were three steps to go up from the place I fell in to the sidewalk. The car had come to a full stop before it started again. I only know that I just had time to stand up till it started. At the time I felt the jerk, I had not stepped down on the running board or side step, and when I felt the jerk I was in the act of stepping. I had just raised my right foot to step down on the running board, and I had my hand on the back of the seat in front of me, but do

not know what I had hold of behind me. I was holding on with both hands. The conductor was standing on the running board. I fell from the car, and not from the running board. The conductor did not assist me to rise when I fell to the ground. He did not offer any assistance. He was on the ground when I pulled myself up, but offered no assistance. If he brushed the dirt from my dress, I did not know it. The ditch I fell in is on the side of the Boulevard, between the sidewalk and the track. I did not fall in the ditch, but was dashed out a right good distance from the car. There was a conductor and a motorman on the car, and a man sitting in the front seat by the motorman on the same side that I was sitting. There was no one else on the car."

The defendant's evidence as to how the plaintiff was injured (571) was the testimony of J. E. Hunter, the conductor, E. E. Gribble the motorman, W. T. Greene, who was on the car and learning to be a motorman, and Miss Lucy Lookabill. The witness Hunter testified that the *feme* plaintiff directed him where to stop the car, and that he stopped it at that point; that she made an effort to get off; she got up and took hold of the post of the car with her left hand, and then stepped from the car down on the running board, and then she had to turn her hand loose from the post before she could reach the ground, and when she turned the post loose she fell right out in the street. She had too high a hold on the post to reach the ground, and when she turned loose she fell. She had hold of the post with her left hand, the post being by her left side. "I took her by her left arm, and assisted her to get up. After she got up, I asked her was she hurt, and she said that she thought her hip was hurt. I asked her did she step on her skirts, and she said she did not think that she did. I helped her to the sidewalk. She dropped her parasol when she fell, and I picked it up, and handed it to her. I did not go further than the sidewalk with her, as she seemed to be able to go. She limped. She had gone up on the sidewalk when I left her to go back to the car. I then went back to my car. From the time I stopped the car till I went back from the sidewalk to the car and started the car, it might have been a minute. From the time I stopped the car for her to get off till I went back from the sidewalk to the car, the car never started, and was not in motion in any way." That the place he stopped was on a dead level; she stumbled over the running board and fell on the ground; she fell when she turned loose her left hand, and I thought she might have stepped on her dress in stepping on the running board.

The witness Gribble testified:

(572) "I was the motorman on the car. I had been in the service of the company four years this coming July. I stopped the car at Cleveland Avenue, after getting the proper signal to stop. I shut off the current and applied the brake, which is the way to stop the car. I saw the plaintiff fall. I stopped the car, and was holding the brake in my right hand. We had stopped a considerable time, and I heard the conductor say, 'this is the place.' I shoved the brake a little further forward, and set it. The car was right still. I looked back over my shoulder, and saw Mrs. Asbury standing on the running board of the car, and holding to the post with her left hand. She was in the act of stepping off the running board to the ground when she fell. In making the step her hand left the post, and she fell. I saw the conductor when I first looked around, and he was standing on the ground. Mrs. Asbury was facing him. When she fell he assisted her in getting up, and asked her how came her to fall—if she stepped on her skirt. He stooped and picked up her skirt and shook the dust off it, and also picked up her parasol and handed it to her. He asked her if she thought that she could go along, and she said that she thought she could. He walked with her over to the sidewalk. I think he held on her arm to the sidewalk, though I am not positive about this. I saw her parasol on the ground. From the time the car stopped till the conductor came back the car never started, and was not put in motion in any way. The only thing that could have started the car was to have released the brake and applied the current, and I neither released the brake nor put on the current. The ditch is about forty or fifty feet from the first rail. The Boulevard is very wide—much wider than Tryon Street."

The witness Miss Lookabill testified:

"I live in Dilworth, and know the place where Mrs. Asbury got hurt, which is about seventy-five yards from my home. I was on the back porch, and heard the car coming, and also heard it stop. When I (573) looked I saw the lady, and the conductor was brushing her sleeve. From the time I heard the car stop till I saw the conductor brushing her sleeve, I never heard the car move—I could have heard it from there perfectly. Mrs. Asbury was coming towards our house when I saw her. When I saw the conductor brushing the dirt off her sleeve, she was very near the car. The unusual length of time the car stopped attracted my attention. There is no ditch at that place." On cross-examination: "I was standing on the back porch." On redirect examination: "Mrs. Asbury asked

me if she was not in the ditch when I saw her, and I told her in reply, that there was no ditch there."

The witness Hunter was recalled, and said: "I was on car No. 14, and saw this car last night. There is no iron wheel cover or box on that car like Mrs. Asbury spoke of. The defendant has three cars which have these boxes as described by plaintiff, and three cars without them. The cover, or box, over the wheel is a little larger than this book."

And the *feme* plaintiff further said that the motorman and Greene were laughing and talking, and paid no attention to her.

If this Court were permitted to criticise the verdicts of juries, we might have something to say concerning the one delivered in this case, but that is forbidden ground to us, and we can only review the instructions of law given in the court below upon the evidence.

His Honor made no mistake in the law laid down to the jury for their guidance. The charge was fair to both sides, and it was full and very clear. The defendant's first exception was to the refusal of the court to give their second prayer for instruction, which was in these words: "That if the jury are left *uncertain* by the evidence in the case as to how the injuries to the plaintiff Mary E. Asbury were caused, that is, whether they were caused (574) by the negligence of the defendant or not, they will answer the first issue, 'No.'" The prayer was equivalent to a request of the court to tell the jury that unless the plaintiff's evidence produced to a certainty the conviction that her injuries were caused by the negligence of the defendant that they should decide the first issue in favor of the defendant; or, in other words, that the plaintiff was required to make out her case beyond a doubt. That is not the rule. His Honor had told the jury in the opening of his charge that the burden was on the plaintiff to prove the affirmative of the first issue by a greater weight of the evidence; and in compliance with the defendant's third prayer he told the jury that if the evidence in the case was evenly balanced, so that the jury could not decide whether or not the injuries were caused by the negligence of the defendant, they would answer the first issue, "No." The defendant has nothing to complain of in the refusal of his Honor to give their second prayer for instruction.

The defendant's second, fourth and fifth exceptions are directed to one and the same view of the case, and they can be discussed together. The alleged error pointed out by these exceptions, is, that as the complaint of the plaintiffs alleged and charged *active* negligence of the defendant's conductor and motorman, in that they

caused, actively, the motion of the car, and as there was no charge of defective machinery by which the car might have moved itself if there had been any negligent *omission* of duty on the part of the defendant's employees, that his Honor should have directed the jury that if the car did not move by the positive act of the defendant's servants, they should answer the first issue, "No"; and that he should not have added the modification to that request, the legal proposition that a want of due care—simple passive negligence—also would make the defendant liable.

The contention of the defendant is, that as the plaintiffs' (575) complaint alleged that the defendants had negligently *caused* the car to be suddenly started forward, that therefore, if they permitted the car to start forward *through want of due care* on their part, that that would not be causing it to start, and that therefore there would be a variance between the allegations of the complaint in reference to the negligence of the defendant upon the evidence brought out in the case and the instruction of the court. It seems to us that there could have been no difference between the motorman's actually turning on the current and moving on the car by his volition, and the failure on the part of the motorman to exercise due care in the management of the machinery so as to prevent the car from moving through his negligence. In both cases the negligence of the motorman and conductor, whether of *omission* or *commission,* caused the car to start. The defendant further complains, under that head, because his Honor did not explain what due care meant to the jury, and also did not tell the jury what act of the defendant's servants, or what omission to act in the particular case, would be negligence. But his Honor told the jury in his charge that due care meant "such care as an ordinarily prudent man, placed in circumstances *like or similar* to those in which the person whose conduct is in question was placed, would use"; and in reference to the exception that his Honor did not tell the jury what act of the defendant's servants, or what omission to act in the particular case, would be negligence, we find in the charge that his Honor instructed the jury that, "It is the duty of the employees of a street car company, in charge of a car, when they stop a car for passengers to get off, not to start the car until they see that passengers, who have arisen from their seats to get off, have gotten off, and a failure in the performance of this duty is negligence on the part of the company." And he further instructed the jury that, "If the jury find from the evidence that the employees of the defendant in (576) charge of the car in question stopped the same for the *feme* plain-

tiff to get off at the place she requested, that after they stopped the car the *feme plaintiff* arose from her seat to get off the car, and that, after she arose from her seat to get off, the said employees did not cause the car to start or move, and did not, through any want of due care, permit the same to move until she was entirely off the car, then the jury will answer the first issue, 'No.' "

The defendant further contends that his Honor when defining the meaning of due care to the jury said that it meant such care as an ordinarily prudent man placed in circumstances *like or similar* to those, etc., gave a faulty definition, and they insisted that he should have used the word *same* instead of the words *like* and *similar*. The words "like and similar" were full and sufficient. *Ellerbe v. R. R. Co.,* 118 N. C., at p. 1026; *Hinshaw v. R. R., ibid.,* at p. 1055. Under the head of due care, the defendant contended further that when his Honor laid down the rule of "the prudent man" in reference to the conduct of the *feme* plaintiff at the time of her injury, he committed error. The argument was that the definition of due care was misleading "as the care to be exercised by a *woman,* when she is placed in a dangerous position, would be greater than that required of a *man* surrounded by the same circumstances; that she is supposed to be less able to take care of herself than he is, and the danger to her will therefore be greater; that when this is the case, that is, when the danger is greater, the law requires a greater degree of care to be exercised in avoiding it." And the case of *High v. R. R.,* was cited as an authority for that position. The woman there was injured by an engine, while walking, on a windy day; she was wearing a bonnet which prevented her from hearing well, and this Court held that that gave her no greater privilege than she should (577) otherwise enjoy as licensee, but on the contrary should have made her more watchful. There is nothing in that decision which even squints toward a holding that a woman is not bound by the rule of "the prudent man," but ordinarily by a stricter rule.

There remains for consideration the third exception of the defendants, which is as follows: "The defendant requested the court to charge the jury: If the plaintiff was standing in the position in the car as testified by her, and if this was a dangerous position, and would have appeared to be dangerous to any person in the exercise of ordinary care, or such care as a prudent person would exercise under such circumstances, and this proximately contributed to her injuries, the jury will answer the second issue, "Yes." The court refused this instruction, and modified it by inserting therein after the word "injuries" and before the words "the jury," the words

"and if she could by due care have avoided taking such position," which will appear in the instruction numbered five, as given by the court, and above set forth. There was no error in his Honor's modifying the prayer as he did.

No error.

Cited: S. v. Clark, 134 N. C., 702.

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(578)

JAMES CANSLER v. G. N. PENLAND ET AL.

(Decided 22 December, 1899.)

Farming out Public Office—The Code, Sec. 2084—Acts Mala in Se and Mala Prohibita.

1. The Code, sec. 2084, prohibits a sheriff from letting to farm, in any manner, his county, or any part of it.
2. The court will not lend its aid in enforcing an illegal transaction.
3. A sheriff may employ a deputy to *assist* him, but he can not *delegate* his authority to another.
4. As to the validity of contracts, the law makes no distinction between acts *mala in se* and acts *mala prohibita*, and will withdraw its support as soon as the illegality is discovered.

CIVIL ACTION by the sheriff of Macon County against the defendant, to whom he had delegated the collection of taxes for 1891 and 1892, for balance of commissions due, as per contract, tried before *Greene J.*, upon exception to report of referee at Fall Term, 1898, of the Superior Court of MACON.

The referee reported a balance due the plaintiff of $93.02, to which defendant excepted. Exception overruled, and judgment for plaintiff. Defendant appealed. The illegality of the transaction was raised for the first time in the Supreme Court.

Simmons, Pou & Ward for appellant.
Shepherd & Busbee for appellee.

FAIRCLOTH, C. J. This is an action for an alleged balance due the plaintiff by the defendant on the following facts: The plaintiff was sheriff and tax collector for Macon County and the tax list was

in his hands for collection for the years 1891 and 1892; that plaintiff and defendant contracted with each other that the defendant was to collect the taxes for those years, and to receive a commisson of 2½ per cent for making collections, and the tax list was turned (579) over to the defendant by the plaintiff.

This action was commenced in 1894. The matter was referred, and the result was a judgment in favor of the plaintiff for $93.02, with interest and costs. Appeal by the defendant.

In this Court the defendant contends that the contract was illegal and void, and that the plaintiff can not maintain his action. This question has not heretofore been presented to this Court, and the defendant's counsel disclaims any insinuation that the contract was corruptly made or that the parties intended to violate the law.

We agree with counsel that the contract was illegal and void on the grounds of public policy. The Code, section 2084, says: "No sheriff shall let to farm, in any manner, his county, or any part of it, under pain," etc.—meaning his office. There is no question of fraudulent purpose in the case. The question is one of policy and safety to the public interests, and that is highly important.

There can be no doubt that a sheriff may employ a deputy or other private person to *assist* him, but he can not *delegate* his authority to another, as that would tend to injure the public service. The public has an interest in the proper performance of their duties by public officers, and would be prejudiced by agreements tending to impair an officer's efficiency or in any way interfere with or disturb the due execution of the duties of the office. The office of the sheriff and tax collector is one of public confidence and fidelity to a public trust, and can not be a matter of bargain and sale. It requires good faith and duty. Under the present contract, the duty, the power and the control of the tax collector's office are placed in the hands of the defendant. True, the sheriff's bond is liable for (580) the amount of collectible taxes, but the public trust and confidence are not secured by his bond. As to the validity of contracts, the law makes no distinction between acts *mala in se* and acts *mala prohibita,* or wrong, simply because they are prohibited by statute. When a statute intends to prohibit an act, it must be held that its violation is illegal, without regard to the reason of the inhibition, or the morality or immorality of the act; and that is so, without regard to the ignorance of the parties as to the prohibiting statute. The law would be false to itself if it allowed a contract to be enforced in the courts against the intent and express provisions of the law.

The above principles were recognized and expressed in *Puckett v.*

Alexander, 102 N. C., 95, where a graduated physician had not been licensed, but practiced, and undertook to collect under a contract in violation of The Code, sections 3122 and 3132. It was held that the contract was void in its inception.

The plaintiff's counsel in this Court then took the position that, if the contract was illegal and unenforceable, the defendant had waived it by not pleading the illegality and by submitting to an account on the merits of the controversy. That is true generally, under the code practice, but there are some matters that party can not waive, and the authorities are against the proposition in such cases. In *Osconyan v. Arms Co.,* 103 U. S., 268, the contract under consideration was held illegal and void, because it was against public policy, which was not pleaded, and the plaintiff insisted on the waiver. *Coppell v. Hall,* 7 Wallace, is incorporated in the case. The Court said, there can be no waiver in such cases: "The defense is allowed, not for the sake of the defendant, but of the law itself. It will not enforce what it has forbidden and denounced. . . . When-
(581) ever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

When an action is instituted in a court which has no jurisdiction of the subject matter, the court will not proceed to do a vain thing, but will stop, without waiting for a plea denying its authority to proceed. So, under our Constitution and statutes, no *personal* contract of a married woman will be enforced against her (with a few exceptions), if the court can discover in any part of the record that she is married, although her *coverture* is not pleaded. *Green v. Ballard,* 116 N. C., 144; *Weathers v. Borders,* 124 N. C., 610.

The priciple is that when the court discovers that it is invoked to aid in enforcing an illegal transaction, the court *ex mero motu* will withdraw its hand.

The common law was provident in respect to public interests. It would not allow the sale of an office to be the foundation of an action, because it was against public policy. *Parsons v. Thompson,* 1 H. Bl., 322; *Blatchford v. Preston,* 8 Term Rep., 89. Such a sale was, and is invalid, because the law could not know in advance whether

the grantee or bargainee would be competent to discharge the trust, in the public interest. *Reynols'* case, 9 Coke, 95.

For the above reasons, we feel it to be our duty to declare that the judgment of the Superior Court was erroneous.

Reversed.

CLARK, J. I concur in the result.

Cited: S. c., 126 N. C., 793; *Wittkowsky v. Baruch,* 127 N. C., 318.

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(582)

STATE ON RELATION OF MRS. J. C. ALSTON, GUARDIAN, v. B. B. MASSENBURG, LUCY H. MASSENBURG ET AL.

(Decided 22 December, 1899.)

Clerk's Bond—Receiver—Loan of Fund.

A clerk of the court, appointed receiver of infant wards' estate, by the court, with direction in the order "to collect all moneys due them, to secure, loan, invest and apply the same for the benefit and advantage of the said infants, under the direction and subject to such rules and orders in every respect as this court may from time to time make in regard thereto," receives the fund and loans it out upon note and mortgage. The fund is partially lost by defect of title, and the clerk's bond is sued by the guardian. The jury answered "Yes" to the following issue: Did B. B. Massenburg, Receiver, in lending the money of the infant ward use the discretion which an ordinary prudent business man would use in the investment of his own funds? *Held,* the receiver is not liable for the loss.

CIVIL ACTION upon the official bond of the defendant B. B. Massenburg, clerk of Franklin Superior Court, who had been appointed receiver of the estate of the infant wards of plaintiff, tried before *Moore, J.,* at January Term, 1899, of the Superior Court of said county.

Upon the verdict of the jury in response to the issues submitted, both sides claimed the judgment of the court. Judgment was rendered in favor of plaintiff, and defendants excepted and appealed.

F. S. Spruill for appellant.

P. H. Cooke and W. M. Pearson for appellee.

MONTGOMERY, J. This action was brought by the plaintiff against the defendants to recover of them an amount of money on the alleged ground that the defendant Massenburg who, while clerk of the (583) Superior Court of Franklin County, had been appointed receiver of the estate of Willie Waugh, the plaintiff, had invested the money of the estate as such receiver without the advice of the court, and that the money had been lost through the negligence of Massenburg in not taking proper security. The defendants admitted that the defendant Massenburg had received a certain amount of money belonging to the estate of Waugh, but not as much as was set out in the complaint. But they insisted that the other defendants, who were sureties on the official bond of Massenburg as clerk, as aforesaid, were not liable for the acts of Massenburg as receiver. And for a further defense, the defendants averred that Massenburg as receiver invested the money of the plaintiff and used due care in making the investment, and that the loss which has been caused to the plaintiff was not caused by Massenburg's negligence. The following issues were submitted to the jury:

1. Was the plaintiff Alston the guardian of Willie Waugh at the time this action was instituted?

2. What amount of money did the clerk, Massenburg, receive as receiver of the fund belonging to Willie Waugh?

3. Did Massenburg, receiver, in lending the money of the infant ward, use the discretion which an ordinarly prudent business man would use in the investment of his own funds?

The jury responded to the first issue, "yes," to the second issue, "$271," and to the third issue, "yes."

The plaintiff moved for judgment upon the ground that the order set out as Exhibit "A" in the answer did not authorize and empower the receiver to lend the money at all and that the loan was *ultra vires,* and therefore in case of loss the receiver would be required to make the same good, even though the jury had found the third issue "yes." The court being of opinion with the plaintiff, granted the motion and signed the judgment set out in the record. The (584) defendant excepted and appealed.

Exhibit "A" referred to was a judgment and order made by Judge Whitaker at January Term, 1891, of Franklin Superior Court, and in the following words:

This cause coming on to be heard at this term of the court before the undersigned, judge presiding at this term of said court, and being heard upon the foregoing petition and exhibits attached, it is considered and adjudged by the Court necessary that a receiver should

be appointed, for the reasons and purposes set forth in said petition and exhibits. It is therefore adjudged by the Court that B. B. Massenburg, clerk of this court, be and he is hereby appointed receiver, to take possession of the estate of said infants, and to collect all moneys due them, to secure, loan, invest and apply the same for the benefit and advantage of the said infants, under the direction and subject to such rules and orders in every respect as this Court may from time to time make in regard thereto. And the clerk of this court is directed to docket this case upon the docket of this court for further rules and orders of this court. And it is further ordered, that the said receiver pay to John E. Woodard, solicitor, out of any money of said estate, the sum of $20, for services rendered in this behalf, the receipt of said solicitor to be a voucher to the receiver for said sum in his accounts. And this cause is retained for further orders, etc.

We are of the opinion that there was error in the ruling of his Honor, and in the rendition of the judgment in favor of the plaintiff. We think that a fair construction of the judgment of Judge Whitaker is that the receiver should proceed at once to collect the money, and to properly invest it. It would be a strained construction to hold that the receiver was first to ascertain where and how the investment of the fund might be made, and then report to the court and get its advice as to what to do. We think that the order virtually instructed the receiver to invest the fund, of course using good (585) faith and sound discretion.

The case of *Rountree v. Barnett,* 69 N. C., 76, cited by the counsel of the plaintiff, is not in point. There, the order of the court directed a specific and particular method of investment, which the officer charged with the duty violated by an investment in another manner. The change in the order was at his peril.

Error.

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

F. A. BUTNER ET AL., TRADING AS BUTNER, KAPP & CO. v. NANCY BLEVINS ET AL.

(Decided 22 December, 1899.)

Foreclosure of Mortgage—Private Examination of Wife—Mortgagee —Notice of Fraud, Duress or Undue Influence—Act 1889, Ch. 389, Innocent Purchaser.

1. Where, upon a conflict of evidence, in the trial of an issue as to the regularity of the private examination of the *feme* covert, the jury respond in the affirmative, the finding of the jury is fatal to her objection relating thereto.

2. Where there is no allegation or proof that the mortgagee had any notice of fraud, duress, or undue influence, and the privy examination is properly certified, the act of 1889, ch. 389, validates his title.

3. The act of 1889 also protects the title of an innocent purchaser for value from a grantee, who did have notice of such fraud, duress or undue influence.

(586) ACTION TO FORECLOSE mortgage made to plaintiffs by defendant, Nancy Blevins, and her deceased husband tried before *Allen, J.*, at March Term, 1899, of the Superior Court of SURRY County.

There was an issue submitted as to the regularity of the privy examination of the defendant Nancy Blevins, which the jury found in the affirmative.

There were several prayers for instruction in regard to compulsion and undue influence of the husband, asked for by her, but declined by the court.

Defendant excepted.

There was no allegation nor proof that the mortgagee had any notice thereof, if such compulsion or undue influence was used towards her. Act of 1889, ch. 389.

Judgment in favor of plaintiffs. Appeal by defendants.

Glenn & Manly for appellants.
Jones & Patterson for appellees.

FAIRCLOTH, C. J. This is an action to foreclose a mortgage executed by Calloway Blevins and his wife, Nancy Blevins. The defendants admit the execution of the mortgage, but the wife avers in her answer that she did not sign the mortgage deed freely and voluntarily. She

testified that "I signed the mortgage in controversy. John Kapp and Harrison Wolfe came to me; my husband called me out and said they wanted a mortgage against the Hunt place and 100 acres of my land. . . . I said to him that I had said I would not put my hand to a mortgage on my land. He said 'you have got to do it.' Kapp and Wolfe were inside of the house, my husband and myself on the outside. I asked if it was against anything but the land; he said, 'No.' I said, 'I can sign it, but I never intend to do it willingly.' I told him it might knock me out of my home. He then went into the house and said, 'Boys, all right, go ahead.' Wolfe called for (587) a table to write on, and my daughter got it. He filled out the writing and read it. He said, 'Is this all right?' My husband said, 'Yes.' I never opened my mouth. I sat a minute, my husband said, 'Go and sign it.' I got up and stepped across and signed my name. Kapp, Wolfe and my husband were all there. I signed and sat down, my husband signed too." She said that was all that was said and done. In further examination she said she did not sign freely and voluntarily, that "the justice did not take me separate and apart from my husband. . . . The justice did not ask me if I signed it 'freely and voluntarily.'" There was conflicting evidence. This issue was submitted: "Was the defendant Nancy Blevins privately examined, separate and apart from her husband, touching her free and voluntary execution of said mortgage, as required by law?" And the jury answered, "Yes." This finding was fatal to the defendant, as to her privy examination.

Several prayers for instruction were made, involving the matters of compulsion of her husband and undue influence, etc. We are relieved of the duty of examining them for the reason that there is no allegation or proof that the mortgagee had any notice of, or participated in, the fraud, duress or other undue influence, in the execution of said mortgage, if such matters were true. The act of 1889, chapter 389, provides that no deed of conveyance by husband and wife, if the privy examination is certified in the manner prescribed by law, shall be deemed invalid because its execution was procured by fraud, duress or other undue influence, unless the grantee had notice of, or participated in such fraud, duress or other undue influence. This act also provides that an innocent purchaser for value from a grantee who had notice of such fraud, duress or undue influence, shall not take lands subject to any equity arising out of such fraud, etc. As the mortgagee is in (588) no way connected with the matters complained of (at least it does not so appear), it is unneccessary to consider any other matter

in the record. Neither the Court nor counsel, nor the parties, made any allusion to this statute. *Bank v. Ireland,* 122 N. C., 575.

Affirmed.

Cited: Benedict v. Jones, 129 N. C., 472; *Marsh v. Griffin,* 136 N. C. 334.

SOUTHERN PANTS COMPANY v. G. A. SMITH ET AL.

(Decided 22 December, 1899.)

Appeal From Justice's Court—When Docketed—Laches of Appellant.

An appeal from a justice's court must be docketed for trial at the next succeeding term of the Superior Court, where more than ten days after judgment rendered intervene.

CIVIL ACTION instituted in the justice's court of POLK County, and carried by appeal of defendant to the Superior Court, when it was tried by *Coble, J.,* at Spring Term, 1899.

The appeal was not docketed at the next ensuing term of the Superior Court, and the plaintiff moved to dismiss the appeal on that account. The defendant's excuse was that the trial justice had informed him that it had been done. Motion to dismiss disallowed, and plaintiff excepted. The trial was proceeded with, and a verdict was rendered for defendant. Judgment against the plaintiff, who appealed to Supreme Court.

Morris & Morgan for appellant.
No counsel contra.

(589) FAIRCLOTH, C. J. On May 16, 1898, the plaintiff obained a judgment against defendants in a court of justice of the peace. The defendant Smith gave notice of an appeal. The case on appeal was not sent up, nor docketed at the next term of the Superior Court, held on November 21, 1898, nor did the appellant take any steps at said term to have his case docketed. In April, 1899, the defendant applied to the judge holding the courts in the district for a writ of *recordari* and *supersedeas.* The order was granted, and on May 28, 1899, the justice of the peace made his return of proceedings had before him. No notice of appeal was then served on the appellee. The

case was docketed, and was tried on the issue, "Is defendant indebted to plaintiff, and if so, in what sum?" The jury answered "No," and judgment was entered against the plaintiff for costs, and the plaintiff appealed.

When the case was called for trial, the plaintiff's counsel made several motions to dismiss the appeal. One motion was based on the failure of the appellant to docket his appeal at the next succeeding term of the Superior Court, without showing any legal excuse for his laches.

It is to be inferred from the verdict of the jury that the defendant had a good defense, and it is unfortunate that he loses his judgment by his own laches.

We are compelled to hold that the plaintiff's motion to dismiss the appeal should have been allowed. The law requires that an appeal from a justice's court must be docketed for trial at the next succeeding term of the Superior Court, when more than ten days after judgment rendered, and notice and bond given, as expressly declared by our Code of Procedure. These Code provisions are reasonable, in order to prevent delay and put an end to litigation in a reasonable time. Every phase of these Code requirements is fully presented in the cases cited below, and repetition is unnecessary. *State v. Johnson,* 109 N. C., 852; *Ballard v. Gay,* 108 N. C., 544; *Davenport v.* (590) *Grissom,* 113 N. C., 38.

There was error. Reversed.

Cited: Jerman v. Gulledge, 129 N. C., 245; *Johnson v. Andrews,* 132 N. C., 379; *Blair v. Coakley,* 136 N. C., 408.

CATHERINE E. WATERS, WIDOW, v. W. H. WATERS ET AL., HEIRS AT LAW OF JESSE E. WATERS.

(Decided 22 December, 1899.)

Dower—Seizin of Husband.

In a petition for dower it is incumbent on the widow, by proper evidence, to show seizin in the husband during coverture and summons served on the heirs.

PETITION FOR DOWER, tried upon transfer from the clerk to term, before *Adams, J.,* at June Special Term, 1898, of SAMPSON County.

The petition states that the husband of petitioner died in April, 1890, and the widow testified that her husband died in 1890.

It seems that the evidence as to title was a contract of assignment made by an instrument in writing, and under seal, between her and a portion of the prospective heirs, dated November 14, 1889, which was read in evidence by the defendants, together with a lease by the widow made to one of them in 1891, in the part assigned her.

The jury responded, "Yes," to the following issue:

1. Was the plaintiff and Jesse E. Waters married, and did they live together on the lands set out in the complaint, and was Jesse
(591) E. Waters seized and possessed of the lands recited in the complaint, during their coverture?

Judgment for plaintiff. Defendants except and appeal.

Stevens & Beasley for appellants.
J. D. Kerr and Geo. E. Butler for appellee.

CLARK, J. This is a proceeding by the widow begun before the clerk to procure allotment of dower. The defendants, heirs at law of the husband, answered, denying that he was seized at any time during coverture of the land described in the complaint, and also pleaded forfeiture of dower rights by reason of adultery. Upon the trial in the Superior Court, the plaintiff, (probably to estop the defendants as to the plea of non-seizin) introduced a witness who testified that he was present when the widow and heirs at law agreed upon an assignment of dower, that he made the survey and wrote the deed, which was executed by the heirs at law and registered; the deed was introduced, also a subsequent lease of said dower land executed by the plaintiff. When the plaintiff rested, the defendants saw their opportunity, and moved for judgment because, having agreed to actual assignment, Code, sec. 2110, the plaintiff was estopped to claim dower by assignment of law. The plaintiff then asked to withdraw the deed and lease, which the court allowed, and the defendants excepted.

The withdrawal of the evidence was a matter within the discretion of the Court. *Wilson v. Mfg. Co.*, 120 N. C., 94; *Crenshaw v. Johnson, ibid.*, 270. But why the defendants objected to the withdrawal is difficult to see, since the evidence of the plaintiff's witness was left standing, that there had been an assignment of dower by deed, and the withdrawal of the paper prevented any inquiry as to any defect in the deed.

But the matter did not stop here, for the defendants reintro-
(592) duced the deed and lease, and asked the Court to instruct the jury

that the plaintiff could not recover. This was refused, presumably upon the ground of defective execution by some of the parties. This would have raised the question whether the plaintiff was not barred of dower as to the heirs at law who properly executed the deed, but it is unnecessary to consider it, for the court then submitted the following issues to the jury, to which the defendants excepted:

"1. Were the plaintiff and J. E. Waters married, and did they live together on the land set out in the contract, and was J. E. Waters seized and possessed of the land described in the complaint? Answer. Yes.

"2. Is J. E. Waters dead? Answer. Yes."

There was no issue raised by the pleadings as to the marriage or the death of the husband, and the mingling of several matters in one issue, much of which was admitted by the defendants, was calculated to mislead the jury. And, certainly, if the deed was not sufficiently executed by the infant and *feme* covert defendants so as to estop the plaintiff under The Code, sec. 2110, it could not operate as an admission by them of seizin in the husband. In other words, if the deed between the plaintiff and some of the defendants was valid, as to them, she is barred, and if, as to the others, it is invalid by reason of infancy and coverture, then certainly the plaintiff, as to them, has shown no seizin of the land in the husband, for she has shown it in no other way, and it was incumbent upon her to show it, for it is denied in the answer.

The question was earnestly argued before us that the defendants could not set the deed up as an estoppel because not pleaded in the answer. Neither did the complaint state that the defendants were estopped to deny title. But aside from the fact but for the deed there is nothing to show title in the husband, which the plaintiff is called on to prove, the deed when offered by the defendants was not ex- (593) cepted to by the plaintiff, and, if it had been, we could not notice the exception, for the plaintiff is not appealing. The evidence being in, the court might even, after judgment, in its discretion, have allowed the answer to be amended to conform to the proof. Code, sec. 273.

As the case must go back for a new trial, the court below will have the power to permit amendments of both the complaint and the answer, and counsel on both sides will doubtless consider with more care the effect of their "moves" and "counter-moves" before they are made.

New trial.

Cited: S. v. Ellsworth, 130 N. C., 691; *Moore v. Palmer,* 132 N. C., 977.

FIRST NATIONAL BANK OF GASTONIA v. HENRY D. WARLICK ET AL.

(Decided 22 December, 1899.)

School Orders—Official Approval—Guarantors.

1. School orders, by the former Board of Education (the county commissioners) were not negotiable, and were open to defense, although taken without notice.

2. The approval by an individual commissioner, officially, did not render him personally liable, when given in good faith.

3. The personal guaranty of a school committeeman is discharged by unreasonable delay of more than sixty days in presenting a sight draft for payment.

CIVIL ACTION on a school order, commenced in justice's court, and tried on appeal by *McNeill, J.*, at Fall Term, 1899, of the Superior Court of LINCOLN County. Jury waived.

(594) His Honor rendered judgment in favor of defendants. Plaintiff excepted and appealed.

The facts are stated in the opinion.

D. W. Robinson and Jones & Tillett for appellant.

L. B. Wetmore for appellee.

CLARK, J. This is an action by the plaintiff, assignee of an order drawn upon the treasurer of the Board of Education of Lincoln County, by two members of a school district committee, for $22.50, for certain maps and school supplies. The order was signed "approved," but not at any session of the commissioners of the county, by the defendant Sain, who was chairman of the board, and also (as the law then stood) of the county board of education, and the order was also endorsed "approved" in the same irregular mode by defendant T. J. Saunders, another member of the board of county commissioners. At the first session of the board thereafter, it appearing that the maps and supplies had not been furnished, the board passed an order disallowing this claim. Two months or more thereafter the holder of the order sold it to the plaintiff bank at a discount, the bank, however, having no actual notice of any defect, or invalidity or defenses thereto.

The plaintiff, it is admitted, can not recover against the county, for such orders are not negotiable under the law merchant (*Wright v. Kimsey,* 123 N. C., 618; *Indiana v. Glover,* 155 U. S., 513); and the

assignee, though taking without notice, can not recover: First. Because the supplies have not been delivered. Second. The order was not approved in a regular meeting of the Board of Commissioners. *Cotton Mills v. Comrs.*, 108 N. C., 678.

The plaintiff admits that it can not recover against the county, but seeks to recover against the defendants, individually, by reason of their endorsement, by which the plaintiff says it was (595) misled. No doubt public officers may make themselves liable to one misled by their unauthorized action (Throop Pub. Officers, sec. 774, Mechem Pub. Officers, secs. 811, 812, 816), but we need not discuss what circumstances would be sufficient, for the plaintiff took this order, which was a sight order on the county treasurer, more than sixty days after its date, at a considerable discount, and made no inquiry, though such inquiry (which could have been readily made by telephone) would have revealed that the records of the county commissioners showed that the order not only had not been approved in any session of the board, but had been disallowed. There is no fraud or misrepresentation alleged or shown which would make the defendants Sain and Saunders (the chairman and member of the board of county commissioners) liable, but on the contrary it is admitted that they acted in good faith. The plaintiff must blame its own unaccountable negligence in taking a school order more than sixty days after its date, without inquiry, though it was a sight order. There was nothing in the endorsement which indicated any assumption of personal liability by Sain and Saunders, and indeed it is admitted that they did not intend to make themselves personally liable by their endorsements.

But as to the other two defendants, Warlick and Wood, committeemen of the school district, they saw fit to write above their signatures "payment guaranteed by the undersigned members of the committee." Though the paper, for reasons above given, is not binding on the county or upon the two county commissioners who signed it without any express or implied guarantee, it would be binding upon Warlick and Wood, who expressly guaranteed its payment, but for the fact that they are discharged by the unreasonable delay of more than sixty days in presenting a sight draft for payment. *Bank v.* (596) *Bradley*, 117 N. C., 526. Though the order was not negotiable paper in the sense that one who took without notice would hold discharged from liability to equities and defenses, none the less there should be prompt presentment for payment and notice to guarantors, if not paid.

Affirmed.

T. G. BARKER v. SOUTHERN RAILWAY COMPANY ET AL.

(Decided 23 December, 1899.)

Ejectment—Insufficient Description—Location in Fact—Estoppel by Act of Grantor—Color of Title

1. A deed to be color of title must attach to some particular tract.

2. Where the description in itself is too vague to be located by outside evidence, it may *in fact* be located by the grantor himself, and he may be estopped from denying his own act, if at the time of conveyance he has the lot surveyed and placed the grantee in actual possession under designated lines and marked corners.

2. There is a clear distinction between cases where the parties themselves have definitely located the land, and where it is merely sought to locate it by outside testimony, not in the nature of admissions.

EJECTMENT, tried before *Coble, J.*, at Spring Term, 1899, of the Superior Court of HENDERSON County.

The plaintiff had been original owner of the land in controversy and had conveyed the same to the Spartanburg and Asheville Railroad Company, under whom the defendant claims. The contention of the plaintiff was, that his deed was too indefinite to convey any title, and too vague to be aided by parol evidence.

The description of the land contained in plaintiff's deed, and (597) the evidence offered by defendant in support of the deed, are contained in the opinion.

His Honor held that the description was too vague, and excluded the evidence offered in support of it. Defendant excepted.

There was verdict and judgment for plaintiff. Defendant appealed.

Smith & Valentine for plaintiff (appellee).

G. F. Bason and A. B. Andrews, Jr., for defendant (appellant).

DOUGLAS, J. This is an action in the nature of ejectment. On April 1, 1879, the plaintiff executed to the Spartanburg and Asheville Railroad Company, whose title the defendant now owns, a deed with the following description: "Adjoining the lands of T. G. Barker (the plaintiff), beginning at a stake on the east side of the railroad track and on said track, and runs east 20 south 270 feet to a stake; thence north 2 west 240 feet to a stake; thence west 20 north 270 feet to a stake in the railroad track; thence south 2 east with the railroad track 240 feet to the

beginning, containing 1½ acres . . . for its use as a stockyard, and other railroad purposes."

The defendant introduced testimony tending to prove that at the time of the execution of said deed the plaintiff had a surveyor to run out and locate the lot in controversy, and put the Asheville and Spartanburg Railroad Company in actual possession thereof; that the said company built a fence around said lot, the line of which fence can still be seen; and that the said company and its successor in title, the defendant, have remained in actual and continuous possession of said lot to the present time. The plaintiff now seeks to recover said lot, on the ground that the descriptive words in the deed are insufficient to convey title as being too vague and indefinite to (598) admit of location.

This contention of the plaintiff as to the insufficiency of the description appears to be correct. There is not a single corner fixed by anything more definite than a stake, which as far back as *Massey v. Belisle,* 24 N. C., 170, 178, was held insufficient as designating "imaginary points." It is true the stake is said to be on the east line of the railroad, but that is extremely indefinite, as the railroad is of great length. The lot in question is again said to adjoin the lands of the plaintiff, which we presume means simply the land from which it was cut off, but on which side it adjoins does not appear. In other words, from the description in the deed the lot attempted to be conveyed might be shifted up and down the railroad for an indefinite distance. We, therefore, think the description is not sufficient. *Massey v. Belisle, supra; Mann v. Taylor,* 49 N. C., 272; *Archibald v. Davis,* 50 N. C., 322; *Hinckey v. Nichols,* 72 N. C., 66. There are a large number of other cases holding insufficiency of description; but the above are cited as directly based upon a description calling for stakes alone.

It is urged in behalf of the defendant, that, while the description in the deed is too vague to admit of identification by parol evidence, the deed itself purports to convey something, and therefore may be color of title. This contention is opposed equally to reason and authority. A deed to be valid on its face requires not only a grantor and a grantee, but a thing granted. If the description is too indefinite to convey anything, then the paper *on its face* lacks one of the essential elements of a conveyance. A deed can not be color of title to land in general, but must attach to some particular tract. Otherwise we would be brought to the absurd conclusion that a man holding a deed pur- (599) porting to convey a hundred acres of land by stakes and distances only, might shift his color of title to any part of the county by merely "pulling up stakes" and squatting upon any land he might fancy. This

Court has repeatedly held that "a deed is color of title only for the land designated and described in it." *Davidson v. Arledge,* 88 N. C., 326; *Smith v. Fite,* 92 N. C., 319; *King v. Wells,* 94 N. C., 344; *Dickens v. Barnes,* 79 N. C., 490. In this last case, FAIRCLOTH, J., speaking for the Court, says: "If the claim of the party be invalid on its face, or if the deed under which he claims be void, or insufficient in form to pass title, *or the description therein, be fatally defective,* in such cases the possession is not adverse under our statute, because the party acquiring possession must be presumed to know the law and to see that *in such cases there is no color of title.*"

While we have come to the conclucion that the description in itself is too vague to be located by outside evidence, it appears from the testimony that the land was *in fact* located by the plaintiff himself, who is thus estopped from denying his own act. Having had the lot surveyed, and placed the defendant in actual possesion thereof under designated lines and marked corners, he is now bound by his own admission, and can not be permitted to controvert the legal effect of his own conduct to the prejudice of another, especially after such long acquiescence. There is a clear distinction between cases where the parties themselves have definitely located the land and where it is merely sought to locate it by outside testimony not in the nature of admissions. We think this distinction is recognized inferentially in *Massey v. Belisle, supra,* where the Court says, on p. 177: *"The stakes may be real boundaries when so intended by the parties,* but it is a settled rule of construction with us that when they are mentioned in a deed simply, or with no (600) other description than that of course and distance, they are intended by the parties, and so understood, to designate imaginary points."

If the facts are true as testified upon the trial, we think the plaintiff is clearly estopped from denying his location of the land, and therefore can not recover. For error in the charge of the court a new trial must be ordered.

New trial.

FAIRCLOTH, C. J., concurring in the result. On April 1, 1879, the plaintiff conveyed by deed a lot of land to the defendant, the Spartanburg and Asheville Railroad Company, in Henderson County, described in these words: "Adjoining the lands of T. G. Barker (the plaintiff), beginning at a stake on the east side of the railroad track and on said track, and runs east 20 south 270 feet to a stake; thence north 2 west 240 feet to a stake; thence west 20 north 270 feet to a stake in the railroad track; thence south 2 east with the railroad track 240 feet to the

beginning, containing 1½ acres . . . for its use as a stock yard and other railroad purposes."

The plaintiff now sues for the possession of said lot, on the ground that the descriptive words are insufficient to convey title.

It was proved that the defendant entered into immediate possession, with the consent of the plaintiff, and has been in actual possession ever since. The defendant was allowed to prove by parol that the plaintiff, at the time of the deed was executed, had a surveyor to run out and locate the land, and that the defendant put a fence on the line established by the surveyor, and that he put the defendant in possession of the lot, known as the "stock-lot" in the town of Hendersonville. At the close of the evidence his Honor instructed the jury that, if they believed the evidence, they should answer the issue in favor of the plaintiff. Verdict and judgment for the plaintiff. The de- (601) fendant appealed.

The extrinsic evidence was competent. It does not contradict the deed, but it is the unwritten part of the agreement and was useful to find out the intention of the grantor and grantee. The Court, when it can do so, desires to give effect to the intention of the parties. The descriptive part of the deed is not a blank. It fixes the locality on the east side of the railroad track and on said track. The jury, with these simultaneous acts and declarations of the grantor, would be able to locate the land referred to in the deed. Assuming, however, for the sake of argument that the deed is defective in its descriptive clause, I still think it is color of title. Color of title, when the language is plain and unambiguous, is a question of law for the Court. Any deed, having a grantor and grantee and containing a description of the land intended to be conveyed, and apt words for its conveyance, is color of title. Color of title is defined to be that which in appearance is title, but which in reality is no title. "Color of title may be defined to be a writing upon its face *professing* to pass title but which does not do it, either from a want of title in the person making it, or the defective mode of conveyance which is used, and it would seem that it must not be so obviously defective that no man of ordinary capacity could be misled by it." *Tate v. Southard,* 10 N. C., 119. "To constitute color of title, there must be some written document of title *professing* to pass the land, which is not so obviously defective that it could not have misled a man of ordinary capacity." *Dobson v. Murphy,* 18 N. C., 586. A deed then, like the present, regular and complete in all respects, except in the starting point, which would only be detected by the scrutiny of a legal mind, must fall within the above definitions, and the bona fide possession of the

(602) defendant for a time far beyond the statutory period can not be defeated by the grantor or any one claiming under him.

The defense may rest upon another ground. The plaintiff, having by his deed professed to convey the land, and having at the same time surveyed and located the corners and lines, and put the defendant in possession of the premises within those lines, and allowed his possession to remain uninterrupted for a long time, can not now be allowed to disturb that possession. He is *estopped* by his own act and deed.

I think there was error below.

Cited: Elliott v. Jefferson, 133 N. C., 211.

(603)

STATE v. W. H. ELKS ET AL.

(Decided 17 October, 1899.)

Indictment, Forcible Trespass—Possession, Actual and Constructive—Title.

1. Actual possession of part of the land embraced within a deed for 23 years is, by operation of law, coextension with the boundaries of the deed, and constitutes ownership of the whole tract.

2. Where a number of men, five or six, enter upon the land of another and proceed to cut down and carry off trees outside of the enclosure of the owner, and refuse to desist when the owner comes and orders them off, their conduct amounts to a forcible trespass, and it matters not on which side of the fence the owner stood and gave the orders for the trespassers to quit and leave.

INDICTMENT for forcible trespass, tried before *Hoke, J.,* at September Term, 1899, of the Superior Court of PITT County. The defendants were convicted, and from the judgment rendered against them appealed to the Supreme Court.

The case is fully stated in the opinion.

Zeb V. Walser for the State.

T. J. Jarvis for defendants (appellants).

FURCHES, J. This is an indictment for forcible trespass upon land, and the facts disclosed by the trial, as stated in the case on appeal,

are substantially as follows: That the prosecutrix, an "old colored woman," owned a small tract of land containing 20 acres; that she had lived on this land continuously for 29 years, and had a deed for the same, giving metes and bounds, for 23 years. That there was a field of cleared land around her dwelling house, enclosed by a fence, but that this fence did not extend to the boundary line, as indicated by her deed, by about fifty yards; that the land between (604) her fence and the boundary of her land, as indicated by her deed, was woodland; that she had been in the habit of getting wood and timber off this woodland, selling wood and timber off of it to others, and also to the defendant Elks, in the year 1898. That this woodland was in sight of the prosecutrix's residence, but some three hundred yars from her house. That she saw defendants enter upon this woodland and commence cutting and carrying off the wood and timber, and she went to within thirty or forty yards of where defendants were engaged in cutting and carrying off said timber, and forbade them to do so; but they refused to stop, telling prosecutrix that she had no land, and continued to cut and carry off said timber, until prosecutrix had them arrested, under a State warrant, for said alleged trespass. That she did not go nearer to the defendants, for the reason that she was afraid to do so, there being six of them, all white men, with axes and saws, and the defendant Elks having the reputation of being a violent and dangerous man.

The defendant Elks claimed that he was the owner of the *locus in quo,* and introduced a deed for the same dated in January, 1899, from some third party.

Upon this evidence the court charged the jury, among other things, not excepted to, "that if they believed the evidence, the prosecutrix owned the land covered by her deed; and if prosecutrix went to place of the alleged trespass, in twenty or forty yards of defendants, and ordered them to desist and leave the premises, and the defendants, in her presence, and against her protest, and on land covered by her deed, continued to cut timber, the law would carry the force and effect of her possession to the outer boundaries of her deed; and if the language and conduct of the defendants were then and there such as were calculated to provoke the prosecutrix to a breach of the peace, and their numbers such as to overawe resistance, or render it useless, (605) defendants would be guilty; and this would be true though the prosecutrix never crossed her fence, but remained all the time within her enclosure.

Defendants excepted to so much of said charge as stated: "If alleged trespass was committed in presence of prosecutrix, and on

land covered by her deed, the law would carry the force and effect of her possession to the boundary of her deed."

"Also to that portion which said it was not necessary for prosecutrix to have crossed her fence."

"Only that portion of charge is set out deemed necessary to give defendants their exceptions."

These are the only exceptions contained in the record, and we do not think they can be sustained. It was contended for defendants that the evidence was conflicting as to where the prosecutrix's line was, and that there was error in that part of the charge in which his Honor told the jury "that if they believed the evidence, the prosecutrix owned the land covered by her deed." But we see no error in this. There was no dispute but what the prosecutrix owned and had a deed for the land where she lived, and had been holding possession under said deed for 23 years; and the court simply told the jury that she was the owner of that land up to the boundaries of her deed. This was certainly correct, and the jury must have found that prosecutrix's deed covered this land. The court instructed the ju that the law was that she was the owner to the line called for by her deed. He did not charge them where this line was, nor that the prosecutrix's deed covered the *locus in quo,* as defendants seem to think he did.

The prosecutrix being found to be in possession of the *locus in quo,* it would seem that the case is settled by *State v. Robbins,* 123 N. C., 730, and *State v. Lawson, ibid.,* 740. The case of *State v. Rob-*
(606) *bins* is almost an exact counterpart of this case—the facts there being almost identically the same as those here. And the case of *State v. Lawson* is directly in point, in which the authorities are all collected and considered.

These two cases are the latest expression of this Court on the subject of forcible trespass, and must govern us in our judgment in this case. According to them, there is no error, and the judgment must be affirmed.

It is shown, at least in this case, that the meshes of the law have been sufficient to catch and hold the strong, and to protect the weak. There is no error, and the judgment is

Affirmed.

NOTE.—We feel it to be our duty to call the attention of the judges and the profession to the frequent inadequacy of amounts at which appeal bonds are fixed, especially so in State cases where there are several defendants. As in this case, where there are five defendants, and the Attorney-General's cost is $50, to say nothing of the other costs, and yet the appeal bond is fixed at only $25.

STATE v. LORENZO BROWN.

(Decided 17 October, 1899.)

Indictment for Rape—Corroborative Evidence—Declarations of Prosecutrix.

The prosecutrix having testified to the assault, was cross-examined for the purpose of impeaching her evidence; it is competent for the State to introduce a witness to corroborate the prosecutrix, by proving a declaration made by her soon after the assault, in regard to the same.

INDICTMENT for rape upon Pearlie Harper, a female child under 10 years of age, tried before *Moore, J.*, and a jury, at April Term, 1899, of PITT Superior Court.

The prosecutrix, Pearlie Harper, was first examined for the (607) State, and testified to the commission of the offense upon her by the prisoner; that she was hurt and bleeding, and while she was crying he threatened if she told to kill her, and told her to say that she did it herself with a cotton stalk.

This witness was then cross-examined by the prisoner for the purpose of impeaching her testimony.

For the purpose of corroboration, Louisa Best was introduced as a witness for the State, and, after objection from the prisoner, testified as follows:

"Pearlie Harper came to my house between seven o'clock and eight o'clock the morning the rape is alleged to have been committed. When Pearlie came she was crying. She first said she hurt herself with a cotton stalk, she then asked Rachel if she would beat her if she (Pearlie) told. Then Pearlie said that she and Lorenzo Brown had communication together."

The defendant objected to all the foregoing testimony of Louisa Best, as far as it related to any conversation between witness and Pearlie Harper, the prosecutrix.

Objection overruled, and defendant excepted.

There was evidence that the prosecutrix was eight years of age.

There was other evidence, both for the State, and for the defendant, who was examined in his behalf, and contradicted the prosecutrix in every essential particular.

There was a verdict of guilty, and judgment of death, from which judgment the prisoner appealed to Supreme Court.

Zeb V. Walser, Attorney-General, for the State.

No counsel contra.

FAIRCLOTH, C. J. The prisoner was indicted and convicted of rape on a female under ten years of age. Only one exception (608) appears in the record, and that is to the competency of evidence.

The prosecutrix testified to the assault, and was cross-examined by the prisoner for the purpose of impeaching the evidence of the prosecutrix. The State then introduced a witness to corroborate the prosecutrix, by proving a declaration of the prosecutrix made soon after the assault, in regard to the same. The prisoner excepted to the admission of such evidence, the conversation having taken place in the absence of the prisoner. The evidence is competent according to all the numerous decisions made for nearly a century. In *Burnett v. Railway Co.*, 120 N. C., 517, this Court considered the question in all its bearings, and cited a long list of the cases.

We were not favored with an argument in behalf of the prisoner. We are not aware of a single authority in conflict with the rule above referred to.

We see no error in any part of the record, and must affirm the judgment of the Superior Court.

No error.

(609)

STATE v. WALTER FAGG.

(Decided 24 October, 1899.)

Affray—Former Conviction—Nemo Bis Vexari Pro Eadem Causa, State v. Albertson, 113 N. C., 633.

Where the defendant was prosecuted, convicted and punished, in the justice's court, for participating in an affray, in which a deadly weapon was used, but not by him, his plea of *former conviction*, when indicted in the Superior Court for the same offense, ought to have been sustained.

INDICTMENT for affray against defendant Fagg, and another, in which a deadly weapon was used, tried before *Moore, J.*, at July Term, 1899 of WAKE Superior Court. Defendant's plea of former conviction was disallowed by the court, upon the evidence. Verdict, guilty. Judgment and appeal.

Statement of Case on Appeal.

This was an indictment against the defendant and one Ralph Fortune for an affray, in which a deadly weapon was used.

The defendant Fortune submitted to a verdict of guilty. The defendant Fagg pleaded former conviction. It was admitted that he had been tried before a justice of the peace, and punished for a simple assault. The evidence on the trial before the Superior Court, as before the justice, showed that the defendant Fagg had used no deadly weapon and inflicted no serious injury—though Fortune, who submitted, had.

The defendant requested his Honor to charge the jury, under the admissions and evidence, to return a verdict of "not guilty."

His Honor refused to so charge the jury and the defendant (610) excepted. His Honor, among other things, charged the jury that the defendant had failed to sustain his plea of former conviction. Defendant excepted. There was a verdict of guilty. Judgment against the defendant for a fine of one dollar and one-half the costs of this action. Defendant excepted, and appealed to the Supreme Court.

Defendant, upon affidavit filed, allowed to appeal to the Supreme Court without giving bond for costs.

It is agreed that the above shall constitute the statement of the case on appeal in this cation.

EDWARD W. POU,
Solicitor.
DOUGLASS & SIMMS,
Attorneys for Defendant.

This July 12, 1899.

Douglass & Simms for appellant.
Attorney-General for State.

DOUGLAS, J. The essential facts are thus set out in the statement of the case: "This was an indictment against the defendant and one Ralph Fortune for an affray, in which a deadly weapon was used. The defendant Fortune submitted to a verdict of guilty. The defendant Fagg pleaded former conviction. It was admitted that he had been tried before a justice of the peace, and punished for a simple assault. The evidence on the trial before the Superior Court, as before the justice, showed that the defendant Fagg had used no deadly weapon, and inflicted no serious injury, though Fortune, who submitted, had. The defendant requested his Honor to charge the jury, under the admission and evidence, to return a verdict of 'not guilty.' His Honor refused to so charge the jury, and the defendant excepted. His Honor, among other things, charged the jury that the defendant had failed to sustain the plea of former conviction." (611)

This case presents the single point whether a plea of former conviction can be sustained where the defendant has been previously

convicted before a justice of the peace of a simple assault in an affray where another defendant did use a deadly weapon. This point has been decided in *State v. Albertson,* 113 N. C., 633; and we see no good reason to reverse that decision. Section 892 of The Code was then in force, and, while not alluded to in the opinion, was construed by necessary implication. Whatever difficulties the Court then had, or we might now have if it were an open question, in arriving at such a conclusion, were apparently solved; and for the six years since intervening its decision, as far as we are aware, has never been questioned. It has thus become firmly established and should not be disturbed except for the gravest reasons.

Of course, when in the deliberate opinion of any court, any construction is subversive of the principles of natural justice, or of constitutional guarantees: in other words, where its continued enforcement would violate the conscience of the Court, precedent must give way to conviction. But in the present case no such condition exists. The construction is in favor of the liberty of the citizen, and, as far as we can see, offers no obstruction to the proper administration of the law. The offense is slight, and its punishment is strictly limited by statute, a limitation applying equally to the Superior Court as well as to the justice of the peace. This defendant has already been punished, and the allowance of his plea of former conviction can not interfere with the proper punishment of his codefendant.

The verdict of guilty will be set aside.

Error.

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(612)

STATE v. HENRY DAVIS.

(Dated 31 October, 1899.)

Confessions by a Prisoner—To an Officer—Under Influence of Hope or Fear.

1. It is no part of the duty of an officer to extract confessions from a party under arrest—such conduct on his part reprehended.

2. Confessions, to be admissible, must be freely and voluntarily made; if obtained by operating upon the hopes or fears of the prisoner, they are inadmissible.

INDICTMENT for larceny, with a count for receiving, tried before *Moore, J.,* at September Term, 1899, of the Superior Court of WAKE County.

The store of one C. E. Horton, of Wake County, had been robbed and set on fire on Sunday, 16th July. A number of articles, principally provisions, corresponding in description with such as were in the store, but not identified as being the same, were found, the third day after the fire, at the house of defendant's mother, with whom he lived. They were found there by a witness, Beasley, who made the search. The defendant was arrested and indicted for larceny of the goods, and for receiving the same, knowing them to be stolen. Among other witnesses on the part of the State, at the trial, R. J. Conrad testified:

"I arrested the defendant near Elon College. Beasley had told me all about the articles found in the house. When I arrested defendant I offered him no inducement to make a statement, nor made any threats to procure the same. I did tell him that I had worked up the case, and he had as well tell all about it. He first said that he did not know anything about the articles in the house. After a while he told me voluntarily that a little, short, black negro, whose name he did not know, and who would weigh about one (613) hundred and thirty pounds, brought the goods found, to his house, Sunday morning; said if he called for the goods he would get them, and if not, he (the defendant) could pay him something for them. This was on Wednesday, after the fire. Defendant left here the very next day after the fire."

Exception by defendant that the declarations of the defendant, as recited by R. J. Conrad, were incompetent, being made under an inducement or threat held out by said Conrad, who then had the defendant under arrest.

Exception overruled. The jury found the defendant guilty upon the count for receiving. Judgment and appeal.

E. A. Johnson for appellant.
Attorney-General for the State.

FAIRCLOTH, C. J. The defendant was indicted for larceny and receiving stolen goods of one Horton. It was proved that Horton's store had been robbed and burned. There was no evidence identifying the goods alleged to have been stolen, and the prosecution failed on the first count. There was no evidence relied on by the State, except the declarations of the defendant, to sustain the second count. The competency of these declarations is the only question presented.

The defendant was arrested by R. J. Conrad, and whilst in his custody, Conrad said to him: "That he had worked up the case,

and he had as well tell all about it." The defendant denied any knowledge of the alleged stolen articles, but after a while said that another person brought the goods to his house. The house referred to was his mother's house.

An officer, with authority to arrest, discharges his duty by simply making the arrest, and it is no part of his duties to provoke a (614) prisoner to make any statement. The genius of our free institutions provides that admissions of a party should not be used against him unless made voluntarily. The common law looks with jealousy on such confessions, for if made under the influence of hope or fear, they furnish no test of the truth of the matter. They may be true, and they may be inspired by either hope or fear that such statements will be better for him in the near future.

"The mind, under the pressure of calamity, is prone to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail; and therefore a confession obtained by the slightest emotion of hope or fear ought to be rejected." *State v. Roberts,* 12 N. C., 259.

The language that, "I had *worked* up the case, and he had as well tell all about it," was well calculated to agitate the mind of the defendant, an ignorant man, then a prisoner, and cause him to conclude that a prompt admission, true or false, would mitigate his punishment.

This case closely resembles *State v. Whitfield,* 70 N. C., 356, where the language of the prosecutor was: "I believe you are guilty; if you are, you had better say so; if you are not, you had better say that": *"Held,* that the confession was made under the influence of hope or fear, or both, and was inadmissible.

In 1 Greenleaf Evidence "Confessions," the general question, is analyzed, with cited cases, and the priciples above stated run through the chapter. He says: "It should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession."

The fact that the defendant at first denied, and after a while confessed, shows that some influence was operating on his mind. Both statements could not be true.

(615) We are of opinion that the confession, under the circumstances, was inadmissible.

Error.

Cited: S. v. McDowell, 129 N. C., 525.

STATE v. THOMAS SMITH.

(Decided 31 October, 1899.)

Homicide—Premeditation—Judge's Charge.

1. Express malice, or hatred, as a motive for the homicide, from which premeditation could be inferred, cannot be established by proof which directly established abject terror and fear on the part of the prisoner for his personal safety.

2. A charge to the jury injuriously affects the rights of the prisoner which directs their attention to a motive for the homicide which the testimony, in all its bearings, had not tended to prove.

3. Intemperate language on the part of the prosecution indicating passion towards the prisoner, although immediately withdrawn, deprecated with a caution against repetition.

INDICTMENT for murder, tried before *Moore, J.*, and a jury at August Term, 1899, of the Superior Court of JOHNSTON County.

The prisoner was indicted for the murder of Charles Lewis Cawthorn, and was convicted of murder in the first degree.

The killing of the deceased by the prisoner with a butcher knife was conceded. The State insisted that the homicide was attended with such circumstances as evinced premeditation, and established a case of murder in the first degree. For the prisoner, it was insisted that the killing occurred through fright, occasioned by the conduct of the deceased and his associates, and was in self-defense.

The charge of the court relating to premeditation in the kill- (616) ing, excepted to by the prisoner, together with the evidence upon which it was based, is fully recapitulated in the opinion. From the judgment of death the prisoner appealed to the Supreme Court.

Argo & Snow for appellant.
Zeb V. Walser, Attorney-General, for the State.

MONTGOMERY, J., delivers the opinion of the Court.
CLARK, J., delivers dissenting opinion.
FURCHES and DOUGLAS, J. J., each deliver concurring opinion.

MONTGOMERY, J. The defendant was convicted of murder in the first degree at the August Term, 1899, of JOHNSTON Superior Court, and upon sentence being pronounced, he appealed.

A recital of the substance of a considerable part of the evidence is necessary to an intelligible discussion of that part of the charge of

the court upon which, mainly, we have determined to grant to the prisoner a new trial.

At the time of the homicide, the prisoner lived near Selma on a piece of land lying immediately on the public road. His house was a small framed one, fifteen or twenty yards from the road. He, with his wife, went into Selma about three o'clock, on the afternoon of the 26th of December, 1898, to arrange a Christmas tree. Between ten and eleven o'clock at night, he and his wife, both walking, left the town for their home; while the father and mother of the prisoner, riding in an ox cart, were just behind, returning to their home, also. A short distance out of town the prisoner and his wife passed three persons who wore masks which concealed their features. They each had a woman's skirt, and one of them was wearing his. The three
(617) masked persons were Charles Lewis Cawthorn, Graham Garner and Thomas Winfrey. They had all been drinking and had a pint of liquor along with them. During the day they had been shooting off fireworks in Selma, and upon being prohibited by the town authorities from further indulging in the sport, they determined to go out in the country that they might do so. One of them Winfrey, had in his pockets two loaded pistols—a Bull Dog, of 32 calibre, and a Harrington & Richards, of like bore.

In a short time after the prisoner and his wife had passed the three masked persons the latter started on the road in the same direction in which the prisoner was going. The masked persons were shooting off their fireworks and singing and laughing, one witness said they were "hollering" too, and firing the pistols. When not far from the prisoner's house, a pistol shot was fired, which the prisoner said he heard. The homicide occurred just at the prisoner's gate, and in the road. The evidence is contradictory as to what occurred then and there.

The evidence of the State tended to prove that the prisoner, armed with a dangerous knife, came from the house, after the discharge of one Roman candle, into his yard, and made a sudden and furious assault upon the three masked men, in which one of them, Cawthorn, was killed, and another of them, Winfrey, was dangerously wounded; that they had not stopped at the gate, but were passing on, and were merely Christmas revelers.

The evidence of the defense tended to show that the three men had stopped at the gate, discharged fireworks into the prisoner's yard and near his house, and had so frightened the prisoner that he was alarmed for his personal safety; that he took up the knife and went to the gate, whereupon he was seized by the man who had the pistol,

and who had thrust it into his face, and that he commenced to (618) use the knife in self-defense.

Amongst other things, the court charged the jury that: "If the assault was prompted by the occurrences of Wilmington, and the rioting at Selma, or either of them, this would be a circumstance from which the jury might infer premeditation on the part of the prisoner."

That instruction was so great an error, when considered in the light of the evidence, that a recital of the evidence, and the whole of it, on that point, will make that error manifest without any extended discussion of it, and we therefore give the *whole* of that evidence:

In his evidence Winfrey said he "carried the pistols because I thought something might happen to me. The white folks and negroes had been rioting in Selma that day. I was going to deliver one of the pistols to Charlie Roberts."

J. H. Parker testified that he was mayor of Selma (and to quote his language): "I saw some fighting and shooting fireworks that day; the white men were beating negroes; they were using Roman candles; a white man beat a negro with a stick; one man shot a negro with a rifle; did not see prisoner participating in the row, and did not hear him say anything about it."

J. T. Ellington, sheriff of the county, testified that the prisoner, after he had surrendered himself into his custody, said: "He had not been able to sleep, and had had a dream." The prisoner further said: "He had been reading about the Wilmington troubles, and thinking about them until he could not sleep, and that when he saw men in disguise he thought they had come to kill him."

Lawrence Smith, the father of the prisoner, testified that he "had never heard prisoner say anything about the Wilmington trouble."

The prisoner testified: "I was not mad because of what my wife told me, and because of what I had read about the Wil- (619) mington affair. My wife told me she saw some one shooting at Henry Richardson, and I said it was a shame." He further testified: "I then heard some shooting. I was scared. I was frightened because I heard shooting, and had heard that there had been a riot at Selma that evening."

The above is every word of the evidence in reference to the matters embraced in his Honor's charge, which we are considering. It is hardly necessary to add that that testimony did not justify the charge. The testimony, instead of furnishing evidence of malice or hatred against the white race or against those three masked persons from which premeditation to kill could be inferred, directly established abject terror and fear, on the part of the prisoner, for his personal

safety. The charge must have had a most damaging effect upon the rights of the prisoner, for it directed the attention of the jury to a motive for the homicide, in the prisoner's breast, which the testimony, in all its bearings, had not tended to prove.

We will not consider the other exceptions raised on the appeal. While the record discloses that there was too much of passion on the part of the prosecution for the State, in the trial below, it further shows that that fact was acknowledged; and it may be expected that on the next trial the error will not be repeated.

Every citizen of North Carolina on trial for crime should feel, if he is really innocent, that he has nothing to fear, and in all cases that the prosecuting officer is not his enemy. There must be a

New trial.

CLARK, J., dissenting. I cannot concur that the prisoner has not had a fair trial. Three persons passing along the public road, on a
(620) Christmas frolic, fired off a Roman candle in his yard, and a pistol not far from his house. Instead of making allowance for the customary exhilaration of such occasions, he came out of his house, armed with a butcher knife, and made a sudden and furious murderous assault, killed one man, and seriously, almost fatally, wounded another. The jury found that this was not done in self-defense, nor upon heat of blood upon provocation. Of these facts they were the sole judges. There was evidence tending to show that the mind of the prisoner, who was a negro, had been inflamed by reading about the race troubles at Wilmington, and by having seen some of his race maltreated by white men at Selma that same afternoon. The prisoner had stated that "he had been reading about the Wilmington troubles, and thinking about them till he could not sleep, and that when he saw men in disguise he thought they had come to kill him." If, under that wrong impression, he took up the butcher knife and came out to kill the white men, there was surely some evidence tending to show premeditation, and that it was not the result of sudden provocation. It was not self-defense, but murder. The jury, not the prisoner, were to judge of the reasonableness of the apprehension (*State v. Harris,* 46 N. C., 190), and his Honor committed no error in telling them that if the ground of the prisoner's apprehension, or his motive, was (as the prisoner himself had intimated), "prompted by the occurrences at Wilmington, and the rioting at Selma, this would be a circumstance from which the jury might infer premeditation" on his part. His admissions showed he had been thinking over these matters with much intensity of feeling. Whether that thinking resulted in excessive and mistaken fear, or in malice, was for the jury, and

if either motive caused the killing it was without legal cause on the part of the deceased, and was murder. The Attorney-General being a white man, it may be presumed, would not be so deeply impressed by occurrences not arousing feelings of either fear or (621) revenge in his race, but which the prisoner said had not allowed him to sleep. The judge at least was correct in telling the jury it was a circumstance from which the jury could infer premeditation, i. e., killing on purpose, and not in self-defense or on sufficient provocation, and he told them no more. The fact that the prisoner came out of his house without any further excuse than that the deceased and his companions were passing along the road, in a boisterous manner on a Christmas occasion, and fired off a Roman candle into a tree in the prisoner's yard (and the jury found that state of facts, if they believed the State's evidence), might well be taken into consideration coupled with the evidence of his deep feeling over the Wilmington and Selma riots. His extraordinary and unjustifiable assault might well have been caused by such premeditation and a determination resulting therefrom, either to avenge his race, or prevent a repetition of such incidents towards himself. Neither the statute nor the decisions of this Court restrict murder in the first degree to that deliberation which is used when the killing is by lying in wait or by the administration of poison. In *State 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 *State v. McCormac,* 116 N. C., 1033, in which the Court holds that "attendant circumstances rather than computation of the time intervening between the formation and execution of the purpose," throw light upon the question of premeditation. In *State v. Carrington,* 117 N. C., 862, it is said: "It is immaterial how soon after resolving to kill the prisoner carried his purpose into execution." These decisions are all under the construction placed by *State v. Fuller,* 114 N. C., 885, upon the act of 1893, for the act itself contains nothing transferring to murder (622) in the second degree the presumption of malice raised theretofore by a killing with a deadly weapon. In the present case the judge left the admitted brooding of the prisoner ("so he could not sleep") over the Wilmington riot, together with his sudden rushing out of the house and slaying with a butcher knife a harmless roisterer, or reveler (if that synonym is preferable), on a festive occasion, and the almost fatally wounding of another, as attendant circumstances, among others, from which the jury might decide whether there was premeditation. Deliberation and premeditation may be inferred from facts and circumstances. *State v. Booker,* 123 N. C., 713.

Whenever public opinion demands it, the Legislature can, and will, abolish capital punishment, but it should not be done by judicial construction. The prisoner has had a fair trial before judge and jury. It is to the verdicts of juries that the people must look for protection of their lives and property. The jury is the sole judge of the facts, and their finding should be final, in the absence of error of law on the part of the judge, and I can see no error that he has committed in this case.

FURCHES, J., concurring. I concur in the opinion of Justice MONTGOMERY, but feel that I ought to say something in justification of my concurrence.

The statute of 1893 divided murder into two degrees, and it has been discussed in so many cases that it would seem that the change made in the law of murder by that statute should be *recognized,* and pretty well understood by this time.

The rule prescribed by that statute entirely changed the law with regard to murder in the first degree. Before that statute, when the killing was admitted or shown to have been with a deadly weapon,
(623) *the law presumed murder,* and the burden was then thrown upon the prisoner to show facts and circumstances in mitigation or excuse. This was a harsh rule, handed down to us as a part of the common law of England. Many of the States of the Union recognized the harshness of this law, and changed it by legislation years ago; but our Legislature made no change until 1893. It then divided murder into two degrees, first and second. The rule and the presumption with regard to the second degree is the same now that it was at common law. But with regard to murder in the first degree—after specifying several modes of killing, as by poisoning, etc.—it prescribed that any other killing, when done with *deliberation* and *premeditation,* shall be murder in the first degree. But the statute throws upon the State the burden of showing—proving—both *deliberation and premediation.* Unless these rules are observed by the courts—if juries are allowed to find prisoners guilty of murder in the *first* degree without any evidence of *deliberation* and *premediation,* the statute if 1893 is a nullity.

What, then is the evidence in this case that the State insisted proved *deliberation* and *premediation* on the part of the prisoner? He was at home, in the peace of God and the State, but not of these "festive, harmless roisters," dressed in woman's clothing, armed with whiskey, Roman candles, and pistols. These "festive" fellows were at the prisoner's house, shooting into his yard, and guilty of an affray. *State v.*

Huntley, 25 N. C., 418. And this view of the case was not presented to the jury.

But the State was asked to point out the evidence upon which it relied to prove *deliberation* and *premeditation.* The response to this inquiry was the fact that there had been a riot that evening between the negroes and the whites in Selma, and that there had been a riot in Wilmington last November, and the evidence that the prisoner said that he had read about the Wilmington riot until he could (624) not sleep.

The prisoner is shown to live in Johnston County, near Selma, and that he had no connection with the Wilmington riot; that he was in Selma the evening of the 26th, when the riot took place, but that he was not in it, and had nothing to do with it.

The Attorney-General, who contended that this evidence showed deliberation and premeditation, was asked if he had read about the riot in Wilmington, and he said he had. He was then asked, suppose there had been a riot between the negroes and whites in Lexington on the evening of the 26th of December, and you had been in Lexington at the time, but had nothing to do with it, and that at ten or eleven o'clock that night three men had come to your house in the condition and manner that these three men went to the house of the prisoner, and a fight had ensued between you and them, and one of them had been killed, as related by the State's witnesses; do you think you ought to be convicted of murder in the first degree, because you were in Lexington that evening or because you had read about the Wilmington riot? He answered that he thought not; and so, it seems to me, that every honest, right-thinking man would say. And if it be no evidence of *premeditation* and *deliberation* against the Attorney-General, it should not be against the prisoner, unless we should have one rule of law for the trial of a negro and another for the trial of a white man. This we can not have.

This affair and the riot at Wilmington, and the riot at Selma, are greatly to be regretted by all good men, and it is hoped that the like will not occur again. Let these riots be among the things of the past. Let the dead bury their dead, but do not bring their ghosts into court to bury the living.

DOUGLAS, J., concurring. In concurring in the opinion of the (625) Court it is needless to remind the profession of the responsibility of him in whose hands rests the life of a fellow being. That responsibility must be fully met without fear or favor, and the result determined solely by the law of the land, and the facts of

the case. If the facts were different, so would be my opinion; and hence, I am unwilling to have my action judged upon any supposed state of facts, not shown in the record. This would be equally unjust to the prisoner and to the Court. If the prisoner had rushed out of the house, armed with a butcher knife, and had immediately made a sudden and murderous assault, my opinion would be different; but this the prisoner did not do, and I can find no witness that says he did. There were only three men in the party. Cawthorn was killed, and Garner swears that he ran away when the dog began to bark, and did not come back until after the assault on Cawthorn, and immediately left again. So, Winfree was the only witness who was present when the prisoner came to the gate.

What does Winfree say? These are his exact words, on cross-examination, as taken from the record: "Prisoner came out and asked if that was Pendergrass; I said 'no'; I then said to Cawthorn 'we can get a ride'; prisoner said 'that is my father and mother'; am almost positive that I said, 'we'll shoot the damn dog'; can't say whether this was before or after I said we would get a ride; it was all about the same time." And again Winfree says: "Had no feeling against prisoner; did not know him then; was not under the influence of whiskey; *prisoner seemed friendly when he came to the gate; he did not seem to be mad.*" Where then is the rushing out of his house, and the sudden murderous attack? Here were three disguised men who were already guilty of an affray under the laws of this

(626) State, and whom the prisoner knew to be armed, as a pistol had just been fired; and yet this evidence shows that the prisoner came out to the gate in a friendly manner, asked if it was Mr. Pendergrass, and never struck a blow until after an assault was threatened upon his aged parents, coupled with the equivocal remark, "We'll shoot the damn dog." And yet we are told that the prisoner had no provocation beyond the boisterous conduct of a harmless roisterer. There are no harmless roisters. That species of roisterer, if it ever existed, became extinct before the dawn of history. Various definitions of the word are given in the dictionaries, all unfavorable. The Century Dictionary says it is derived from the old French word "rusterer" meaning ruffian. The word is Shakespearean, and if we look to Shakespeare, and the current literature of the times, we shall learn the character of the "roistering blades" that followed Falstaff and Prince Hal. So far from being harmless, they became such an unmitigated nuisance that their leader was sent to jail, although the son of England's king, and the heir of England's throne.

Let us reverse the case, for the sake of argument: Suppose that three negroes, disguised and armed, had come to a white man's house, and after he had come to the gate in a friendly manner, had threatened to get into the cart with his aged father and mother, what would he probably do? I fear it would not require any premeditation for a ready weapon to meet a willing hand.

I have no intention whatever of abolishing capital punishment by judicial construction. In fact, it should be remembered that the distinction between murder in the first and second degree was not made by the decisions of the Court, but by an express act of the Legislature, ch. 85 of the Laws of 1893.

At the February Term, 1894, in *State v. Fuller,* 114 N. C., 885, this statute was construed as casting upon the State the burden of proving premeditation. The concluding paragraph of (627) the opinion of the Court, delivered by Justice AVERY, meets my unqualified approval. This decision has been uniformly followed, and was approved by a unanimous Court, in *State v. Booker,* 123 N. C., 713.

I do not say that the prisoner is innocent of crime. If the verdict had been for manslaughter, or even for murder in the second degree, I would not have felt justified in disturbing the judgment of the court below, for the killing with a deadly weapon presumes malice, but not premeditation.

In conclusion, I can only say that I am not a follower of Draco, and have no desire to be considered the especial avenger of blood. I can do the right only as I am given to see the right; and I have no ambition beyond the performance of my duty in such a manner as to make every one feel and know that, so far as depends upon me, no one is so rich and powerful as to be beyond the avenging arm of the law, and none so poor and humble as to be beneath its completest protection.

Cited: *S. c.,* 126 N. C., 1117; *S. v. Potter,* 134 N. C., 731.

(628)

STATE v. F. M. SHARP.

(Decided 7 November, 1899.)

Working Public Roads—Road Hands—Notice—Warrant of Justice—Motion in Arrest of Judgment—Road Act (1899), Ch. 581, Secs. 4 and 24.

1. Under the Road Act of 1899, ch. 581, it is competent for the overseer to testify that he left a written notice with a road hand specifying time and place for working the road, without producing the same.

2. Working the public roads is not a tax, but a duty imposed and regulated by law, like service upon juries, military service, etc., which may be required to be rendered to the State without compensation, and the neglect of this duty may be remedied by indictment.

3. Legislation in regard to public roads need not be uniform throughout the State, but may be adapted to the wants and wishes of various localities, being an exercise of the police power, similar to acts relating to local liquor prohibition, to local prohibition as to cattle running at large, to local differences in methods of election of town and county commissioners, to local provision as to public schools, dispensaries, etc.

4. The Road Act, sec. 24, dividing the county of Durham into two road districts, is unobjectionable, and is an arrangement heretofore held valid.

5. Where the affidavit upon which the warrant is based sets out the charge in full, and the justice appends his warrant referring thereto, this incorporates the charge, and makes it part of the warrant, and if taken together they constitute a charge of a criminal offense, a motion in arrest of judgment for insufficiency of the warrant will not be entertained.

INDICTMENT for failure to work the public road, tried on appeal from justice's court, before *Brown, J.*, at September Term, 1899, of DURHAM Superior Court. The defendant was convicted. Motion for new trial. Motion overruled. Defendant excepted. Motion in arrest of judgment disallowed. Defendant excepted. Judgment. (629) Appeal by defendant.

Case on Appeal.

This was a criminal action for failing to work road, tried before a justice of the peace of Durham County, and afterwards on appeal in the Superior Court. It was admitted that A. H. Stokes was duly elected superintendent of roads for Durham County; that the county had been duly divided into road districts; that I. W. Shields was

duly elected supervisor of Durham Township in Durham County, and that the defendant is 41 years old, and an able-bodied man.

I. W. Shields, Supervisor, and a witness for the State, testified that on August 12, 1899, he left a notice to work roads at defendant's residence. It was in writing, and he gave it to a servant at defendant's residence. "Sharp lives in my road district. The notice specified a place to work and to meet. I had plenty of tools, and did not put in any tools. Notice required defendant to appear on public roads, beginning at Watts Hospital, at 7 a. m., on the 17th and 18th of August, 1899."

The defendant objected to witness testifying about notice without producing it. Overruled, and exception by defendant. First exception.

"Defendant did not pay me any money in lieu of working roads. He lives in North Durham."

A. H. Stokes, a witness, testifies: That he is county superintendent of roads, and that defendant paid in no money to him in lieu of working the road.

S. Bowling, a witness for the State, testifies: That he was county treasurer since last December, and also treasurer of the road fund. Defendant paid him no taxes, money in lieu of working public roads. Public Acts of 1899, ch. 581, offered in evidence. (630)

The defendant offered Private Acts of 1891, ch. 186, it being the charter of North Durham, which, it is agreed, may be read in evidence in the Supreme Court, from the bound volume.

Defendant, Sharp, testified: "I live in North Durham. B. L. Duke is mayor of North Durham, and it has a board of commissioners. I am one of them. It has accepted its charter and acted under it. I have paid for cleaning up and keeping up the streets of North Durham. It was a gift from me and not a tax. I paid no road tax to the county, and no money in lieu of working the roads. I do not live in the corporate limits of the town of Durham, but do live in the corporate limits of North Durham."

That was all the evidence. The court thereupon charged the jury, that if they believed the evidence, the defendant was guilty.

The jury returned a verdict of guilty. Motion for a new trial. Motion overruled and exception.

Motion in arrest of judgment. Motion overruled and exception.

Appeal to the Supreme Court. Notice of appeal waived in open

court. Bond of $25 adjudged sufficient. Twenty days to serve statement of case on appeal, and twenty days to serve counter case.

September 13, 1899.

BOONE & BRYANT,
WINSTON & FULLER,
Attorneys for Defendant.

The foregoing is accepted as the case on appeal.

September 18, 1899.

A. L. BROOKS,
Solicitor of Fifth Judicial District.

(631) *Winston & Fuller and Boone, Bryant & Biggs for appellant.*
Manning & Foushee and Chas. E. Turner, with the Attorney-General, for the State.

CLARK, J. The defendant is indicted for a failure to work the public roads of Durham County, as required by secs. 4 and 24, ch. 581, Laws 1899.

The first exception was, that the court permitted the road overseer to testify that he left a written notice at the defendant's residence, specifying time and place for working the roads, without producing the same. This was not error, because the statute requires the notice (not a copy of it) to be left with the defendant. As the overseer could not produce it, he could, therefore, state what it was. It is not the return of process to a court. Besides, the issue is not as to the contents of the notice, which is in the defendant's possession, and the contents could be proved for that reason, but the collateral fact that it was served. *State v. Wilkerson,* 98 N. C., 696; *Carden v. McConnell,* 116 N. C., 875; *Archer v. Hooper,* 119 N. C., 581.

The next exception is, that the act requires all the citizens of Durham County to work the public roads, except citizens of the town of Durham, and the defendant is also an inhabitant of an incorporated town, to wit, North Durham. But that is a matter left to legislative authority, and if it worked any hardship, liable to be changed by any subsequent Legislature. This act authorizes some counties to work the roads in the mode therein prescribed, i. e., partly by taxation, and partly by labor, leaving the other counties, generally, to work their roads in the old method, by labor alone. And there are still others in which the roads are worked entirely by taxation. Among the counties authorized to work by the mixed system, partly labor and part-

ly by taxation, the general rule, laid down in section 4, is to (632) exempt citizens of incorporated towns from labor on the roads, but in section 24, as to Durham County only the inhabitants of the town of Durham are thus exempt. By section 22, this mixed system is made imperative as to certain counties or townships named. By section 23, its operation in other counties and townships, therein specified, is made conditional upon the adoption of the provisions of the act by the county commissioners; and still other sections contain modifications of the act as to specified counties and townships, and section 27 specifies counties exempt from the provisions of the act. This legislation was to meet the varying phases of public sentiment in regard to the important matter of working the public roads. A method which would be satisfactory in some counties might, for local reasons, or by reason of a difference in public sentiment, be altogether unadvisable and unacceptable in others. Being altogether a local matter, the Legislature has endeavored to meet the views of each locality. If it has made any mistake as to the wishes of any locality, or should there be a change of sentiment in any, any subsequent General Assembly can amend the act.

Local legislation of this nature has been very common in North Carolina, and has always been held to be within the powers of the Legislature: as to local liquor prohibition acts, *State v. Muse,* 20 N. C., 319; *State v. Joyner,* 81 N. C., 534; *State v. Barringer,* 110 N. C., 418; fence laws, *Cain v. Comrs.,* 86 N. C., 8; *State v. Snow,* 117 N. C., 774; restricting sale of seed cotton in certain counties, *State v. Moore,* 104 N. C., 714; local prohibitions as to cattle running at large, *Broadfoot v. Fayetteville,* 121 N. C., 418; local differences in the methods of electing town and city commissioners, *Harris v. Wright,* 121 N. C., 172; in the method of electing county commissioners, *Lyon v. Comrs.,* 120 N. C., 237; local provisions as to public schools, *McCormac v. Comrs.,* 90 N. C., 441; local dispensaries for sale of liquor, *Guy v. Comrs.,* (633) 122 N. C., 471; and, indeed, in this very matter of the method of working public roads, *Tate v. Comrs.,* 122 N. C., 812; *Brown v. Comrs.,* 100 N. C., 92; *Herring v. Dixon,* 122 N. C., 420; and in many other matters, *Intendent v. Sorrell,* 46 N. C., 49 and other cases.

The provision as to Durham County simply divides the county into two road districts one consisting of Durham town and the other of the rest of the county, an arrangement which is held valid in *Broadfoot v. Fayetteville, supra.*

The defendant's counsel strenuously insists that the method of working the public roads by conscription of labor is unjust, in that it falls to the same extent upon the poor man, who has not a wheeled con-

veyance, and upon him who has many, and that, indeed, if the latter happens to be above the road age, he may use the road by an unlimited number of vehicles, without contributing in the slightest degree to keeping that road in order. It is a matter of common knowledge that the system of working the public roads by conscription of labor is expensive, wasteful and inefficient. It, perhaps, was suited to a former age, when roads were little used, when labor could be furnished without inconvenience, by any able-bodied man, to do the little work required, and money was a scarce commodity. Because of its inefficiency, and possibly from a growing conviction of the essential injustice of the system, and the increasing inequality under present conditions of the burdens laid by working the roads under that system, there has been a steady growth of legislation (beginning with Mecklenburg County, in which so many progressive measures have started) away from the old system, and in the direction of having them worked by taxation.

(634) The present stage of public sentiment, varying in different counties, and even townships, is doubtless fairly represented by the variant provisions of the act now before us. It is in the power of future Legislatures to extend its provisions at their will, till the roads shall be worked entirely by taxation throughout the State, but that is a matter which rests with the legislative department of the Government.

We can not agree with counsel that requiring the defendant to work the roads is a tax, and, therefore, unconstitutional, because not levied *ad valorem* in proportion to property. It is not a tax at all, within the meaning of the constitutional provision, which requires the prescribed equation between poll and property tax to be observed. It is not a tax, but a duty, like service upon a jury, grand jury, special venire, military service, or as witness, *(Town of Pleasant v. Host,* 29 Ill., 490; *Fox v. Rockford,* 38 Ill., 451), which duties formerly were, and, to some extent, are still, required to be rendered to the State without compensation. With the increased wealth and consequently increased use of roads and need for better roads, this duty will become more onerous and unequal, and there will probably be an acceleration in the movement to substitute a taxation upon property in lieu of it. But a duty so long recognized as such, which was universally exacted at the time of the adoption of the present Constitution, and which has been recognized ever since, can not now be deemed and held a tax, and, therefore, unconstitutional. Till 1868 the method of working the roads was left entirely to the Legislature to prescribe, and if there had been any intention to restrict the power of the Legislature in that regard, or to change the common-law duty of the citizen (1 Bl. Com.,

358) to work them into a tax, there would have been some express provision to that effect inserted in the new Constitution.

There have been numerous decisions of this Court since 1868 sustaining indictments for failure to work the public roads, and necessarily sustaining the constitutionality of such statutes, (635) though the point was not expressly raised, the latest case being *State v. Joyce,* 121 N. C., 610. The defendant moves in arrest of judgment, because the warrant does not describe the offense charged. The affidavit sets out the charge in full, and at the foot the justice of the peace has added his warrant in proper form, but inserting "to answer the above complaint," without reiterating the particulars of the charge. This incorporates the charge in the affidavit into, and makes it a part of, the warrant. This was expressly decided in an exactly similiar case for this same offense *(State v. Sykes,* 104 N. C., 694), which has been cited and reiterated as to all offenses, in *State v. Davis,* 111 N. C., 729; *State v. Wilson,* 106 N. C., at p. 721, and in other cases. The defendant contends that the prior case of *State v. Bryson,* 84 N. C., 780, is in conflict with these. If it were, the later repeated decisions would govern, but in fact *State v. Bryson* merely holds that "the affidavit being not an essential part of the warrant, if the warrant itself charges a criminal offense, it will be sustained." The later cases above cited hold "the affidavit and warrant in contemplation of law are one, if one is referred to in the other," and if, together, they constitute a charge of a criminal offense, it will be sufficient.

Affirmed.

Cited: S. v. Covington, post, 643; *S. v. Carter,* 129 N. C., 560; *S. v. Yoder,* 132 N. C., 1113; *Brooks v. Tripp,* 135 N. C., 161; *S. v. Holloman,* 139 N. C., 646, 8; *S. v. Wolf,* 145 N. C., 445.

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(636)

STATE v. CORA HICKS.

(Decided 7 November, 1899.)

Murder in Second Degree—Infant Criminal—Child Murder—Doli Capax.

1. A special instruction in reference to murder in the first degree need not be passed upon when the verdict is for murder in the second degree.

2. Where there was no element of manslaughter in the case, the court properly refused to submit a hypothetical view of manslaughter to the jury.

3. Where his Honor, by varied and amplified expressions, impresses upon the jury the idea that before they can find the accused, a child between seven and fourteen years of age, capable of committing crime, they must be fully satisfied from the evidence that the accused was capable of a mischievous discretion and of forming an intention to commit crime, the charge meets the requirements of the law.

4. The certainty requisite to a verdict of guilty is the same for all grades of criminal offenses.

5. Since the Act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree.

INDICTMENT for murder, tried before *Bryan, J.*, and a jury at May Term, 1899, of the Superior Court of DURHAM County.

The prisoner, a child of about eleven years of age, was indicted for the murder of Annie Belle Justice, a child of about two years of age, by fatally burning her.

The evidence, the judge's charge, and the exceptions thereto, are sufficiently stated in the opinion.

There was a verdict of guilty of murder in the second degree. Judgment of imprisonment in the State Prison, for seven years. (637) Appeal by the defendant to the Supreme Court.

Manning & Foushee for appellant.
Zeb V. Walser, Attorney-General, for the State.

MONTGOMERY, J. The defendant, a child of eleven years of age, according to the testimony of one witness, and of fourteen, according to the testimony of another, was convicted of murder in the second degree at the May Term, 1899, of Durham Superior Court. The deceased was an infant just beginning to walk, and was being nursed by the defendant. The principal evidence upon which the defendant was convicted was the testimony of Sally Leathers, as follows: "Was there when the body was burned; it was after 12 m.; Cora took body by the heels, and had her head between her legs holding it more on one side than the other, and sat it in some hot ashes where they had been cooking ash-cakes; baby screamed. She then smacked it on the jaws; laid baby on the foot of the bed; got some soda and rubbed it on. She said she did it to scare it, but didn't go to burn it. Baby had on a diaper when she came over that morning, but not when put on the ashes. Cora took it off just before burning baby. She pulled the clothes behind the baby, didn't let them burn."

The defendant, as a witness in her own behalf, denied that she burnt the child, and said she did not know how the burning occurred.

It is unnecessary to discuss the first exception further than to say that, even if his Honor was in error in refusing to charge the jury, at the request of defendant's counsel, that there was no evidence of murder in the first degree (which we do not pass upon), no harm was done, for the jury returned a verdict of murder in the second degree. There was no element of manslaughter in the case, and the court properly refused to submit a hypothetical view of manslaughter (638) to the consideration of the jury.

This view of the case disposes of all of the defendant's exceptions based upon his Honor's refusal to submit the question of manslaughter to the jury.

On the matter of the presumption of incapacity to commit crime, in favor of infants, the Court instructed the jury that an infant under seven years of age could not be shown, even upon the clearest evidence, to entertain a criminal intention; but that if the age of seven had been reached, the State could prove that such a person was of sufficient capacity to entertain a criminal intention. In the same connection, he further said: "This presumption of incapacity to commit crime may be rebutted by clear and strong evidence of a mischievous discretion, a discretion to discern between good and evil, or by proof that she (defendant) knew the act was wrong, and that she had knowledge of good and evil, and of the peril and danger of the offense, and the fact of guilty knowledge must be distinctly made out. If she understands the nature and consequences of her acts, and the act indicates intelligent design and malice, she may be convicted." It might have been better if his Honor had instructed the jury that they should be "fully satisfied" that the defendant was *doli capax,* or that they should be satisfied "beyond a reasonable doubt" of her capacity to entertain a criminal intention; but we are not prepared to say that his Honor's charge was erroneous.

In the case of *State v. Sears,* 61 N. C., 146, the Court said: "Whenever it appears that the judge has been careful to impress upon the jury the great principle that the innocent must in no case be convicted, we must hold that to be sufficient, without regard to the particular form of language which may be used." If it be conceded that the same degree of proof is necessary to show that an infant over seven and under fourteen years of age is capable of a mischievous discretion, of (639) forming an intention to commit crime, as is required to convict a person of full age of crime, the charge of his Honor, we think, meets

the requirement. It is impossible that the jury could have misunderstood their duty under the instructions given.

The question as to whether the same degree of proof was necessary to the conviction of crime in both misdemeanors and felonies was debated in the argument here. The matter was decided in *State v. Knox,* 61 N. C., 312, where the Court said: "We have no hesitation in saying that the certainty to which a jury should be brought before rendering a verdict of guilty is the same for all grades of criminal offenses." His Honor, upon the degrees of murder, charged the jury that, "Where the killing is admitted or proved, and nothing else appearing, the court charges you that no presumption is raised that it is murder in the first degree, and unless the circumstances show, beyond a reasonable doubt, that there was a deliberate, premeditated, preconceived design to take life, it is murder in the second degree"; and further, "If the jury is not satisfied beyond a reasonable doubt that the killing was done willfully, deliberately, and with premeditation, then you will inquire whether the killing is murder in the second degree." "In this case, if the jury are satisfied, beyond a reasonable doubt, that the defendant killed the deceased by burning, then the burden is shifted to the defendant to show that it is not murder in the second degree."

These instructions were perfectly fair to the defendant. As we have said, there was no element of manslaughter in the case, for the defendant denied that she burnt the child, and said that she did not know how the burning occurred; and the testimony of Sally Leathers (640) showed that there was no provocation for the act, even if a child two years old could give provocation, to reduce a killing from the grade of murder to that of manslaughter.

Before the passage of the act of 1893, chapter 85, when the killing was proved to have been done with a deadly weapon, the law presumed malice, and that made the killing murder in the first degree. Since the act of 1893, the killing being proved, and nothing else appearing, the law presumes malice but not premeditation and deliberation, and the killing is murder in the second degree. *State v. Gadberry,* 117 N. C., 811; *State v. Finley,* 118 N. C., 1161; *State v. Booker,* 123 N. C., 713.

It is a sad spectacle, that of the incarceration of a child eleven years of age in the State Prison for the crime of murder, but the trial was had by a judge who saw it properly and humanely conducted, and she has been convicted under the law of the land.

Affirmed.

Cited: S. v. Utey, 132 N. C., 1030; *S. v. Clark,* 134 N. C., 714; *S. v. Worley,* 141 N. C., 767.

(641)

STATE v. W. W. COVINGTON.

(Decided 14 November, 1899.)

Working Public Roads—Public Duty—Excuse—Sickness—Service of Notice—Sufficiency of Warrant—The Code, Sec. 2020.

1. As a general rule, it is sufficient if the indictment (or warrant) follows the words of the statute.

2. The personal service of summons to the work hand means service on him personally, and not service by the overseer personally.

3. The statutory requirement to work on the public roads, is not a tax, but a duty—inability to perform it, through sickness, is a full defense. *State v. Sharp, ante*, 628.

STATE WARRANT for failure to work the public road, heard upon appeal from the justice's court, by *Robinson, J.*, at April Term, 1899, of the Superior Court of RICHMOND County.

By consent, the jury returned the following special verdict:

That on the 18th of April, 1898, the defendant was notified to work the public road in the county of Richmond, leading from ——— to ———.

That said road had been established according to law, and had been worked as such, under the law, since the year 1867. That the defendant was on the aforesaid.....notified to work the road on the 22d day of April, 1898. That on the 22d day of April, 1898, the defendant was so sick that he was unable to work the road. That the said notice to the defendant was not given by the road overseer, George W. McIntosh, but by one L. W. Stubbs, who was directed by the said overseer to notify the defendant. That on the 22d day of April, 1898, the defendant, W. W. Covington, was the owner of more than $500 in property, but did not have $1 in actual cash, on the said date. That the defendant did not work the said road at the time when he was so notified to work, to wit, April 22, 1898, and he did not pay $1 to the (642) overseer, under the statute.

That the board of supervisors met in February, 1898, and August, 1898, and at no other times that year.

If, upon the foregoing facts, the Court should be of the opinion, that as a matter of law, the defendant is guilty, then the jury so find. If upon these facts, the Court should be of the opinion, that as a matter of law, the defendant is not guilty, then the jury so find.

Upon the foregoing, the Court doth adjudge that the defendant is not guilty; that he be discharged.

The Solicitor for the State appeals to the Supreme Court from the foregoing judgment. Defendant recognized to appear at December Term, 1899.

W. S. O'B. ROBINSON,
Judge Presiding.

Zeb V. Walser, Attorney-General, and J. D. Shaw, Jr., for the State.
W. H. Neal and J. H. Cook for defendant.

CLARK, J. This was an indictment for failing to work the public roads. The first exception is because the warrant does not charge that the defendant "unlawfully and willfully" failed to work the public roads. Those words are not in the statute, Code, sec. 2020, and as a general rule it is sufficient if the indictment follows the words of the statute. *State v. George,* 93 N. C., 567, and cases cited. The fact of failure to work the roads by one liable to such duty, after being notified, and without paying the $1 to procure exemption, constitutes the offense without allegation or proof of willfulness, any excuse,
(643) as in the present case being a matter of defense. The omission of the words "willfully and unlawfully," therefore is not fatal. *State v. Howe,* 100 N. C., 449.

Another exception is, that the summons to work the road was left at the house of the defendant, not by the overseer himself, but by another acting as his agent or deputy. We do not see how the defendant was injuriously affected thereby or why the overseer could not send the notice by another to be left at the defendant's house. The defendant relies upon the provisions in The Code, section 2044: "When an overseer shall not be able to *personally* notify the hands . . . he shall leave at the house a written summons." The personal service therein mentioned means service on the defendant personally, and, if not to be had, then by leaving notice at his house— it does not mean service by the overseer personally (which is not even required of the sheriff in serving legal process), and therefore that service by his agent or deputy is void.

The defendant further contends that he is not guilty, because the special verdict finds "that defendant was notified to work the road on the 22d of April, 1898; that he was sick on that day, and was so sick that he was unable to work the road." It has been decided at this term, in *State v. Sharp,* that the statutory requirement of all able-bodied male persons between the ages of eighteen and forty-five years to work on the public roads is not a tax, but a duty, similar to service on the jury,

grand jury, on the special venire, military service, or as a witness, which duties the State can exact without compensation, or at prices fixed by the State, usually less than would compensate the parties. It was also held a duty and incumbent upon a resident, though he was not a citizen. *State v. Johnston,* 118 N. C., 1188. Being a duty, sickness causing inability to perform it is a full defense, as in the case of the other duties above recited. The $1 to be paid the day before, by each (644) person not intending to work, is a payment exacted of those who have no sufficient excuse for not rendering the service, and who are thus authorized to procure exemption, by paying an amount deemed sufficient to purchase a substitute. The statute does not require the $1 of one, who, by reason of illness, is unable to perform the duty.

Working the roads by conscription of labor was the common-law method. It was part of the *trinoda necessitas,* from which no man was exempt, and the same was true under the civil or Roman law, *nullum genus hominum, nulliusque dignitatis ac venerationis meritis cessare oportet,* C. 11, 74, 4. As late as the statute 13 George III, chapter 78 (1773), the duty of working the public roads was obligatory upon all able-bodied males between the ages of eighteen and sixty-five, or to send a laborer, but this statute limited the exaction to six days in the year (like our Code, sec. 2017), and required property to contribute in teams and in money. This was an advance on the previous common-law system, under which labor alone bore the burden of maintaining the highway, and, in its turn, has long years ago been superseded in England by the present system of working the roads by taxation. In France the same duty was imposed upon labor alone of working the highways, a duty known as *corvees,* a grievance which contributed powerfully to their revolution of a century ago, since which time the roads have been worked by taxation. The supervision of roads and bridges was held so honorable a duty among the Romans, that their highest religious official was styled *Pontifex Maximus,* i. e., "head bridge builder," whence the title of Pontiff still worn by the Pope, and Cicero, in his letters to Atticus (11, ep. 1), says, that a road overseer* was colleague of Julius Cæsar in his candidacy for the Consulship. 1 Bl. Com., 358, note.

Upon the special verdict, the court below properly held that the defendant was not guilty.

Affirmed.

Cited: S. v. Yoder, 132 N. C., 1113; *S. v. Holloman,* 139 N. C., 647; *S. v. Long,* 143 N. C., 676.

* Thermus, curator of the Flaminian road. W. C.

(645)

STATE v. ARCHIE McIVER.

(Decided 28 November, 1899.)

Indictment—Murder—Evidence as to Character of Deceased.

1. Evidence of the general character of the deceased as a violent and dangerous man is admissible *where there is evidence tending to show that the killing may have been done from a principle of self-preservation;* and also where the evidence is wholly circumstantial, and the character of the transaction is in doubt. *State v. Turpin*, 77 N. C., 473, 476.
2. The prisoner having given his version of the homicide, which, if believed by the jury, strongly tended to prove self-defense, he was clearly entitled to testify tending to show the violent character of the deceased.

INDICTMENT for the murder of J. T. Howie, tried before *Shaw, J.*, at January Term, 1899, of the Superior Court of MONTGOMERY County. The killing by shooting was admitted. No third person was present. The deceased was seen to enter the house, angry and cursing, where the prisoner was. Immediately two pistol shots were heard, and the deceased was found lying dead, with an axe by his side. The prisoner, who was a workman under the deceased, testified that Howie assaulted him with the axe, and he shot him in self-defense.

Mat Hill, a witness for the State, on cross-examination, was asked by the prisoner's counsel if Mr. Howie was not a man of vicious, bad temper, and violent when he got mad.

The question was, on objection from the State, excluded by the Court, and prisoner excepted.

The prisoner's counsel also asked this witness if Howie did (646) not exhibit this violent and vicious temper towards another of his hands that morning, and beat him unmercifully.

Objection by the State was sustained, and the question excluded by the court. Prisoner excepted.

There was a verdict of guilty of murder in the first degree. Judgment of death, and appeal by the prisoner to the Supreme Court.

Douglass & Simms for appellant.
Attorney-General, for State.

DOUGLAS, J. This is an appeal on conviction for murder in the first degree. Among other exceptions, are those to the exclusion of the following evidence: The prisoner proposed to ask a witness for the

State if the deceased was not a man of vicious temper and violent when he got angry. On objection by the State, the question was excluded. The prisoner also proposed to ask the witness if the deceased did not exhibit this violent and vicious temper towards another of his hands that morning, and beat him unmercifully. This was also excluded. In this we think there was error. The rule, as laid down in *State v. Turpin,* 77 N. C., 473, 476, is as follows: "Evidence of the general character of the deceased as a violent and dangerous man is admissible *where there is evidence tending to show that the killing may have been done from a principle of self-preservation,* and also where the evidence is wholly circumstantial, and the character of the transaction is in doubt." This has been so often cited and approved as to have become a settled rule of evidence. *State v. Byrd,* 121 N. C., 684, and cases cited therein. The facts in the case at bar are very similar to those in Turpin's case, and even stronger, inasmuch as the threats were made directly to the prisoner.

It appears from the evidence that the deceased came to the (647) shanty where the prisoner lived, about 6 o'clock on the morning of the homicide, and ordered the prisoner to leave. The language and manner of the deceased are thus described by Will Hill, a witness for the State: "Heard Mr. Howie (the deceased) cursing Arch (the prisoner) that morning, and all Arch said, was: 'I'm sick.' Mr. Howie cursed him for everything. Arch was in bed. Mr. Howie told him if he did not leave before morning he would land him in hell. Arch did not say he did not want any trouble. Howie did not give Arch time to get his clothes or his breakfast; told him he would kick him into hell if he did not leave." Shortly afterwards the deceased and the prisoner both left the shanty. About half past nine o'clock, the prisoner came back to the shanty, and soon thereafter the deceased rode up in front of the shanty, and, after some altercation with the prisoner, got off his horse and entered the house. In a few minutes he was shot by the prisoner. There was no one else in the house. The prisoner admits the killing with a deadly weapon, but claims that it was done in self-defense. With regard to the killing, the prisoner testified in his own behalf as follows: "I went in the shanty. Cora said, 'yonder comes Mr. Howie.' I said, 'let me get away before he gets here to keep from having a fuss.' I was in the house waiting for Esther to bring my handkerchief. I had my coat on my arm, fixing to leave there. Mr. Howie rode up on his horse in front of the door about forty feet, and said, 'look here, old nigger, I thought you were gone.' I told him I had gone, but had to come back for my coat. He said, 'you damned nigger, think I can't break you away from that shanty.' I did not

reply. He rode his horse up in front of the door, and said, 'get out of here, you damned yellow son-of-a-bitch; I'll blast you down.' He got down off his horse, and grabbed up an axe which was there beside (648) the door, and came into the shanty, and drew back to hit me with the axe, and I reached over on the bed and got the pistol, and shot him, before he could hit me with it. The first time I shot him, he didn't stop; he shook his head and came right on to me, and I shot him again, and the axe dropped on the floor, and he fell forward on the axe, and put his hand back to his hip pocket. I stepped out at the door. He raised up and said, that was all, 'damn you, I'll get you.' I then went on down the road, and met Mat Hill on the bridge." The testimony of the prisoner was competent, and, if believed by the jury, strongly tended to prove self-defense. Under the circumstances, the prisoner was clearly entitled to testimony tending to show the violent character of the deceased. The principle is so fully discussed in the cases of Turpin and Byrd, *supra,* that we need not further discuss it, which we could not do, without useless repetition.

As the excluded evidence was competent, and in the highest degree material, the prisoner is entitled to a new trial. There are also some exceptions to the charge of the Court, which we think tended to the prejudice of the prisoner, but as these objections are not likely to arise upon another trial, we need not discuss them.

New trial.

Cited: S. v. Sumner, 130 N. C., 721.

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(649)

STATE v. JOHN FENDER, CROCKETT CHEEK, AND TROY COLLINS.

(Decided 28 November, 1899.)

Indictment—Trespass—The Code, Sec. 1062.

Offenses in the nature of trespass are against the possession; where the *actual* possession is in the prosecutor, the defendant can not exculpate himself by showing title to the land upon which the fence was situated, and from which it was unlawfully removed by defendant.

INDICTMENT under section 1062 of the Code for unlawfully and willfully pulling down and removing a fence surrounding a pasture, the property of, and in possesion of, one Morgan Edwards, tried before

Allen, J., at Spring Term, 1899, of the Superior Court of ALLEGHANY County.

The case is fully stated in the opinion.

The defendants were convicted, and from the judgment rendered appealed to the Superior Court.

Finley & Greene for appellants.

R. A. Doughton and W. C. Field, with Attorney-General, for the State.

DOUGLAS, J. This is a criminal actioon wherein the defendants were indicted under section 1062 of The Code for unlawfully and willfully pulling down and removing a fence surrounding a pasture, the property of, and in the possession of, one Morgan Edwards.

The evidence showed that there was a dispute between prosecutor and the defendants as to the correct line of two between them, the two lines being about twenty yards apart; that about four days before the alleged offense, the prosecutor enclosed a pasture, commencing on his undisputed land and extending across the line (650) claimed by the defendants on to the land between the disputed line and near the line claimed by the prosecutor; that defendants had done some grubbing on the land between the lines, up to the line claimed by them; that when the defendants, or one of them, found out the pasture fence was being erected by the prosecutor, he saw the prosecutor and complained about it; there was an effort to settle the dispute, and they went to Sparta to examine a certain map for that purpose, but failed to agree, and four days after the enclosure had been built, the defendants went to the place in the night time, and pulled it down; that defendants owned the land on one side of the two disputed lines, and the prosecutor on the other; it was uncultivated, and mostly woodland, except that defendants had done some grubbing on their land which had extended on to the land between the disputed lines, but not at the point where the pasture fence was built. The defendants offered to show title and also surveys and certain partition proceedings tending to show the correct line, which were excluded upon objection.

After stating the contention of the parties, and the evidence and the law as to reasonable doubt, the jury were further instructed that the title was not in question and not affected by this trial; that to constitute the offense charged, there must be a trespass. That if the prosecutor moved the fence to the line claimed by him, and the land he moved it on was in the possession of the defendants, and being used by them for such purposes as it was capable of being used, then it

would not be a trespass for the defendants to pull it down, and if they did so, they would not be guilty unless they allowed the fence to remain long enough for (the prosecutor) to obtain quiet possession of the enclosure, which extended on to the land between the two lines; and if the prosecutor had gotten into quiet possession, and was using it for such purposes as the land was capable of being used, and while
(651) so in possession and using it the defendants pulled it down, they would be guilty.

The jury were further instructed that if the defendants were in possession of the land on which the fence was moved, and within a reasonable time, and before the possession of the prosecutor became quiet and fixed, they pulled down the fence, they would not be guilty; and further, that if the prosecutor claimed one line and defendants another, and the prosecutor moved the fence over the line claimed by the defendants to or near the line claimed by himself, and the defendants knew it, and allowed it to remain until prosecutor completed the work and kept the fence on the disputed land around his pasture as a part of his enclosure long enough to get quiet control of it, and use it for the purposes for which it was capable of being used, and the defendants then pulled it down, deliberately and of purpose, and without regard to whether it was done rightfully or wrongfully, they would be guilty.

Opinion.

We see no error either in the exclusion of testimony or in the charge of the Court. Offenses of this nature are against the possession —and hence it has been repeatedly held, that where the State has shown *actual* possession in the prosecutor, the defendant can not exculpate himself by showing title to the land upon which the fence was situated. *State v. Graham,* 53 N. C., 397; *State v. Hovis,* 76 N. C., 117; *State v. Piper,* 89 N. C., 551; *State v. Marsh,* 91 N. C., 632; *State v. Howell,* 107 N. C., 835, 840. If the defendant has a good title to the land he may assert his right in a civil action.

Of course, if the prosecutor were admittedly a naked trespasser, without any pretense of right, it might be different, but the courts do not encourage the trial of title upon the criminal docket. Still less can it sanction the conduct of a defendant in cutting the
(652) gordian knot of a contested title by a criminal act, which, in its very nature, is calculated to bring on a breach of the peace. But the possession of the prosecutor must be *actual,* and not merely constructive. Nor will actual possession suffice, if it consists in a mere ouster of the defendant, unless coupled with his actual or implied

acquiescence. Such acquiescence, as well as the nature of the possession, are usually mixed questions of law and fact, and were properly left to the jury.

Affirmed.

Cited: S. v. Conder, 126 N. C., 987.

STATE v. W. K. BEACHAM.

(Decided 28 November, 1899.)

Town Ordinance—Municipal Authority.

1. Municipal powers are given by statute, and must be limited to the provisions made by the law-making power, with such restrictions as the State may deem proper to impose.

2. Where by private acts relating to the town of Laurinburg—1889, ch. 220, and 1891, ch. 192—a board of health is instituted in whom is vested the authority to make regulations and ordinances for the preservation of health to be enforced by the town commissioners, the commissioners must enforce those ordinances and are without authority to enact similar ordinances of their own.

PROSECUTION instituted by warrant from the mayor of Laurinburg, against defendant, for violation of town ordinance, in unlawfully keeping a hog inside the corporate limits, tried, on appeal, before *Timberlake, J.,* at September Term, 1899, of RICHMOND Superior Court. The defendant contended that the commissioners were without authority to enact the ordinance; that by the private acts, read (653) in evidence, relating to Laurinburg—Acts 1889, chapter 220, and 1891, chapter 192—a board of health was created with authority to make ordinances relating to the public health; and an ordinance relating to keeping hogs in town, enacted by them, was read in evidence, and the defendant asked his Honor to instruct the jury that the ordinance of the commissioners was void. This his Honor declined to do, but instructed the jury that it was valid.

Verdict of guilty. Judgment. Appeal by defendant.

J. D. Shaw & Son for appellant.
Attorney-General for State.

FAIRCLOTH, C. J. The validity of the following ordinance is the question in this case: "It shall be unlawful for any person to keep hogs in the town of Laurinburg, N. C. Any person violating this ordinance shall be fined $5 for each offense, and each day said ordinance shall be violated shall constitute a separate offense." Ch. 8, sec. 75a. This ordinance was adopted on July 3, 1899, by the board of commissioners of said town. It was shown by the State that the town was incorporated in 1877, with corporate powers, under chapter 111 of Battle's Revisal, now Code, chapter 62. The State claims that the board of commissioners had full authority to adopt the ordinance and to enforce it under section 3802 of The Code, which allows the board to abate nuisances and to legislate for the health of the citizens. It was insisted by the defendant that the ordinance was unreasonable, and should be so declared, by reason of the broad and extended limits of the town and the small population, occupying a small portion of the corporate territory, near the central part thereof.

(654) We find it unnecessary to discuss those questions. There can be no doubt, generally, of the authority of the town, through its agencies, to provide for the health of its citizens, and to regulate and to abate nuisances, and such authority is liberally construed by the courts for the benefit of the citizens. Municipal powers are given by statute, and must be limited to the provisions made by the law-making power, with such restrictions as the State may deem it proper to impose.

The defense is a denial of the authority of the board of commissioners to enact ordinances regulating the means of preserving the health of the town of Laurinburg, because that power is vested in another body.

Private Acts 1889, chapter 220, requires the commissioners to appoint a board of health for the town, and requires the board of health "to prepare rules and regulations to be kept and observed by all citizens of said town," and any person violating the same shall be guilty of a misdemeanor. Private Acts 1891, chapter 192, amends section 7 of said act by providing that, when the regulations of the board of health shall have been duly published, "the same shall become ordinances of said town," and that any person violating the same "shall be punished by fine in such amount as the town commissioners may prescribe," and that all laws in conflict therewith are repealed.

The said board of health was duly appointed and organized, and on the 13th of March, 1893, passed this ordinance: "It shall be unlawful for any person to keep hogs in the town of Laurinburg, within 400 feet of any well or dwelling house, street, place of business, school,

or church," and that any violation thereof shall be fined $5, etc. The defendant was not charged under this ordinance, but under the ordinance, chapter 8, section 75a, *supra*. It will be seen that the authority to make regulations and ordinances for the town is vested in the board of health, and the duty of enforcing the same is im- (655) posed on the board of commissioners. Therefore, the charge of his Honor, that said ordinance, chapter 8, section 75a, was valid, and that if the jury believed the evidence the defendant was guilty, was erroneous. The ordinance was simply void for want of authority in the board of commissioners.

Error.

Cited: Brockenbrough v. Comrs., 134 N. C., 17.

STATE v. C. E. RIDGE.

(Decided 28 November, 1899.)

Indictment—Forgery—Variance—Judge's Charge.

1. Where the indictment charges the forgery of a certain instrument in writing, and the paper introduced in evidence is partly printed and partly in writing, there is no ground for exception on that account. An instrument signed by a party is, in legal parlance, the paper writing of such party.

2. A variance now, since sec. 1183 of The Code, to be fatal, must be substantial and material.

3. As a general rule, an omission to charge upon any point is not error; if fuller instructions are desired they should be asked for in apt time. The presumption is that proper instructions were given.

INDICTMENT for the forgery of a county order on treasurer of Randolph County, tried before *Robinson, J.*, at July Term, 1899, of the Superior Court of RANDOLPH County. The defendant was convicted, and from the judgment rendered appealed to the Supreme Court. The exceptions taken are noted in the opinion.

J. T. Morehead for appellant. (656)
Attorney-General for State.

CLARK, J. This indictment was for forgery. The defendant excepted because the indictment charged the forgery of "a certain instru-

ment in writing" (which is properly set forth), whereas, the paper introduced in evidence was partly printed and partly in writing. To the same objection, in *State v. Jones,* 1 McMullan (S. C.), 236, which was an indictment for forgery, it is well said: "There is unquestionably nothing in this ground. An instrument signed by a party is, in legal parlance, the paper writing of such party. It is his signature to it which gives it that character, and not the body of the instrument. In a declaration on a note of hand it is described as a note in writing, although every word except the signature may be in print. So of a bond partly written and partly printed, it is said to be the 'writing obligatory' of the party executing it."

The forged paper was alleged to be a county order, and that the forgery was with intent to defraud the treasurer of the county of Randolph. The defendant excepted, because the paper introduced in evidence differed from that specifically set forth in the indictment, in that the additional words "Randolph County" were printed in the margin. The omission of those words from the indictment was cured by section 1183 of The Code, and if there is a variance at all, it could not have misled or prejudiced the defendant in any way, and was immaterial variance. The peculiar strictness required at common law in criminal proceedings was due to the severity of the punishment, and the denial to prisoners, in most cases, of the benefit of counsel, and of the right to compel attendance of witnesses for the defense, or to cross-examine the witnesses for the Crown. With the more humane
(657) practice now in force, the cause for the former rigorous technicalities has disappeared. The variance should be substantial and material, now, to be fatal. *Tremble v. State,* 4 Black, 435; *Stevens v. Stebins,* 4 Ill., 25; *Thomas v. State,* 103 Ind., 419, 437; *Regina v. Wilson,* 2 C. and P., 527; *McDowell v. State,* 58 Ark., 242; *State v. Harris,* 106 N. C., at p. 689; *State v. Barnes,* 122 N. C., 1031.

There were prayers for instructions refused, but they raised the same points that were presented by the exceptions to evidence, which have been discussed.

The further exception in the brief, that the judge did not charge as to other matters, is not made in the case on appeal, and the judge is not presumed to have sent up that part of the charge not bearing on the exceptions taken. *Watkins v. R. R.,* 116 N. C., 961. The presumption is that proper instructions were given. *State v. Powell,* 106 N. C., 635; *State v. Brabham,* 108 N. C., 795; *State v. Cox,* 110 N. C., 503. Besides, as a general rule, an omission to charge upon any point is not error. If the party wishes fuller instruction, he should ask for it by

prayers in apt time. See case cited in Clark's Code, sec. 412 (3); *State v. Wolf,* 122 N. C., 1079.

No error.

Cited: S. v. R. R., post, 671.

(658)

STATE v. C. E. RIDGE.

(Decided 28 November, 1899.)

Indictment—False Pretenses—Intent to Defraud.

1. Section 1025 of The Code renders it unnecessary to charge an intent to defraud any particular person; it will be sufficient to prove that the act was done with intent to defraud.

2. Nor is it necessary to allege any ownership of the chattel, money or valuable security obtained by the false pretenses.

3. While surplusage does not vitiate, indictments for false pretense should charge only intent to defraud, omitting the name of the person intended to be defrauded, also the name of the owner of the property obtained by the false pretense.

INDICTMENT for obtaining goods and money by false pretenses from W. D. Stedman & Co., with intent to defraud said W. D. Stedman & Co., tried before *Robinson, J.,* at July Term, 1899, of the Superior Court of RANDOLPH County. The defendant was convicted, and from the judgment rendered appealed to the Supreme Court. The exceptions taken are noted in the opinion.

J. T. Morehead for appellant.
Attorney-General for State.

CLARK, J. The defendant in this case is indicted for obtaining goods by false pretenses. The paper writing is in all respects similar to the one, for the forgery of which, the same defendant was convicted in the preceding case. The exception that the paper is proof was partly in writing and partly printed is disposed of by the opinion in that case, as is the exception as to the additional words "Randolph County," printed on the margin of the paper.

The defendant further excepts in this case that the State was (659) permitted to show that the blank which was filled out was similar to the blanks upon which genuine county orders were filled out. We

see no ground to sustain the exception. The court properly refused the prayer that there was a variance because of the aforesaid words on the margin, or that there was no evidence that the defendant represented the paper as an original order. The words "a true copy" written on county orders do not purport that they are not originals, but that they correspond with the original order entered on the minutes by the county commissioners. They are, in fact, the originals so far as the public are concerned.

The court also properly refused to charge that, if Stedman, of the firm of Stedman & Co., gave the defendant his check in payment of the said alleged forged orders, the defendant is not guilty as charged. This is based upon the ground that the indictment charges an intent to cheat Stedman & Co., whereas the check was that of Stedman alone, but section 1025 of The Code, provides not only that in an indictment for this offense, it shall not be necessary to charge an intent to defraud any particular person, which *per se* would make the charge of an intent to defraud the firm surplusage, and like any other surplusage, not required to be proved, but it is expressly added that "it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act with intene to defraud." *State v. Burke,* 108 N. C., 750.

The statute, Code, section 1025, further provides that it shall not be necessary to allege "any ownership of the chattel, money or valuable security" obtained by the false pretenses, which renders the allegation of ownership thereof in Stedman & Co., surplusage, like the day of the month, and like matters which need not be proved, though charged,

and dispenses with the consideration of the exception that the
(660) ownership of the check obtained was not proved to be in them.

Solicitors, in drawing indictments for false pretense, should properly charge only the intent to defraud, leaving out the name of the person intended to be defrauded, and, likewise, that of the owner of the property obtained by the false pretense, but surplusage does not vitiate.

No error.

Cited: S. v. R. R., post, 671.

STATE v. G. W. CHAFFIN AND S. B. FARROW.

(Decided 29 November, 1899.)

Landlord and Tenant—Case Agreed.

1. Where there is a case agreed on appeal signed by the solicitor and counsel of defendant, the intervention of the trial judge in settling the case is unnecessary.

2. When the case agreed states that there was no evidence of any tenancy existing between the prosecutor and defendant, the appellate court will consider that such was the fact.

INDICTMENT, under landlord and tenant act, The Code, section 1761, for removing an outhouse from the premises during the tenancy.

There was a verdict of guilty, and appeal by defendants.

The case on appeal, signed by the Solicitor and counsel of defendants, is prefixed to the opinion.

Statement of Case on Appeal.

This was a criminal action, tried before *Coble, J.*, and a jury in FORSYTH Superior Court. The defendants were indicted for removing an outhouse, under the Landlord and Tenant Act, Code, from land bought by the prosecutor at commissioners' sale in 189—, (661) when and where the commissioners had excepted the house at the sale, it being the property of G. W. Chaffin. There was no evidence of any tenancy existing between the prosecutor and defendant. The prosecutor testified that defendant asked to rent the land on which the house stood but he refused to rent to defendant; the defendant had leased the land 14 years prior from the owner of the land, with the permission to remove at will of defendant.

The defendant asked his Honor to charge the jury:

1. That there was no evidence of any tenancy.

Refused. Excepted.

2. That if the defendant was a tenant of prosecutor, and having built the house with leave to remove, he had a right to remove it, and would not be guilty under the act.

Refused. Excepted.

His Honor charged the jury that if the jury believed that if Chaffin was a tenant of prosecutor and during the tenancy or after its expiration he unlawfully demolished or destroyed the said building or the codefendant Farrow aided or abetted in so doing then the jury will find them guilty. (Excepted.)

There was a verdict of guilty, motion for a new trial, motion overruled, defendant assigns as errors:

1. His Honor refused to give the charge asked for.

Judge's Charge.

The charge given. The defendants were charged with willfully demolishing a certain outhouse used as a "bar-room" the property of A. E. Holton, while the said defendants were the tenants of said Holton.

If the State has shown beyond a reasonable doubt that the defendants were tenants of said prosecuting witness, Holton, and that during their tenancy or after its expiration they willfully and unlaw-
(662) fully demolished and destroyed a certain outhouse used as a "bar-room" on the land rented by the said defendants from the said Holton, the jury will find defendants guilty.

If the State has proven beyond a reasonable doubt that defendant Chaffin was a tenant of the said prosecuting witness, Holton, that is, the defendant Chaffin had rented from prosecuting witness, Holton, the land or where the house in question stood, and during his tenancy or after its expiration the defendant Chaffin willfully and unlawfully demolished and destroyed a certain outhouse used as a "bar-room" on the land rented by the said Chaffin from the said Holton, and that defendant Farrow was there present and aided and abetted in such willful and unlawful act, then jury will find the defendants guilty.

The defendants contend that they were not tenants of the said Holton. The defendant Farrow contends that he was not, and the defendant Chaffin contends that he was not prosecuting witness, Holton's, tenant. If neither of the defendants had rented the land on which the house in question stood from the said Holton, then the defendants would not be guilty.

The word willful used in a State [statute] creating a criminal offense means something more than the intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority, careless whether he has the right or not in violation of law, and it is this which makes the criminal intent, without which one can not be brought within the meaning of a criminal statute.

The defendant Chaffin contends that he did not pull down the house willfully and unlawfully. He contends that he built the house there, made an agreement with the then owner of the land that he would have the right to remove the house at his pleasure, and that he bona fide believed the house to be his, and pulled it down under
(663) such belief, and he contended that he is not guilty, and defendant

Farrow, also, for the same reasons, contends that he is not guilty. If the defendant did not willfully demolish and pull down the house they would not be guilty.

If the defendant Chaffin bona fide believed that the house was his, and that he had the right to pull it down and remove it, and has shown such facts upon which the defendant Chaffin could reasonably and bona fide believe that he had such right, and pulled the house down under such belief, then the defendant would not be guilty. The jury may find both defendants guilty, or both not guilty, or one guilty and other not guilty, accordingly, as the evidence in the case warrants jury in finding.

The jury will consider all the evidence, and if jury are not beyond a reasonable doubt that the defendant Chaffin was the tenant of prosecuting witness, Holton, that is, that defendant Chaffin had rented the land on which the house in question stood from prosecuting witness, Holton, and that during his term, or after the expiration, willfully and unlawfully demolished and destroyed a certain outhouse used as a "bar-room," and that defendant Farrow was there aiding and abetting in said willful and unlawful act, then jury will find defendants guilty.

The State contends that both defendants are guilty, the State contends that defendant Chaffin was tenant of prosecuting witness, Holton. That defendant went in the night time and pulled the house down, and did it willfully and unlawfully, that defendant Farrow was there present aiding and abetting in the act, and they are both guilty.

If, after considering all the evidence, the jury have any reasonable doubt of the guilt of defendants, jury will acquit defendants.

Bill of Indictment. (664)

STATE OF NORTH CAROLINA, } *Superior Court—*
FORSYTH COUNTY } *November Term, 1897.*

The jurors for the State, upon their oath, present: That George Chaffin and S. B. Farrow, late of the county of Forsyth, on or about the 20th day of July, 1897, being then and there tenants of one A. E. Holton, and in possession of a certain tract of land belonging to, and the property of, the said A. E. Holton, situated in said county, and after expiration of said tenancy, and while they were so in possession as such tenants did unlawfully and willfully demolish, pull down and destroy and injure and damage a certain house situated on said premises, and did remove the same therefrom, against the will of the

said A. E. Holton, to his great damage and injury, contrary to the form and statute, and against the peace and dignity of the State.

MOTT, *Solicitor.*

Service of this cause was made in specified and apt time by defendants' counsel on me, but the papers were lost by me, and by agreement this paper is substituted, and shall form the case on appeal, to be heard at the next term of the Supreme Court.

M. L. MOTT,
Solicitor.
J. S. GROGAN,
Attorney for Defendants.

J. S. Grogan for appellant.
Attorney-General for State.

CLARK, J. The case on appeal was agreed upon by the solicitor and the counsel for the defendant. Such being the case, there is no (665) ground for action by the judge, *State v. Cameron,* 121 N. C., 572, The Code, sec. 1234; nor for a *certiorari* to correct the case by the judge's notes of the evidence on file; nor to permit the judge to correct the case. If, in the interest of justice, this can be allowed in any case (which is possible) it would be an exceptional one, and upon specific allegations which have not been made in the present instance. It was the solicitor himself who assented to the settlement of this case, and not the assistant counsel for the prosecution, which last it was held, in *State v. Cameron, supra,* was not authorized to agree upon the settlement of a case on appeal.

Taking, as we must, therefore, the agreed case upon appeal as a correct statement of what transpired on the trial, it appears that this was an indictment of a tenant for removing an outhouse after the expiration of the tenancy; it is agreed in the case that there was no evidence of tenancy, and that the judge refused so to charge, though requested. There must be a

New trial.

(666)

STATE v. SOUTHERN RAILWAY COMPANY.

(Decided 5 December, 1899.)

Indictment—Undue and Unreasonable Preference—Free Passes—Acts 1891, Ch. 320, Sec. 4—Acts 1899, Ch. 164, Sec. 13—Acts 1899, Ch. 506—Motion to Quash.

1. Where there are two indictments for same offense, they may be treated as in effect two counts in same bill; if either is good, it will support a verdict.

2. The purpose and constitutionality of the statute of 1891, ch. 320, have been carefully considered and adjudged in a similar indictment against this same defendant, 122 N. C., 1052.

3. The statute of 1891, ch. 320, is not repealed by the Acts of 1899, ch. 164 and ch. 506, but was in effect amended, reënacted and continued in force. *Abbott v. Beddingfield*, at this term.

INDICTMENT, in effect, for furnishing T. N. Hallyburton a free pass over defendant's road, heard before *Stephens, J.*, of the Western Criminal District Court, upon a motion to quash, made at Special June Term, 1899, of BURKE County, and allowed by him, and afterwards affirmed on appeal of the Solicitor, by *Bowman, J.*, at Fall Term, 1899, of the Superior Court of BURKE County, from which judgment the solicitor appealed to the Supreme Court.

Mr. Justice CLARK prefixes the following statement of the case to the opinion:

At the Fall Term, 1898, of Burke Superior Court the following indictment was found by the grand jury:

The jurors for the State, upon their oath, present: That the Southern Railway Company, a common carrier, a corporation doing business in said Burke County, late of the County of Burke, on the 1st day of January, A.D. 1897, with force and arms, at and in the county (667) aforesaid, unlawfully and willfully did give undue and unreasonable preference to one T. N. Hallyburton, by giving said T. N. Hallyburton a free pass over the road of the said defendant company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

J. F. SPAINHOUR, *Solicitor.*

By virtue of chapter 371, Laws 1899, all criminal proceedings pending in the Superior Court of Burke were transfered and removed to the Western Criminal District Court, created by that act. At the June

Term, 1899, of said criminal court, the grand jury returned a second bill of indictment into court, as follows:

The jurors for the State, upon their oath, present: That on the 1st day of January, A.D. 1898, the Southern Railway Company was a corporation operating the Western North Carolina Railroad, a line of railway located wholly within the State of North Carolina, from Paint Rock, a point on the boundary line between the States of North Carolina and Tennessee, to Salisbury, in the said State of North Carolina, and doing the business of a common carrier in the said State of North Carolina, subject to the provisions of chapter 320, Public Laws of 1891; and that the said Southern Railway Company required and received of persons traveling over its said line of railway a regular first-class passenger fare of three and one-quarter (3¼) cents per mile for each passenger.

And the jurors aforesaid, on their oath aforesaid, do further present: That the said Southern Railway Company, on the day [and] year aforesaid, at and in the county of Burke and State aforesaid, unlawfully and willfully did collect and receive from one T. N. Hallyburton a less compensation for the transportation of the said T. N.
(668) Hallyburton from the town of Morganton, in said county of Burke, a station on its line of railway, to the town of Salisbury, another station thereon, in said State, than it collected, demanded and received for the transportation of other passengers over its said line of railway from the said town of Morganton to the said town of Salisbury, for a like and contemporaneous service, in the transportation of passengers in its first-class carriages under substantially similar circumstances and conditions.

And the jurors aforesaid, on their oath aforesaid, say that the said Southern Railway Company did then and there, in county and State aforesaid, and in the manner aforesaid, willfully and unlawfully and unjustly discriminate in the collection of passenger fares in favor of the aforesaid T. N. Hallyburton and against other persons to whom like and contemporaneous service was rendered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, on their oath aforesaid, do further present: That on the 1st day of January, in the year of our Lord one thousand eight hundred and ninety-eight, the Southern Railway Company was a corporation operating certain lines of railway in the State of North Carolina as a system of trade, traffic and transportation therein, and in the operation thereof was doing the business of a common carrier in the said State of North Carolina, subject to the provisions of

chapter 320 of the Public Laws of 1891; and that the said Southern Railway Company demanded and received a regular passenger fare of three and one-quarter (3¼) cents per mile for passengers traveling in its first-class carriages over its said lines of railway.

And the jurors aforesaid, on their oath aforesaid, do further (669) present: That the said Southern Railway Company, on the day and year aforesaid, and at and in the county aforesaid, willfully and unlawfully did make and give undue and unreasonable preference and advantage to one T. N. Hallyburton, by then and there carrying the said T. N. Hallyburton as a passenger free of charge over its line of railway lying and situate wholly within the State of North Carolina, and known as the Western North Carolina Railroad, from the town of Morganton, in said county of Burke, to the town of Salisbury, in said State, the said North Carolina Railroad being then and there one of the lines of railway aforesaid operated by the said Southern Railway Company as a part of its system aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

AVERY, *Solicitor.*

Counsel for defendant moved to quash the indictment upon the grounds:

1. That the bill failed to charge specifically that upon the same train upon which the witness for the State was carried there were other passengers who paid fare or passage.

2. On the ground that the act of 1891, chapter 320, under which the presentment was made, was repealed, to take effect on April 4, 1899, and the act creating the Corporation Commission became operative on the 5th of April, 1899, and, therefore, that the defendant could not be convicted on the charge.

The court refused the motion upon the first ground, but allowed it upon the second, and ordered that the indictment be quashed. The solicitor for the State appealed to the Superior Court of Burke County. In that court, the judgment of the criminal court was confirmed. The solicitor for the State excepted and appealed.

Attorney-General and Avery & Avery and Avery & Erwin for (670) *State.*

F. H. Busbee for the defendant.

After stating the case,

CLARK, J. The two indictments are, in law, to be treated, says *State v. Perry,* 122 N. C., at p. 1020, "as in effect two counts in the same bill, *State v. McNeill,* 93 N. C., 552; *State v. Johnson,* 50 N. C., 221; and if either is good, the good count will support a verdict, *State v. Toole,* 106 N. C., 736, and numerous cases there cited"; and of course, if either is good the judgment quashing the bill was error.

The defendant renews in this Court his motion to quash for insufficiency of the indictment, as its refusal was not brought up by the appeal of the State. This he can do. Rule 27 of this Court, 119 N. C., 939. The second count in the bill is so full and explicit as to need no discussion. It is in substance the same as that upon which a conviction for this offense was sustained in *State v. Southern Railway Co.,* 122 N. C., 1052. Though not discussed in the opinion, the same motion was made and argued before us in that case, and the judgment sustaining the conviction necessarily implied that the objection to the validity of the bill was overruled.

The first count alleges that the defendant, a common carrier . . . unlawfully and willfully did give undue and unreasonable preference to one T. N. Hallyburton by giving said T. N. Hallyburton a free pass over the road of the defendant company. This is defective, in that it fails to allege that by virtue of such free pass, said Hallyburton received free transportation, which would be an undue preference, forbidden by the statute, equally, whether it was given upon a free pass from an official, or by a verbal order, or upon a ticket or mileage book not in truth paid for, but donated by the company. It is the (671) fact of discrimination, and not the method by which it is done, which constitutes the offense, though the method of violation may, and doubtless should be, charged in the indictment, to the end that the common carrier may be more fully prepared to meet the charge.

There are discriminations which require more explicit allegation, as for instance, illegal rebates upon freight charges, and the like, *(U. S. v. Hanley,* 71 Fed. Rep., 672), but as the common carrier carries for hire, the allegation that it gave a person named undue preference by transporting him free *ex vi termini* alleges discrimination. There are sections of the act creating this offense, which authorizes common carriers to grant free transportation in specified cases, but not being within this section it is not necessary in the indictment to make the negative averment that Hallyburton did not belong to one of the excepted classes. *State v. Harris,* 119 N. C., 811; *State v. Bynum,* 117 N. C., 749. If he did, it would be matter of defense. *State v. Downs,* 116 N. C., 1067; *State v. George,* 93 N. C., 567.

If the short form set out in the first count had not been defective in the particular indicated, we are inclined to think (though we do not now pass upon it), it would have been sufficient. It would be no benefit to the defendant to require the solicitor to exhaust time and labor in drafting the long and tedious instrument which constitutes the second count, if a shorter allegation can express "the charge against the defendant in a plain, intelligible and explicit manner, which is all the statute exacts. Code, sec. 1183. The General Assembly has authorized the English form of indictment for murder (ch. 58, Laws 1887), which can be sufficiently and fully set out in three lines, *State v. Arnold,* 107 N. C., 861, 863; and all other indictments are greatly simplified, *State v. Ridge,* at this term. Certainly information can be conveyed to a common carrier, employing intelligent serv- (672) ants and attorneys, that it is charged with violating the law against undue preference and discrimination, by carrying a passenger free, without using the above prolix form, covering two and a half printed pages—more than a thousand words.

Counsel argued to us that it must be charged and proved that at the same time and on the same train there were other passengers paying fare. We do not so understand the law (though this, in fact, is explicitly charged in the second count), for as the common carrier carries for hire, it would have been equally a preference and discrimination against the public if this had been a special train carrying a solitary dead-head, or a train composed entirely of that class whirled away, possibly, to some political convention. In fact, either of these cases would be an aggravation of the offense instead of an excuse. As the common carrier is dependent for its profits upon its receipts, the carrying of those free who should pay (not being in the class excepted by law) necessarily adds to the cost of their transportation to the charges exacted of those who pay, and such cost would be increased if the train, on a given occasion, carries all its passengers free, whether it is one man only in solitary and lonely state, or a car or train load, and this would equally violate another purpose of the law, which is to prohibit the many evil results which must be the necessary consequence of *quasi* public corporations having the power to discriminate in their charges.

The subject need not be further treated from this standpoint, as the purpose and constitutionality of the statute have been fully and carefully considered by MONTGOMERY, J., upon a previous indictment against the same defendant, 122 N. C., 1052.

The other point, and the one principally relied on by the defendant is that, the statute under which the indictment was drawn, Laws 1891, ch. 320, sec. 4, is repealed by ch. 506, Laws 1899, (673)

but it was held at this term, in *Abbott v. Beddingfield,* that chapter 164, Laws 1899, creating the Corporation Commission, which was enacted on the same day as chapter 506, in effect reënacted and continued in force chapter 320, Laws 1891. It necessarily follows, therefore, that this indictment has lost none of its vitality by virtue of any act which merely amended and continued in force the statute under which it was drawn.

Nor, indeed, would the condition of the defendant be any better if the Court had adopted the view presented in the dissenting opinion in *Abbott v. Beddingfield.* That went upon the ground (so far as this matter is concerned), that the two acts taken as a whole were not the same. But there was, and can be, no controversy, that section 4, of chapter 320, Laws 1891, under which the defendant is indicted is precisely the same, *in totidem verbis,* with section 13 of chapter 164, Laws 1899, which was enacted on the same day at which the former statute was repealed, and it was held in *State v. Williams,* 117 N. C., 753, as follows: "The reënactment by the Legislature of a law in the terms of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but it is a reaffirmance of the former law, whose provisions are thus continued without any intermission. Bishop Stat. Crimes, sec. 181; *State v. Sutton,* 100 N. C., 474." To same effect, *State v. Gumber,* 37 Wis., 298; Code, sec. 3766. Whatever difference of opinion there may be as to the essential identity of the two acts as a whole, there is none as to the section creating the offense for which the defendant is indicted. The provision that the former act should go out of existence after April 5, and that the new act should take effect after April 6, is not a break in the continuity (674) of the existence of section 4, now section 13, but merely a suspension for one day of its operation. It had no effect upon this section, which was identical in both acts, other than to make April 5 a *dies non,* and the defendant could not have been convicted of this offense if committed on that day. Indeed, the decision of the Court in *Abbott v. Beddingfield* is that this is true of the entire act of 1891, and, as the greater includes the less, it would necessarily embrace the single section of the act for the violation of which the defendant stands indicted.

The judgment quashing the indictment is set aside. This will be certified direct to the Western Criminal Court of Burke County, that it may proceed according to law.

Reversed.

Cited: McNeill v. R. R., 132 N. C., 155; *S. v. Holder,* 133 N. C., 711; *S. v. R. R.,* 145 N. C., 550.

STATE v. ED. WHITE.

(Decided 5 December, 1899.)

Bastardy Proceedings—Insolvent Debtor's Act—Code, Ch. 27.

1. Under the Act of 1879, ch. 92, Code, sec. 31, bastardy is a misdemeanor, and exclusive original jurisdiction is conferred on justices of the peace. *State v. Oswalt*, 118 N. C., 1208.

2. A defendant convicted of bastardy may be discharged from imprisonment by complying with the provisions of the insolvent debtor's act, Code, sec. 2967.

3. *Quære de hoc*—Are the statutes on the subject of bastardy in accord with Art. IV, sec. 27, of the Constitution?

PETITION of defendant, convicted of bastardy, to be allowed to take the benefit of the insolvent debtor's act, made before the committing justice, who disallowed the petition, and heard, on appeal, (675) before *Moore, J.*, at September Term, 1899, of the Superior Court of WAKE County. The defendant had pleaded guilty, in the justice's court, of the misdemeanor of begetting a bastard child on the body of Hattie E. Hunter. "Whereupon, it was adjudged that the defendant pay into court the sum of $40 as an allowance to Hattie E. Hunter, and to cover the costs of this case, to be paid, $5 this 27th day of June, 1899, and beginning Saturday, July 8, 1899, he pay $1 each week until the full sum of $40 shall be paid, and that he pay a fine of one cent. And in default of the payment of any installment of this judgment, as it becomes due and payable, then the whole amount shall be due and payable, and he shall be committed to the house of correction for such time as will cover such balance due, including costs of capias and jail fees, and the cause is held for further action.

Allowance to Hattie E. Hunter	$37.40
J. P. costs—H. H. Hunter	1.30
Constable fee—J. E. Potter	1.30
Fine to use school fund	.01
	$40.01

"This 24th day of July, 1899, the said Ed. White, having failed in the payment of two weekly installments, it is ordered that an instanter capias issue, and on the 24th day of July, 1899, I issued an instanter

capias to J. E. Potter, constable. Capias returned July 25, 1899, and Ed. White, being produced in court, is committed to the house of correction of Wake County, for a term of six months, in accordance with the foregoing judgment.

(676)

Amount due to use Hattie E. Hunter	$33.20
J. P. fees—H. H. Roberts	.90
Officer—J. E. Potter	1.00
Jail—M. W. Page	.90
County allowance to prisoner $6.00 per mo.	$36.00

"And a commitment, accompanied by a copy of the judgment, was transmitted to the sheriff and jailer of Wake County; also, a copy of the same filed with the clerk of the board of county commissioners. And on the 28th day of August, 1899, the said Ed. White, by his attorney, R. N. Simms, Esq., filed with me his petition, under chapter 27 volume 2, of The Code, praying that he be allowed to take the insolvent debtor's oath, and be discharged from his imprisonment. . . . It is considered and adjudged that the prisoner's petition be denied, and Ed. White is remanded to the custody of the superintendent of the House of Correction. This 11th day of September, 1899.

"H. H. ROBERTS, *J. P.*"

From this judgment, denying his petition, the prisoner appealed to the Superior Court.

Upon the hearing of the appeal, his Honor declined to grant the motion to discharge the defendant, and remanded him to the authorities of Wake County to serve out the judgment imposed by the justice of the peace.

Defendant excepted, and appealed to the Supreme Court.

Douglass & Simms, for appellant.
J. C. L. Harris, with the Attorney-General, for the State.

(677) FAIRCLOTH, C. J. The defendant pleaded guilty to the charge of being the father of the bastard child of Hattie E. Hunter. The justice of the peace imposed a small fine, and ordered an allowance of $40, to be paid in weekly installments by defendant. Failing to make said payments, the defendant was committed by the justice, on July 24, 1899, to the house of correction for six months. The

county commissioners allowed defendant compensation at $6 per month. On August 28, 1899, defendant filed a petition to be allowed to take the "insolvent debtor's" oath, and to be discharged from imprisonment, under the provisions of The Code, chapter 27, which was refused by the justice, and on appeal, his Honor refused said petition, and remanded the petitioner to serve out the term of the judgment, and defendant appealed to this Court.

The act of 1870, chapter 92, Code 31, conferred exclusive original jurisdiction on justices of the peace to try all proceedings in cases of bastardy, and in case of conviction or confession, imposed a fine not exceeding ten dollars, on the putative father, and authorized an allowance to the mother, not exceeding fifty dollars.

This Court has frequently held that this statute makes the father of a bastard guilty of a criminal offense, that is, a misdemeanor. *Myers v. Stafford,* 114 N. C., 234; *State v. Oswalt,* 118 N. C., 1208. Can the defendant be discharged from imprisonment by complying with the provision of the insolvent debtor's act? This is the main question presented. Code, 2967, provides that the following persons may be discharged by complying with this chapter: (1) Every putative father of a bastard committed for a failure to give bond, or to pay any sum of money ordered to be paid for its maintenance. (2) Every person committed for the fine and costs of any criminal prosecution. Code, 2968. "Every such person, having remained in prison for twenty days" may apply by petition, etc., and be discharged on taking (678) the oath prescribed in that chapter. The Code, 3448, authorizes the boards of commissioners and mayors to provide for working on the public highways all persons imprisoned for misdemeanors, etc., in their counties.

State v. Giles, 103 N. C., 391, was a case of bastardy. The judgment was a fine, and an allowance for the woman, and costs. The Court held that the requirement to pay the amounts declared was not a punishment for a criminal offense, but the exercise of a power to enforce obedience to the order of the Court, and that the party might be relieved from the imprisonment, under the insolvent laws, as if committed for fine and costs in a criminal prosecution. *State v. Davis,* 82 N. C., 610, was for an affray, and the judgment was a fine and costs, and commitment until payment was made. It was held that the defendant, after remaining in jail 20 days, might be discharged, upon taking the insolvent's oath then required, now in The Code, 2954.

State v. Burton, 113 N. C., 655, was well considered. The defendant was found guilty on a charge of bastardy and committed for nonpayment of fine and allowance for the woman. He was discharged by the

clerk, under the provisions of The Code, 2967, 2972. He was subsequently arrested and committed to the house of correction, by the judge of the Superior Court, for failing to pay said amount under The Code, 38. On appeal, it was held, upon several cited cases, that defendant was properly discharged and that the subsequent sentence of the judge was erroneous.

In *State v. Oswalt*, 118 N. C., 1208, the Court repeated that a bastardy proceeding was a criminal action, and that if defendant was imprisoned thereunder, he, after remaining in jail, or the house of correction, for 20 days, will be discharged on taking the required insolvent's oath. There are other decided cases to the same effect.

(679) We are now asked to overrule these several decisions, and *State v. Nelson,* 119 N. C., 797, is relied on as authority for so doing. On examination, we find that the question now before us, was neither discussed nor decided in that case. This Court feels as ready to correct its own error, when discovered, as that of any other court, and will do so promptly, before the mischief shall become too widespread. We, however, see no reason for overruling the above-named decisions of our predecessors.

The constitutionality of our statutes on the subject of bastardy, under Article IV, section 27, is not presented by the facts in this case, and we will express no opinion on it until it is presented, and it becomes necessary to do so.

This will be certified to the end that the Superior Court proceed according to this opinion.

Reversed.

MONTGOMERY, J., dissenting. He thinks the main facts are identical with those in the case of *State v. Nelson,* 119 N. C., 797, and is quite sure that the question of law is the same in both cases. In Nelson's case the question for decision was stated by the Court to have been, "whether it is competent for the Legislature to authorize a justice of the peace, instead of a county commissioner, to order one convicted of bastardy, and who is unable to pay the fine, costs and allowance, to work upon the public roads, not as a punishment for the offense, nor as an incarceration for a debt contracted by him, but in the enforcement of a duty or obligation he owes to society, to protect the State or the county, one of its governmental subdivisions, against the probable consequences of his own conduct." And in that case the question was decided in the affirmative. The same question is the one for decision in the case before the Court. In Nelson's case the time

(680) for which the defendant was sentenced, in which he was to work

out of the fine, costs and alowance, was fixed by the justice; it was for a definite time; and that is the case here; and that is the distinguishing feature which differentiates *State v. Nelson* and the present case from those cited in the opinion of the Court. In the cases cited by the Court, the term of imprisonment was not for a definite period, but general, in the nature of a commitment for the payment of fine and costs, and it was, on that account, held that the defendant could take the insolvent debtor's oath and be discharged.

The effect of the decision of the Court in this case is, that hereafter those persons, who are convicted of the crime of bastardy and to pay the fine, costs and allowance, can escape all responsibility for their conduct by lying in the county jail for 20 days, and then swearing out under the insolvent debtor's oath.

In view of the decision in this case, it does seem that, if ever legislative aid was needed to protect the Commonwealth from the burdens of unjust taxation, it is necessary on the subject-matter now before the Court. It does seem that society should be protected against that class of criminals who bring into life illegitimate offspring, at least in so far as to compel them, by law, to maintain that offspring with their means first, and in default of that, by compelling them to do work for the public in compensation for its care of their young.

CLARK, J., dissenting. The defendant, on June 27, 1899, pleaded guilty on a charge of bastardy, and upon default in the payment of the fine, costs and giving bond for allowance to the woman, aggregating $40, was sentenced to work on the public roads of the county, as provided by The Code, sections 38 and 3448, for six months, so that the said sum should be worked out at the rate allowed prisoners at work by the county commissioners. On August 28th the de- (681) fendant filed with the justice of the peace his petition to be discharged as an insolvent debtor, under The Code, section 2967, which, after the 20 days notice given, was heard by the justice, and petition denied. On appeal to the Superior Court, the judgment of the justice was affirmed, and an appeal was taken to this Court.

The Code, section 2967, was in the Revised Code of 1854, and was adopted at a time when, if one in jail in default of payment of fine and costs was not provided with some such mode of discharge, he would remain therein indefinitely. But it was felt that some other mode of discharge should be provided, and that it was a serious and unjust charge upon the public, that these prisoners should be discharged without burden to themselves, leaving the public to bear the real punishment by paying the cost of their trial and conviction, and also that it

was bad policy that prisoners sentenced to the county jail for crime should lie therein in idleness, supported at the expense of the taxpayers. The Legislature, therefore, deeming it had power to so legislate, formulated public opinion in an act originally passed in 1866-67, chapter 30, and which, after being several times amended, is now section 3448. This later act must be read in connection with section 2967, and is, in effect, an amendment thereto. It provides that the county commissioners may work on the public roads all persons imprisoned in jail (1) upon conviction of any crime or misdemeanor, *or* (2) for failure to give bond to keep the peace, *or* (3) for failure to pay all the costs or give security therefor, and that the amount realized from working shall be credited on fine and costs, with a proviso that no such prisoner shall be detained longer *than a time fixed by the court* (in the present case, six months), and a further proviso that no prisoner shall (682) be so worked out unless it is *authorized in the judgment of the court.* And the same Legislature which enacted what is now Code, section 3448, above referred to, in pursuance of the same policy of protecting the taxpayers from paying the penalties and costs which criminals were able to, and should, work out themselves, passed chapter 10, Laws 1866-67, which is now The Code, section 38, which provides: "When the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such putative father shall by law be subject to be committed to prison in default of paying the same, it shall be *competent* for the court to sentence such putative father to the house of correction for such time, not exceeding twelve months, as it may deem proper," with a proviso that the putative father may, if he so elect, bind himself out as an apprentice to some one to get the money. This was held constitutional as early as *State v. Palin,* 63 N. C., 471, which held that the obligation to pay the allowance was not a debt within the constitutional provision abolishing imprisonment for debt, and the Court said (SETTLE, J.), "We must not suppose that it was the intention of the framers of our Constitution to break down the safeguards of society by discharging men from the performance of moral and natural duties." This constitutional construction was referred to, and approved as authority by BYNUM, J., in *State v. Wooding,* 71 N. C., 173, and in *State v. Beasley,* 75 N. C., 212; and it has since been often cited as authoritative. The same principle was stated, without citation, in *State v. Wynne,* 116 N. C., 986, and in *State v. Burton,* 113 N. C., 655, to sustain the constitutionality of section 38 of The Code.

Recently, the constitutionality of sections 38 and 3448, i. e., the power of the Legislature to enact them, was before this Court, in *State*

v. Nelson 119 N. C., 797, (September Term, 1896). The con- (683) stitutionality of those sections was upheld, and it was said that already the Court had held in *State v. Yandle,* 119 N. C., 874, and in *Myers v. Stafford,* 114 N. C., 234, that "in order to provide for payment of a judgment for fine and costs pronounced against one convicted of crime, the defendant, as incident to such judgment," could be required to work on the public roads, and adds: "But it is insisted that this is not a judgment for fine and costs alone, but also for an allowance, and that a judgment for the imprisonment of the defendant for twelve months on default of paying the fine, costs and allowance under section 38 of The Code, is in violation of section 27, Article IV of the Constitution, which fixes the limit to the punishment that a justice of the peace may impose. The *question to be decided* therefore is, whether it is competent for the Legislature to authorize a justice of the peace, instead of a county commissioner, to order one convicted of bastardy, and who is unable to pay the fine, costs and allowance, to work upon the public roads, not as a punishment for the offense or as an incarceration for a debt contracted by him, but in the enforcement of a duty or obligation he owes to society to protect the State or the county, one of its governmental subdivisions, against the consequences of his own conduct." After a full discussion, it is said to be "settled that it is competent for the Legislature, in the exercise of its general police power, to protect the public by permitting either county commissioners or justices of the peace to fix such confinement at hard labor as will enable the defendant to pay a fine due to the State, or costs to its officers, or an allowance made to support a child that, without it, might become a charge to the public"—the identical question which is presented in the present case. But it was held that in that case a sentence of twelve months to pay a fine of $50 and costs, was unreasonably long, and while affirming the power to impose the judgment to work on the roads, the case was remanded that the sentence be short- (684) ened to the time appropriate to earn the amount of fine, costs and allowance with, as the opinion says, "some allowance for contingencies, such as loss of time." The working on the public roads is not a punishment for the crime, but to require the defendant to discharge the duty required of him in labor, if he will not or can not discharge it in money. It is to prevent the public being punished by being made to pay for his default.

The judgment imposed on the defendant in this case of working out fine, costs and allowance "not to exceed six months," in default of payment of the same, is in exact accordance with the provisions of the statute which has been the law since 1866-67, decided constitutional

as far back as *State v. Palin, supra,* in 1869, which has been repeatedly cited with approval since, and the whole subject thoroughly discussed, and the constitutionality of the act reaffirmed by a unanimous Court as late as *State v. Nelson, supra,* at September Term, 1896.

The provision in section 2967, which authorized the putative father imprisoned for nonpayment of the maintenance, and those in jail for nonpayment of fine and costs, to be discharged as insolvent debtors must, by all the rules of construction, be read in connection with sections 38 and 3448, so that all three may stand, and when so read, those imprisoned for failing to pay allowance or fine and costs can swear out only when the court has not exercised the authority, given in those statutes of sentencing them for a fixed period which is required to be designated in the judgment, to work on the roads.

The decisions which are cited in opposition to the above will, on careful examination, be found not to conflict with, but to sustain, this view, though, if the head-notes only are read, it might seem other-
(685) wise.

In *State v. Davis,* 82 N. C., 610, the defendant was simply "committed for fine and costs." He was not sentenced to the roads under section 3448, which expressly requires that to be in the judgment, nor to a definite period as required by section 38. He was clearly entitled to be discharged as an insolvent, therefore, under section 2967. The court, however, having declared such insolvent was entitled to his $500 personal property exemption, the next Legislature (Laws 1881, ch. 76) provided the exemption allowed in such cases should be only $50. This latter act was held constitutional in *State v. Williams,* 97 N. C., 414 (since approved in *Fertilizer Co. v. Grubbs,* 114 N. C., 472), in which the Court expressly says the defendant was entitled to be discharged because committed "till fine and costs were paid," with authority to the county commissioners to work him, but that it would have been valid if the judge had in the sentence followed section 3448, and "fixed a time beyond which" he could not be imprisoned—an express recognition of the validity of that section, and that one so sentenced could not swear out as an insolvent. It is said in that and other cases that the mere fact that the county commissioners had setablished a workhouse would not prevent a prisoner swearing out as an insolvent "when the court had not fixed the period of his imprisonment," as required by sections 38 and 3448. Clearly so, for an unlimited imprisonment at work would be as objectionable as unlimited imprisonment in jail.

State v. Williams cites *State v. McNeely,* 92 N. C., 829, as authority, in which the judgment was suspended "on payment of costs," and,

of course, in the absence of the provision "fixing the term of imprisonment" as required under sections 38 and 3448, the defendant came under section 2967, and was properly allowed to swear out. Exactly the same judgment, without fixing the term of imprisonment, as required to come under sections 38 and 3448, was the case of *State* (686) *v. Bryan,* 83 N. C., 611, and *State v. Giles,* 103 N. C., 396, the latter case calling especial attention to the fact that the sentence was not "for the term of 12 months in the house of correction as *might have been done* under section 38 of The Code."

State v. Burton, 113 N. C., 655, was exactly like the above in that the defendant was simply committed to jail for nonpayment of fine, allowance and costs, "no term of imprisonment being fixed," as required by sections 38 and 3448. The defendant, consequently, swore out, as he was entitled to do, as an insolvent debtor, under section 2967, the only mode left him when the judgment *fixed no period* of imprisonment. He was afterwards rearrested, and the judge sentenced him, under the provisions of section 38, and it was held that this could not be done, because he had already been committed and discharged legally as an insolvent. The same judge (AVERY) who wrote the opinion in *State v. Burton,* at the next term, but one in *State v. Parsons,* 115 N. C., at p. 736, cites *State v. Giles,* 103 N. C., 396, and *State v. Burton,* just quoted, as an authority that the court "might have imprisoned the defendant in the county jail for a definite and reasonable time, and under the express authority of section 38 of The Code the defendant might have been sentenced to the workhouse for a term not exceeding one year." The same judge wrote the opinion in *State v. Nelson* and *State v. Yandle,* in 119 N. C., above cited. *State v. Oswalt,* 118 N. C., is exactly like the above, it being expressly said on p. 1216, that, "While the prisoner may be committed to a house of correction or to prison, yet when committed to prison or prayed in custody, *without further action by the Court,*" he can be discharged on taking the insolvent's debtor's oath.

A review of the authorities shows, therefore, no conflict that the defendant sentenced, as in this case, under sec. 38, is validly sentenced, and no case yet has held that he can nullify the sen- (687) tence authorized by that section by swearing out under section 2967. What becomes of the validity of the sentence for six or twelve months *(State v. Ballard,* 122 N. C., 1025), if it can only last for twenty days?

In no case has it yet been held that one imprisoned for a fixed time at hard labor can be discharged from such sentence as an "insolvent debtor." To do so would be a contradiction in terms. All the cases

have held constitutional the acts authorizing confinement at work upon the public roads for a fixed term, stated in the judgment, to pay fine, costs and allowance, because it is "not as a punishment for the offense, nor as an incarceration for a debt contracted by him, but in the enforcement of a duty or obligation to protect" the taxpayers against paying the penalty due to defendant's bad conduct, and which he should pay with his labor, if he can not or will not pay with his purse. *State v. Nelson,* and other cases, *supra.* It is not a punishment, for as he can be discharged upon payment of the sum in default of which he is sentenced to work, his release is at any moment at his command, (*State v. Wynne,* 116 N. C., at p. 986); whereas, if it were a "punishment for crime" no amount of money, nor other act of the defendant, would secure his discharge. Nor is it "imprisonment for debt" within the constitutional provision forbidding such, and this has been long and uniformly held in cases above cited. From a commitment "for nonpayment of fine and costs" one can be discharged as an "insolvent debtor," but a sentence, as authorized by the statute, to work a fixed period to pay fine and costs, is a valid sentence (*State v. Ballard, supra*), from which he can not swear out, for he can not aver his inability to perform the order of the court.

(688) The Legislature is the lawmaking power. Through it, the people, in all self-governing communities, exercise their power to shape their own institutions as they deem best. The power claimed by our courts to set aside legislative acts because the court adjudges them unconstitutional, obtains in this country alone, for it exists not in England and her colonies, or anywhere else, though constitutional government has been maintained by the English-speaking race for centuries, without any supervision of the legislative power by the courts. If such supervisory power by the courts is not itself unconstitutional (as eminent jurists have always contended) it is admittedly *extra-constitutional,* for not a line in any Constitution, State or Federal, confers or intimates the existence of such power in the courts. If unrestricted, it vests all power in the judiciary who, whenever it shall seem good to them, can annul any legislation by the process of simply declaring it unconstitutional. This would reduce the government in its last analysis to a few men—in North Carolina to three men, who constitute a majority of the Supreme Court, and in the Federal Government to the five men who constitute the majority of its Supreme Court. So vast a power, which asserts itself to be above revision or control, is antagonistic to the fundamental principles of our Government, which rests upon the will of the people. The courts themselves have recognized the delicate, not to say dangerous, power

claimed by them, and have in recognition of the necessity of its limitation, time and again, declared the courts could pronounce an act of the law-making power unconstitutional only when it conflicted with some express provision of the Constitution, and was unconstitutional beyond a reasonable doubt. *State v. Moore,* 104 N. C., 714; *Sutton v. Phillips,* 116 N. C., 502.

Here, the sentence is in the express terms of sec. 38, and is valid if that section is constitutional. That section is recognized as valid in *State v. Ballard* (DOUGLAS, J.), 122 N. C., 1025, February Term, 1898, which cites *State v. Nelson, supra,* as authority. The (689) power of the Legislature to pass section 38 had been adjudged in *State v. Palin,* 63 N. C., down to *State v. Nelson,* 119 N. C. The statute has been acted on and in force for thirty-three years. Can it now be said that beyond a doubt the act is unconstitutional, and that this Court and its predecessors have been in error? If so, what length of time, what number of adjudications will put any statute beyond liability to be set aside whenever the majority of the Supreme Court shall so will to declare?

Recently, the majority of this Court have adhered to the decision in *Hoke v. Henderson,* though that decision is in conflict with judicial authority in all other jurisdictions. But *Hoke v. Henderson* was in derogation of the right of legislation. It had held an act of the Legislature unconstitutional. To overrule it would not have infringed upon the principle than an act of the Legislature should not be held unconstitutional unless it is so beyond a reasonable doubt. But here we have an act which was passed by the Legislature to voice a public demand that evil-doers work out their costs and fines and charges (if the judge shall so order) which act is presumably constitutional, and that presumption is supported by the adjudications of the Court for more than thirty years. To now declare it unconstitutional directly, or in effect, is to violate the canon that no law, passed by the General Assembly, shall be deemed unconstitutional, unless it is so beyond reasonable doubt.

Cited: Abbott v. Beddinfield, ante, 284.

Overruled by S. v. Liles, 134 N. C., 735.

(690)

STATE v. TOLIVER HAWKINS.

(Decided 12 December, 1899.)

Indictment—Forcible Trespass.

1. To constitute a forcible trespass, there must be an entering or remaining on the premises of another, who is present and forbidding, with demonstration of force, tending to a breach of the peace, and calculated to intimidate or put in fear.

2. The indictment must charge the offense to have been committed not only with force and arms, but with strong hand.

INDICTMENT for forcible trespass, tried before *Coble, J.*, at Spring Term, 1899, of CLEVELAND Superior Court.

Upon the evidence the jury found the defendant guilty, and judgment was rendered against him, from which he appealed to the Supreme Court.

The evidence is stated in the opinion.

E. Y. Webb for appellant.
Alexander Stronach, with the Attorney-General, for the State.

FURCHES, J. This is an indictment for forcible trespass, and the evidence of the State is that the defendant went to the house of the prosecutrix, and that the prosecutrix was alone, except her three-year-old child. The defendant went in the house and sat down by the fire and asked the prosecutrix where her husband was. She told him her husband was not at home, but had gone to the field. The defendant was drinking, and said to her, she looked "damn sweet, and he would like to kiss her," and started towards her, and she ran out of the house. But she soon returned and told the defendant to leave, and he left.

But he cursed, and told her not to tell her husband what he had
(691) said; that it would cause her husband to come upon him; that he had as good a pistol as ever fired, and he would kill him. That he had no weapon; that she did not object to his coming in the house, and that he went out when she told him to do so.

The defendant asked the court to charge the jury, that upon all the evidence in the case, in favor of the State, the defendant was not guilty. This prayer was refused, and in this there was error. To constitute the criminal offense of forcible trespass upon the premises of another, there must be an entry or a detention—a holding—after

being forbidden to do so. To constitute this offense, it must be charged to have been committed *manu forti*. An indictment for this offense that charges it to have been committed with force and arms is defective, unless it charges it to have been committed with strong hand. This shows that there must be more than words or acts that would tend to a breach of the peace. If this were not so, every street quarrel or bar-room row would be a forcible trespass.

It is held in *State v. Ray*, 32 N. C., 39, that, to constitute this offense, "there must be demonstration of force, as with weapons or a multitude of people so as to involve a breach of the peace, or directly tend to it, and be calculated to intimidate, or put in fear." This definition has been adopted by some of the best text writers on criminal law as a correct definition, and is often quoted in our Reports. It will be seen that in no view of the evidence in this case, does it come up to this definition of forcible trespass. But the gravamen of this indictment is the entering of the house of the prosecutrix and saying and doing what the State said the defendant did. This must be so, for it will not be contended that if the defendant had said what he did to the prosecutrix on the public streets or public highway, it would have constituted a forcible trespass. And to make it a forci- (692) ble trespass on account of going into the house of the prosecutrix, there must have been an entry after being forbidden, or there must have been a holding of possession—at least a remaining in possession, after being forbidden to do so. But in this case there was neither. The prosecutrix testified that she did not forbid the defendant's coming in, and that he went out when she told him to go. The defendant acted badly, and we think was guilty of an assault, for which he seems to have been tried and convicted and fined $2.50.

We do not know what considerations influenced the justices who tried this case. But, as the case appears to us, it looks like such a fine as this for such conduct as the defendant was guilty of, on an indictment for an assault, was a mock of justice. While we think the defendant was guilty of an assault, we do not think he was guilty of a forcible trespass.

Error. New trial.

STATE v. WILLIAM GRIFFIN, THOMAS GRIFFIN.

(Decided 12 December, 1899.)

Indictment—Affray.

1. When the affray charged is the fighting of two or more persons in a public place, the indictment, in effect, charges several assaults and batteries, and one bill is used to avoid several trial for same offense.

2. The public place need not be specified, and need not be proved.

3. As an indictment for an affray charges mutual assaults, one may be convicted and the other acquitted. The same law is equally applicable to both offenses.

INDICTMENT for an affray, tried before *Coble, J.*, at January Term, 1899, of UNION Superior Court. The defendants were indicted (693) for committing an affray with D. E. Sherrin in a public place, and were convicted, sentenced, and appealed. Their grounds of exception are stated in the opinion.

Armfield & Williams for appellants.
Brown Shepherd, with Attorney-General, for the State.

CLARK, J. The indictment is lost, but an agreement is sent up in the record, that it was in the usual form for an "affray."

Four defendants were on trial. The evidence was that the melee occurred in the road, but it was not stated whether or not it was a public road. The defendants asked the court to charge the jury that they must acquit the defendants unless they were satisfied beyond a reasonable doubt that the fighting was in a public place, and excepted to the refusal so to charge. An affray may be committed by "going armed with unusual and dangerous weapons, to the terror of the people." *State v. Huntley,* 25 N. C., 418. But when the affray charged is the fighting of two or more persons on a public highway or street, or simply in a public place, the indictment is in effect merely for the several assaults and batteries, one bill being used simply to avoid several trials for the same offense. This is recognized in *State v. Baker,* 83 N. C., 649, in which it is said the public place need not be specified, and, of course, therefore, it need not be proved. In the same case it is said that, on an indictment for an affray, one may be convicted, and the other acquitted, for the indictment being for mutual assaults the defendant is "convicted of the offense with which he is legally charged"

—citing *State v. Brown,* 82 N. C., 585, which holds that an indictment on a conviction for an affray may be legally described as for an assault and battery, citing *State v. Allen,* 11 N. C., 356, and (694) *State v. Wilson,* 61 N. C., 237.

This disposes also of the exception that the Court charged the law as to mutual assaults and batteries, without charging the specific law as to affrays. This was for the very sufficient reason that when the affray is charged to have been by fighting of two or more, there is no distinction between the law of affray, and that of assault and battery, by which it is committed. *State v. Perry,* 50 N. C., 9.

The other prayer for instruction was given in substance, and need not be considered.

Affirmed.

STATE v. E. W. GATEWOOD.

(Decided 12 December, 1899.)

Criminal Action—Appeal.

Appeals in *forma pauperis* in criminal actions, are regulated by The Code, secs. 1235 and 1236; they can be allowed only during term, and by the judge.

APPEAL, *in forma pauperis,* from UNION County, by a defendant in a criminal action. There was a conviction, and judgment.

The defendant attempted to appeal. Appeal dismissed for reasons stated in the opinion.

Armfield & Williams for appellant.
Adams & Jerome, with the Attorney-General, for the State.

CLARK, J. Appeals *in forma pauperis* in criminal actions are (695) regulated by The Code, sections 1235 and 1236. They can be allowed only during term of court, and by the judge; otherwise, the appeal "is a nullity." *State v. Dixon,* 71 N. C., 204; *State v. Gaylord,* 85 N. C., 551. Neither the State nor the prosecutor can waive the requirements upon which leave to appeal *in forma pauperis* can be made. *State v. Moore,* 93 N. C., 500. "It is not a matter of discretion with the Court, but it is the right of the State to have an appeal dismissed when there is a failure to comply" with the requirements of the law. *State v. Duncan,* 107 N. C., 818; *State v. Payne,* 93 N. C., 13.

Appeals *in forma pauperis* were not originally allowed in civil causes, under The Code of Civil Procedure, at all (*Mitchell v. Sloan*, 69 N. C., 10), but were first provided for by ch. 60, Laws of 1873-74, (Clark's Code, sec. 553), under which they could only be allowed, as in criminal cases, by the judge, and during the term (*Stell v. Barham*, 85 N. C., 88), but, by an amendment, ch. 161, Laws 1889, in civil causes appeals *in forma pauperis* can be allowed by the judge, either at term or on affidavit filed within five days after court, or the clerk may pass upon and allow such applications during term, or within ten days after its expiration.

But no amendment has been made in sections 1235 and 1236 in regard to pauper appeals in criminal causes which are still allowable only at term time, and by the judge. Indeed, chapter 192, Laws 1887, expressly requires the order to stay execution pending appeal to be made by the judge.

The motion to dismiss must be allowed. *State v. Harris*, 114 N. C., 830.

Appeal dismissed.

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(696)

STATE v. WILLIAM TRUESDALE.

(Decided 12 December, 1899.)

Indictment, Murder—Degree—Verdict—Record Proper—Statement of Case on Appeal—Discrepancy.

1. The court must judicially know from the *record proper*, and not from the *statement* of the case on appeal, what offense the prisoner was convicted of.

2. Where there is a discrepancy between the two, the record proper governs.

3. Under the Act of 1893, ch. 85, distinguishing murder into two degrees, the jury, on conviction, must determine in their verdict whether the crime is murder in the *first* or *second degree*, and the record must show that they have so done, in order that there may be a proper judgment. *State v. Lucas*, 124 N. C., 827.

4. Where the transcript of the record says the verdict was, that the prisoner "was guilty of the felony and murder in manner and form as charged in the bill of indictment," and the statement of the case on appeal says, "a verdict of guilty of murder in the first degree was rendered by the jury," a new trial will be awarded.

INDICTMENT for murder, tried before *Battle, J.*, at September Term, 1899, of the Criminal Court of MECKLENBURG County.

The prisoner was indicted for the murder of Janie Brown, and according to the transcript of the record proper, he was found guilty of the felony and murder in manner and form as charged in the bill of indictment; but the verdict did not indicate the degree of murder, whether first, or second. Sentence of death was passed upon the prisoner, who appealed to the Superior Court of Mecklenburg County. His Honor, *McNeill, J.*, upon a revision of the case, determined there was no error, and affirmed the judgment. The prisoner ap- (697) pealed to the Supreme Court.

The statement of the case on appeal says: A verdict of guilty of murder in the first degree was rendered by the jury, and the sentence of death pronounced by his Honor upon the defendant.

The question as to the discrepancy between the verdict, as recorded, and as stated in the case on appeal, arises in the case.

Chase Brenizer for appellant.
Shepherd & Busbee, with the Attorney-General, for the State.

FURCHES, J. This is an indictment for murder, tried in the Criminal Court of Mecklenburg County, in which the jury returned the following verdict: "The jury say for their verdict upon oath that the said Will Truesdale is guilty of the felony and murder in manner and form as charged in the bill of indictment." Upon this verdict the prisoner was sentenced to be hanged; from which judgment he appealed to the Superior Court of said county. The judge of the Superior Court affirmed the judgment of the criminal court and the prisoner appealed to this Court.

There does not appear to have been an exception taken during the whole trial. But the prisoner asked for the following instructions:

"1. From the testimony in the case the jury can not convict the prisoner of murder in the first degree.

"2. At most, the jury can only convict of murder in the second degree.

"3. There is no evidence of deliberation or premeditation in this case."

The court refused to give either of these instructions, and the (698) prisoner excepted. The refusal of the court to give these prayers was made the basis of the argument before us.

It was contended in this argument that there was not sufficient evidence of deliberation and premeditation to authorize the court to

submit the issue of murder in the first degree to the jury, and *Wittkowsky v. Wasson,* 71 N. C., 451; *Spruill v. Ins. Co.,* 120 N. C., 141; *State v. Gregg,* 122 N. C., 1032; *State v. Rhyne,* 124 N. C., 347; *State v. Norwood,* 115 N. C., 789; *State v. McCormac,* 116 N. C., 1033, and *State v. Thomas,* 118 N. C., 1118, were cited to sustain this contention, but, in our opinion, none of these cases sustain it.

Without quoting the evidence in this case, it discloses these facts—that the deceased was pregnant at the time of her death; that on the day before she was killed, she had the prisoner arrested upon a charge of bastardy as being the father of the child; that at the trial of the bastardy case, the prisoner and the deceased came to terms of compromise, when the prisoner agreed to pay her $10 in cash, and to procure a place for her to stay, in Charlotte; that on the evening after the trial, the prisoner and the deceased went to the house of Emma Leopold (a colored woman), where the prisoner procured lodgings for the deceased for the night; that he left this place about dark, telling the deceased that he would return and bring her supper; that he returned about 9 o'clock, and asked the deceased to take a walk with him; the deceased said that she had not had any supper, when the prisoner remarked that he would get her supper up street; that she was a stranger there, and he wanted to show her the town; that they left together, and this was the last time she was seen alive, so far as the evidence discloses; that on the next day she was found some three-fourths of a mile from the house of Emma Leopard, in the woods, dead; that from
(699) a severe wound on the left side of the head, crushing the skull, she died; that from this and from other wounds and from signs of a scuffle, it was apparent that she had been murdered. This wound on the head (the doctor testified) had evidently been made by some heavy substance, with square corners; that it rained hard that night, and the prisoner returned and went to the house of Rosa Marks (another colored woman) in Charlotte, about 11 o'clock that night, in a wet condition, where he stayed until morning; that he was asked by several parties where the deceased (Janie Brown) was, to which he made different and contradictory statements. To some of the parties he said that she was afraid to stay in Charlotte, and had gone to Asheville. To others, he said he had sent her to Asheville; and, to others, he said that a big black man had taken her from him; he said he knew the man, but refused to tell who he was, as he did not wish to get him into trouble. When arrested the next day, the prisoner was found to be in possession of a pocketbook which Janie had that night when she left Emma's house with the prisoner; containing at that time $4 in

silver, but empty when found in the prisoner's possession. The prisoner made other contradictory statements about the matter. There were splotches on his shirt that resembled blood, and which the doctor thought was blood, though they had been washed, and he would not give a positive opinion as to whether they were blood or not.

Without stating more, we are of the opinion that this evidence was sufficient to carry the case to the jury, and they have said that the prisoner was the murderer. This being so, and there being no exception to the evidence or charge of the Court, it must be held that the prisoner is the murderer. And taking it as a fact found that the prisoner killed the deceased, it seems to us, that there is an abundance of evidence going to show that he did it with premeditation. If he did the killing, it must have been the tragic ending of a murderous conception of the prisoner's mind, entered upon at least (700) from the time they left the house of Emma Leopard.

Probably *Thomas's case* and *Rhyne's case, supra,* are as favorable to the prisoner's contention as any others, and they seemed to be very much relied on in the argument here, by Mr. Brenizer. But, to our minds, they afford no support to his contention. Take *Rhyne's case:* That occurred in the presence of eye-witnesses, who testified to the facts. From this testimony it appeared that there was no quarrel or trouble between Rhyne and the deceased, until the deceased committed an assault on Rhyne, by putting his hand on his shoulder and telling him to come around to the light; and at that moment the fatal stroke was made. To our minds the two cases do not stand in the line of comparison, and that Rhyne's case fails to support the prisoner's contention that there was no evidence of "deliberation and premeditation."

We would affirm the judgment of the court below, but for the verdict of the jury, which is, as stated above, in these words: "The jury say for their verdict, upon oath, that the said Will Truesdale is guilty of the felony and murder in manner and form as charged in the bill of indictment." In this there is error, for which we are bound to arrest the judgment. This we do with reluctance, as the case on appeal states that the prisoner was convicted of murder in the first degree; and we only do so after requiring another certificate of the record below, thinking that it might be that the clerk, in making up the transcript on appeal, had inadvertently committed an error in this respect. But the new certificate shows that he has not, as it is the same as the first.

Where there is a discrepancy between the case on appeal and the transcript of record proper, the statements in the transcript of the record proper must be taken to be correct, and the Court must

(701) be governed by that. *State v. Keeter,* 80 N. C., 472; *Adrian v. Shaw,* 84 N. C., 832; *Farmer v. Williams,* 75 N. C., 401; *McCanless v. Flinchum,* 95 N. C., 358; *State v. Carleton,* 107 N. C., 756. And the Court must judicially know from the record, and not from the statement of the case on appeal, what offense the prisoner was convicted of. *State v. Johnson,* 73 N. C., 70; *State v. Wise,* 66 N. C., 120; *State v. Lawrence,* 81 N. C., 522.

These cases were before the act of 1893, chapter 85, dividing murder into two degrees (first and second), making the punishment on conviction of murder in the first degree death, and in the second degree, a penitentiary offense.

At first, we were disposed to hold that, under *State v. Lawrence, supra,* the verdict was sufficient to authorize a sentence under the second section of the act of 1893—murder in the second degree. But, upon a further investigation of the matter, we are satisfied this can not be done. The third section of the act provides that, "Nothing in this act shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine *in their verdict* whether the crime is murder in the *first or second degree.*" And in *State v. Lucas,* 124 N. C., 827, the jury, when asked by the clerk if they had agreed, responded "guilty of murder." The court asked whether they found the prisoner guilty of murder in the 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. This was objected to by the prisoner, and formed one of his exceptions on the hearing upon appeal, and the action of the court below was approved by this Court.

Under the terms of the statute, and the authorities cited, there must be a new trial, *State v. Whitaker,* 89 N. C., 472, though not (702) especially excepted to. *Carter v. Rountree,* 109 N. C., 29; *Thornton v. Brady,* 100 N. C., 38. This will be certified to the Superior Court of Mecklenburg County, that it may there be certified to the criminal court of that county, for a new trial in that court.

New trial.

Cited: S. v. Jefferson, post, 718; *Justice v. Gallert,* 131 N. C., 394.

STATE v. LEE BARTON.

(Decided 19 December, 1899.)

Embezzlement—The Code, Sec. 1014.

To constitute embezzlement under the statute, the party charged must be an officer, clerk, employee or servant of the prosecutor, and not merely a contractor. (2) The property alleged to have been embezzled must be the property of the prosecutor.

INDICTMENT for embezzlement, tried at Fall Term, 1899, of MACON Superior Court, before *Coble, J.* There was a verdict of guilty, and the defendant appealed from the judgment pronounced.

J. F. Ray for appellant.
Attorney-General for the State.

FURCHES, J. The evidence was, that the defendant made a contract with the prosecuting witness, John Shope, by which the defendant was to make locust pins out of timber on the prosecutor's land; that defendant was to get them out, to have them hauled, and to pay the prosecutor one-half of the net profits; that the defendant, under this contract, got out the pins, hired them hauled, sold them for (703) six or eight dollars, and never paid the prosecutor anything.

Among other things, the court was asked to instruct the jury that, upon this evidence, if believed, the defendant was not guilty. This instruction was refused, and in this there is error.

The statute (Code, sec. 1014) provides that, "If any officer, clerk, employee or servant of any corporation, person or copartnership shall embezzle or fraudulently convert to his own use, or shall take, make way with, or secrete, with intent to embezzle or fraudulently convert to his own use, any money, goods, or other chattels . . . belonging to any other person or corporation, which shall have come into his possession or under his care, shall be guilty of felony, and punished as in cases of larceny."

The defendant was not an officer, clerk, employee or servant of the prosecutor; nor were the locust *pins,* which he manufactured out of timber belonging to the prosecutor, the property of the prosecutor. Under the contract, as testified to by the prosecutor, they belonged to the defendant. The contract was, in effect and in law, a purchase by the defendant of the timber of the prosecutor, out of which to make the

pins, and for which (as the prosecutor says) the defendant was to *pay him* one-half of the net proceeds. This was a valid sale for a valid consideration. The only thing that was not fixed and certain was the amount the prosecutor was to get for his timber; and that, according to the terms of the contract—the sale of the timber—depended upon the price for which the defendant should be able to sell the pins. It was the same, in effect, as if the defendant had agreed to pay the prosecutor $4 for the timber when he sold the pins, but did not do so.

Therefore, as the defendant was not the "agent, clerk, employee (704) or servant" of the prosecutor, and as the defendant did not have "in his possession or under his care any property" (the pins) belonging to the prosecutor, he could not be convicted of embezzlement.

The prayer of the defendant should have been given.

New trial.

Cited: S. v. Keith, 126 N. C., 1116.

STATE v. GUS BROWN.

(Decided 22 December, 1899.)

Indictment—Carrying Concealed Deadly Weapon About the Person—Guilty Intent.

1. The guilty intent is the intent to carry the weapon concealed, and not the intent to use it; if carried openly, the defendant would not be guilty, under the statute, Code, sec. 1005.
2. The question is as to the *manner* of carrying, whether concealed or not, and it might be shown, in defense, that there was no intent to conceal it.
3. To rebut the statutory presumption arising from the concealment, the absence of intent to conceal must be affirmatively found. Walser's Digest, 72.

INDICTMENT for carrying concealed about the person a pistol, tried before *Robinson, J.,* at November Term, 1899, of IREDELL Superior Court. The jury rendered a special verdict, and upon the finding of facts, his Honor held the defendant was not guilty, and discharged him. The solicitor excepted and appealed to Supreme Court.

The special verdict appears in the opinion.

Attorney-General for the State.

No counsel contra.

CLARK, J. The defendant is indicted under The Code, section (705) 1005, which makes it a misdemeanor "if any one, except when on his own premises, shall carry concealed about his person any deadly weapon"—reciting the kinds of weapons, and excepting certain classes of persons, and making the possession about the person presumption of concealment. The special verdict finds that "the defendant had in his hip pocket *concealed* a pistol, off his own premises." This comes within the letter and meaning of the statute. The special verdict further finds that the defendant was "carrying the pistol for the purpose of delivery to a party to whom he had sold it; that it accidentally dropped from his pocket, while engaged in catching a chicken loose upon the streets."

In *State v. Dixon,* 114 N. C., 850, it is said: "In trials for this offense it must be borne in mind that the guilty intent is the intent to carry the weapon concealed, and does not depend upon the intent to use it. The object of this statute is not to forbid the carrying of a deadly weapon for use, but to prevent the opportunity and temptation to use it arising from concealment. If the weapon is carried for lawful use, or even for unlawful use, the defendant would not be guilty under this section, if the weapon is carried openly, since this statute applies not to the act of carrying the weapon or the purpose in carrying it, but to the manner of carrying it." This case reviewed previous authorities, and has itself been cited and followed in *State v. Pigford,* 117 N. C., 748; *State v. Reams,* 121 N. C., 556.

In this last case, FAIRCLOTH, C. J., says: "The offense of carrying a concealed weapon about one's person and off his own premises consists in the guilty intent to carry it concealed, and not in the intent to use it, and the possession of the deadly weapon raises the presumption of guilt, which presumption may be rebutted by the defendant." Here, the special verdict finds that the deadly weapon was, in (706) fact, carried concealed, and the jury do not find that there was no intent to "carry it concealed"—which is what the statute forbids. The jury find that the purpose of carrying it was for delivery to another, but, as the above decisions hold, the *purpose* of carrying it is not to the point. The question is, as to the *manner* of carrying, whether it was concealed or not, and it might be shown in defense that there was no intent to conceal it, which the jury might find when the deadly weapon is conveyed simply as merchandise. But the absence of intent to conceal must be affirmatively found to rebut the presumption arising from the concealment, and the jury not having found that, notwithstanding the concealment, there was no intent to conceal, judgment upon the special verdict should have been entered against the defendant.

The authorities upon this subject are conveniently grouped in Walser's Digest, 72; 5 Am. and Eng. Enc., 734 (2 edition).

Reversed.

Cited: S. v. Hamby, 126 N. C., 1067; *S. v. Boone,* 132 N. C., 1110; *S. v. Simmons,* 143 N. C., 616, 617.

(707)

STATE v. LAURA BOST.

(Decided 22 December, 1899.)

Assault—Right to Chastise—Loco Parentis—Practice on Appeals—Criminal Courts—Superior Courts.

1. A person standing in *loco parentis* has the right to chastise the child, provided it is done with moderation, and for correction.

2. Where there is a conflict of evidence as to the relations existing between the parties, it is not error to leave it to the jury to find whether they were such as authorized the defendant to chastise the child.

3. On appeal from the criminal court to the Superior Court, the trial is not *de novo*, but only upon exceptions as to law. *State v. Hinson,* 123 N. C., 755.

4. In the Act 1899, ch. 471, creating the Eastern District criminal court, the right of appeal is given to the State, or the prisoner to the Supreme Court, from the ruling of the Superior Court, reversing or modifying the decision of the criminal court. Apparently through inadvertence, the right of appeal to the State is omitted in the Western District criminal court.

5. When the State appeals from a ruling of the Superior Court reversing a decision of the criminal court, the prisoner, if he has other exceptions upon which he relies, in addition to the one decided in his favor, should have those exceptions also passed on, so that, if ruled against him, he may also appeal to the Supreme Court—this as a matter of safety and precaution, to entitle him to have those exceptions passed on by the appellate court.

6. There is no reason why both State and prisoner may not append their exceptions with notice of appeal and bond of defendant, and both appeals come up in one transcript.

INDICTMENT for assault with deadly weapon, tried before *Battle, J.,* at April Term, 1899, of the Eastern District Criminal Court of MECKLENBURG County.

The defendant was indicted for beating and abusing Janie (708) Kendrick, a child ten years old. The defense was, that the child lived with the prisoner, who stood *in loco parentis* to her, and that prisoner chastised her for misconduct. The evidence was somewhat conflicting as to the relation in which the parties stood towards each other, and his Honor submitted that question to the jury. Defendant excepted. The defendant was convicted and judgment of imprisonment rendered, from which she appealed to Superior Court. The appeal came on to be heard before *Coble, J.,* at Superior Court of MECKLENBURG County, 29th April, 1899, who sustained the exception of defendant to the ruling of his Honor, *Battle, J.,* and granted a new trial. The exception was to the effect, that upon the evidence adduced, his Honor himself should have decided whteher defendant had a right to chastise the child, and not submit it as a question for the jury. There were other exceptions taken by the prisoner, which were not passed on by the Superior Court.

The State appealed from the ruling granting a new trial.

The evidence is collated in the opinion, and the practice to be observed in appeals in criminal cases is indicated.

Brown Shepherd, for the Attorney-General, for the State.
Clarkson & Duls for the defendant.

CLARK, J. The defendant, convicted in the Eastern District Criminal Court, for an assault upon and brutal treatment of a ten-year-old girl, appealed to the Superior Court of Mecklenburg County, assigning three errors in the charge, and that the judgment of imprisonment for 12 months in the county jail was erroneous. In the Superior Court, the first assignment of error was overruled, the second was sustained, and a new trial ordered, and as to the other two excep- (709) tions, they were probably abandoned, as no ruling is set out. If made, it must have been favorable to the State, as it is not excepted to. The defendant must have been content and willing to rest her case upon the exception held against the State, as she does not appeal.

The exception that was sustained was that the judge of the trial court charged the jury that it was a question of fact for them to say whether, under all the evidence, the defendant stood *in loco parentis,* or in the place of a parent to the girl. There was evidence tending to show that she did, but on the other hand, it was in evidence that the girl's mother was living, and resided only one and a half miles off, and though the girl had lived the last two years with the defendant,

and most of the time before that she had taken care of the girl, but the people around gave her clothing, that what she got to eat the defendant gave her, but it was not much. The relations of the girl to the defendant were not so definite that the judge erred in leaving it to the jury to find whether they were such as authorized the defendant to chastise the girl as her mother would be so authorized. Besides, if there had been error in this regard, it would have been harmless error, for the mother herself would have had no authority to visit such barbarity upon the child. There was error in the Superior Court sending the case back for a new trial on that ground.

This casts upon the Court the duty of determining the practice to be followed when an appeal is taken to this Court from the rulings of the Superior Court, upon an appeal to that court from the criminal court.

In *State v. Hinson,* 123 N. C., 755, it is held that on an appeal from the criminal court to the Superior Court the trial is not *de novo,* but only upon exceptions as to law. Code, sec. 809.

(710) In *State v. Davidson,* 124 N. C., 839, it is said: "As the appeal to the Superior Court (from the criminal court), and its decision thereon, are purely upon questions of law (*State 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 so provide in The Code, section 1237." this inadventure is cured in the act creating the Eastern District Criminal Court, Laws 1899, chapter 471, section 5, whereof provides that appeals shall lie from said court to the Superior Court only on matters of law or legal inference, and the statement of the case on appeal shall be made up in the same manner as appeals from the Superior Court to the Supreme Court, and section 6 provides that when such appeal is taken on any question of law or legal inference, and the judge of the Superior Court "shall reverse or modify the decision of the criminal court from which the cause was appealed, the State or the prisoner shall be entitled and allowed to appeal directly to the Supreme Court from the decision of any such judge as aforesaid." If the defendant had wished us to review the rulings of the judge adverse to her, she should have brought up her appeal. We can not review in this appeal any ruling of the judge not excepted to.

As to the other two exceptions raised by the defendant's exceptions on the appeal to the Superior Court, we must assume that the defendant abandoned them, or at least was satisfied with the judge's action or non-action, for she did not ask the judge to rule thereon. Having failed to do so, when requested, or to rule favorably to her, the

defendant should have appealed. These appeals from the Superior Court to this Court being upon rulings of the judge of the Superior Court upon "matters of law or legal inference," his rulings can only be reviewed by exceptions made by "the party aggrieved," and when no ruling is set out, the judge is presumed to have adopted (711) the rulings of the judge of the court below him, as is the case with the rulings of the judge upon the judgment of the clerk or report of a referee. It would be an anomaly to require either the defendant or the State, when appealing to this Court from an adverse ruling of the judge of the Superior Court, to bring up for review the rulings made in favor of the appellant. *Montana v. Warren,* 137 U. S., 348.

In this case, we have, however, examined the other exceptions which were not expressly passed upon by the judge of the Superior Court (so far as the record shows) and find no error in the criminal court in regard thereto that the judge of the Superior Court should have sustained them. As the original transcript of the case on appeal from the criminal court to the judge comes up to this Court with merely the addition of the rulings of the judge, the exceptions of the appellant, notice of appeal, and the appeal bond (or leave to appeal without bond), there is no reason why both parties may not append their exceptions with the notice of appeal, and the appeal bond of the defendant, and both appeals come up on the one transcript. This rule is otherwise on appeals from trials in the Superior Court (*Jones v. Hoggard,* 107 N. C., 349; *Perry v. Adams,* 96 N. C., 347), because the matters occurring on the trial, excepted to by one appellant, are different from the matters excepted to by the other, though the "record proper" is the same in both appeals.

The judgment of the Superior Court is

Reversed.

DOUGLAS, J., dissents.

Cited: S. v. Mallett, post, 724; *Mott v. Comrs.,* 126 N. C., 882.

(712)

STATE v. JOHN J. JEFFERSON.

(Decided 22 December, 1899.)

Indictment, Murder—Evidence—Dying Declarations—Degrees of Murder, Act of 1893, Ch. 85.

1. Evidence of dying declarations of the deceased is restricted by the law to the act of killing, and those facts and circumstances directly attending the act, and forming a part of the *res gestæ*. *State v. Shelton*, 47 N. C., 360.

2. When it was too dark for the deceased to have recognized the prisoner as the person who shot him from a clump of bushes, a mere opinion of the deceased, founded on what had occurred between him and the prisoner that morning, that the prisoner was the man who fired the fatal shot, is not admissible as a dying declaration. *State v. Williams*, 67 N. C., 12.

3. Where the indictment is in the usual form embracing the different degrees of murder, the jury in their verdict shall determine whether the crime is murder in the first or second degree. Act of 1893, ch. 85, sec. 3.

INDICTMENT for the murder of Calvin Barnes, tried before *Battle, J.*, at October Term, 1899, of the Eastern District Criminal Court of WILSON County.

The indictment was in the usual form, embracing both degrees of murder. The prisoner was found guilty of the felony and murder whereof he stands indicted, in manner and form as charged in the bill of indictment. The verdict not specifying the degree of murder.

Upon the trial, James D. Barnes, son of the deceased, witness for the State, was allowed to testify as to declarations made by the deceased the night he died. The prisoner objected to the evidence, but it was admitted as the dying declaration of deceased—the court finding the facts to be that deceased was in view of death, and believed he could not live.

(713) James D. Barnes testified: "I am son of deceased. He came home at 7:20 p. m. Ned Branch was with him; he and I took him from the buggy and carried him to back porch. I asked father if he was shot much? He answered, 'I am shot through the breast, and can not live.' We put him on the back porch; then took cot and all in bedroom, and I went after Dr. Herring. He came, and father said: 'Ned, the ball is right here' (pointing to his breast). Dr. Herring got

ball out, and after he cut it out, he sent for me, and told me to have John Jefferson arrested; that they had words about tobacco hands and corn, and he had gone off about noon after hands and hadn't come back after sunset, when he left. When he got half way down Hominy Hill, somebody shot him; he looked back and saw a man running out of a clump of bushes at hog pen, but could not recognize him; too dark to recognize him. This was 8:30 or 9 p. m. He died 2:29 a. m., same night. Then warrant was issued."

Defendant excepted.

There was a verdict of guilty. Judgment of death, from which the defendant appealed to the Superior Court of Wilson County.

The appeal came on to be heard before *Hoke, J.*, at November Term, 1899, of the Superior Court of said county, and his Honor sustained the exception of the defendant, and adjudged that there be a new trial had, for this cause, before another jury.

The solicitor for the State excepts, and takes an appeal to the Supreme Court. Notice waived.

Attorney-General for the State.
John E. Woodard for the prisoner.

MONTGOMERY, J. The prisoner was convicted of murder at the October Term, 1899, of the Eastern District Criminal Court, held for the county of Wilson, and sentence of death was passed (714) upon him. The prisoner appealed.

At the November Term of Wilson Superior Court the appeal was heard, and his Honor, Judge Hoke presiding, held that there was error in the trial in the criminal court in admitting certain portions of the evidence offered as the "dying declarations" of the deceased, and the prisoner was given a new trial. The solicitor for the State excepted, and appealed to this Court.

Calvin Barnes was shot and mortally wounded on the public highway near his home in Wilson County, about 7 o'clock on the evening of the 29th of August, 1899. His murderer was in ambush. The prisoner was tried for this crime, and convicted and sentenced as above set forth. On the trial in the criminal court, James D. Barnes was introduced to prove the dying declarations of his deceased father. No exception was made by the prisoner's counsel to the ruling of his Honor that the dying declarations of the deceased should be admitted, but the prisoner did except to the matters and things which the witness was allowed to testify to, because, as he alleged, those matters and things were not dying declarations of the deceased; that the matters testified to

by the witness were not only hearsay evidence, but were also merely opinions of the deceased as to the identity of the prisoner with the person who shot him. The testimony of the witness in reference to the dying declarations, was as follows: "He (Dr. Herring) got the ball out, and after he got it out, he (the deceased) sent for me, and told me to have John Jefferson arrested; that they had had words about tobacco hands and corn, and he had gone off about noon after hands, and had not come back after sunset when he left. When he got half way down Hominy Hill, somebody shot him; he looked back and saw a man running out of a clump of bushes at a hog-pen, but
(715) could not recognize him—too dark to recognize him." We think that the ruling of Judge Hoke that there was error in the admission of that testimony as a dying declaration of the deceased, and that the prisoner was entitled to a new trial on that account, was correct.

At most, the evidence was but the *opinion* of the deceased that the prisoner shot him, that opinion being founded on what had occurred between the deceased and the prisoner during the morning of the day on which he was mortally wounded, for the deceased did not see the person who shot him, because of the darkness of the hour. The opinion of the deceased as to the identity of the person who shot him with the prisoner, was not the direct result of observation through his senses or any of them. It was an opinion formed through the process of reasoning, based upon antecedent transactions, and the conduct of the prisoner during the morning of the day on which the deceased was shot. Such evidence was not admissible as dying declarations. *State v. Williams,* 67 N. C., 12.

Again, dying declarations must be confined to the facts connected with the act of the killing, facts attending the act and forming a part of the *res gestae. State v. Shelton,* 47 N. C., 360.

The general rule is, that testimony, before it is received in evidence, shall be on the oath of the witness, and subject to the right of cross-examination. The nearness and certainty of death are just as strong an incentive to the telling of the truth as the solemnity of an oath, but you can not subject the deceased and what he said as a dying declaration to the test of cross-examination. The exception to the general rule of evidence therefore, in regard to dying declarations, rests upon the grounds of public policy and the necessity of the thing. And as the exception can only be sustained on the grounds above mentioned,
(716) such evidence is restricted by the law to the act of killing and those facts and circumstances directly attending the act and forming a part of the *res gestae.* All of this is clearly decided in *State v. Shelton,* 47 N. C., 360. In that case, Chief Justice PEARSON, delivering

the opinion, said: "If it (the exception to the general rule of evidence in respect to dying declarations) can be extended to a separate and distinct act occurring half an hour before, it will extend to any act done the day before, or a week, month or year. As soon as the limit fixed by absolute necessity is passed, the principle upon which the exception is based being exceeded, there is no longer any limit whatever, and dying declarations become admissible, not merely to prove the act of killing, but to make any homicide murder by proof of some old grudge. That the exception is restricted in the manner above stated is clear from the reason of the thing, and is settled by authority." We have examined the decided cases in our Reports upon this question, and we find not a single one in conflict with the law laid down in *State v. Shelton, supra.* And it is a matter of some surprise to us that evidence so clearly incompetent as that which we have recited, should have been offered in the case by the prosecuting officer, and that it should have been received by the court as competent.

It is true that there was a great deal of proof—competent proof—offered and received by the court, which tended to show that the prisoner fired the shot which killed the deceased. The jury would have been warranted in convicting the prisoner under that evidence, but we do not know that they would have done so. A good deal of it consisted of confessions made by the prisoner, and that class of evidence is usually regarded as not the strongest.

But it is evident that the purpose of the prosecuting officer was to give the State the benefit of the *opinion* of the deceased that the prisoner fired the gun. That he succeeded in doing, through (717) the evidence which was excepted to; and that was exactly what he was not allowed to do by the law and the decisions of this Court. *State v. Williams, supra.*

Upon reading the record in this case, it is probable that the prisoner's life was in danger at the hands of some lawless persons at and about the time of the homicide. Such a spirit is greatly to be deprecated and deplored, but sitting as we are as a court of last resort, in whose hands are confided all the legal rights of the people of the State, we can not, if it should be expected of us by any class of our citizenship, allow the life of any one to be taken under the form of law upon evidence, in part, wholly incompetent, and of such serious nature as was the evidence excepted to in this case by the prisoner on the trial.

But, besides what we have said, the prisoner would have been granted a new trial for another cause. The indictment in the criminal court was in the usual form for murder. The verdict of the jury was that the prisoner, John J. Jefferson, "is guilty of the felony and murder whereof

he stands indicted in manner and form as charged in the bill of indictment." Under chapter 85, of the Laws of 1893, in which the crime of murder is divided into two degrees, section 3 reads as follows: "Nothing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried *shall determine in their verdict whether the crime is murder in the first or second degree.*" In this case, as we have seen, the verdict of the jury was a general one without a response as to which grade of murder the prisoner was guilty. The verdict was that the prisoner was guilty of murder as charged in the bill of indictment, and the bill of indictment was one in form covering murder
(718) in either degree. At this term of the Court, in the case of *State v. Truesdale*, it was held that such a verdict on such a bill of indictment could not be sustained, and a new trial was ordered.

New trial.

STATE v. JOHN P. MALLETT AND C. B. MEHEGAN.

(Decided 22 December, 1899.)

Indictment, Conspiracy—Appeal by State—Evidence—Supplemental Proceedings—Statute of Limitations—Misdemeanor—Felony—Books and Entries of Defendants—Eastern and Western District Criminal Courts.

1. The Act of 1899, ch. 471, sec. 6, provides for appeals by the State in cases going from the Eastern District criminal courts to the Superior Court; and it is no objection to the validity of the act that the same provision is omitted, by inadvertence in regard to appeals going from the Western District criminal courts to the Superior Court.

2. The same Act of 1899, sec. 23, transferred to the new Eastern District criminal court all causes pending in the First Criminal Circuit Court.

3. Facts developed on the examination of defendants in supplementary proceedings are, by The Code, secs. 488 (5), forbidden to be used in evidence against them in any criminal proceeding or prosecution. Where the trial judge in the criminal court carefully excluded from the jury all evidence of the examination of the defendants in supplemental proceedings and all evidence derived therefrom, and only admitted evidence derived from proceedings before referees, before and after the supplemental proceedings, although of a similar character as that contained therein, there is no violation of the rights of the defendants under the statute.

4. The statute of limitations has no application to the offense charged. The Code, sec. 1097, having given the courts power to punish it with imprisonment in the penitentionary, the Act of 1891, ch. 205, makes it a felony.

5. As a rule of practice and prudence, when a defendant is convicted in the criminal court, and upon appeal to the Superior Court is awarded a new trial on some of the alleged erroneous rulings, he should ask for a decision upon all his points taken of record, so that, should the State appeal from the judgment granting a new trial, he may appeal also, from any adverse decision, to the Supreme Court. As, however, the system of appeals from the criminal courts is new, and not generally understood, the points taken of record but not passed on by the judge of the Superior Court are, in this case considered on the reargument asked for.

(1) The sheriff having seized by attachment the ledger and counter-book of the defendants, there was no error in using defendants' own entries therein, on the trial.

(2) At the time of the commission of the alleged offense, the statute allowed no appeal to the State from the ruling of the Superior Court judge. The statute of 1899, ch. 471, ratified March 6, 1899, allowed such appeal to the State, and the appeal in this case was taken July 7, 1899. The State had a right to regulate appeals in its own courts.

(3) No such right of appeal is allowed the State in the Western District Criminal Courts. The omission does not injuriously affect the defendants.

(4) This exception relates to the objection in regard to the examination of defendants in supplementary proceedings; and was sustained by the judge of the Superior Court, and has already been considered in the opinion filed.

INDICTMENT against the defendants, John P. Mallett and C. B. (719) Mehegan, also H. T. Latham (not on trial), for conspiracy to cheat and defraud their creditors, Julian M. Baker and Ida M. Adams, administrators, found in the Circuit Criminal Court of EDGECOMBE County, at November Term, 1897, and tried before *Sutton, J.*, at September Special Term, 1898.

The defendants were convicted, and from the judgment ren- (720) dered appealed to the Superior Court, upon exceptions taken and noted during the trial.

The appeal came on to be heard by *Hoke, J.*, at June Term, 1899, of the Superior Court of EDGECOMBE County, who rendered the following judgment:

This cause coming on to be heard before *Hoke,* Judge Superior Court, holding said term, on appeal from a verdict and judgment had against them in criminal court of said county, the court is of opinion that there

was substantial error committed on trial of cause against defendants therein, for that, among other reasons, the facts developed on examination (of) defendants in proceedings supplemental to execution were, over their objections, used to effect their conviction. Both directly in evidence has Dr. Baker and Mr. Henry Gilliam, and indirectly by placing before this jury the evidence of these defendants, brought out by cross-examination before S. S. Nash, referee, in which examination defendants were asked concerning some matters developed in said supplementary proceedings. It is true the case on appeal states that the judge held, and so declared, that statements made by defendants in said supplementary proceedings were not competent evidence against defendants on this trial, but it is perfectly patent on inspection of the evidence set out, that the facts brought out on examination of defendants in said supplementary proceedings were necessarily used to develop their evidence before Nash, referee, and both in this way and in other particulars directly was this examination in supplemental proceedings used to effect their conviction, contrary to statute.

The court is also of opinion that judge erred in not leaving to jury question whether the facts constituting crime charged were discovered within two years before action brought, this being a misde-
(721) meanor and barred unless accruing or facts discovered within said two years.

It is therefore adjudged that defendants are entitled to a new trial, and it is ordered that this opinion and judgment be certified to criminal court to next term, that new trial may be had pursuant to this judgment.

The State excepts, and takes an appeal. Notice waived.

W. A. HOKE,
Judge Presiding.

There were other exceptions, in the case on appeal to the Superior Court by the defendants, which were not passed on by Judge Hoke, but which are noted in the opinion.

Attorney-General, Jacob Battle and Gilliam & Gilliam for the State.
G. M. T. Fountain for defendants.

CLARK, J. This is an indictment for "conspiracy to cheat and defraud," and an appeal therein to this Court by the State from a judgment of the Superior Court, overruling the judgment of the Circuit Criminal Court, held in Edgecombe County. In *State v. Davidson,* 124 N. C., 839, it was pointed out that an appeal should lie in such

cases at the instance of the State, and attention was called to the inadvertence of the Legislature (which alone has the power to prescribe the instances in which the State may appeal) in not amending sec. 1237, so as to embrace appeals by the State in cases going to the Superior Court from the Western Criminal Circuit. This inadvertence did not occur in the act (Laws 1899, ch. 471) creating the Eastern District Court, section 6 whereof expressly provides for such appeals. Section 23 of said act transferred to the new Eastern District Criminal Court all causes pending in the First Criminal Circuit Court.

The judgment of the Superior Court overruled the criminal (722) court on two grounds: First. Because facts developed on the examination of the defendants in supplementary proceedings were used to affect their conviction, contrary to the provisions of The Code, sections 488 (5), which provides that the answers of a defendant in supplementary proceedings "shall not be used as evidence against him in any criminal proceeding or prosecution." Second. That the judge of the circuit court, having held that this offense was a misdemeanor, which by section 1177 of The Code was barred only by the lapse of two years from its discovery, erred in not submitting to the jury the question whether the facts constituting the crime were discovered within two years before action begun.

As to the first point, a careful inspection of the record and case on appeal, sent up from the criminal court to the Superior Court, shows that the judge of the criminal court in fact carefully excluded from the jury all evidence of the examination of the defendants in supplementary proceeding, and "all testimony based on information received from the examination of the defendants in such proceedings, and only allowed such as was had by the witness before the institution of the supplementary proceedings," and the same care to exclude such testimony was shown by him throughout the trial. There were proceedings, subsequent to the supplementary proceedings, and entirely independent of them, and for a different purpose, before S. S. Nash, referee, and T. H. Battle, referee, at which the defendants offered themselves as voluntary witnesses, and at which it is possible and probable they may have made statements similar to those they had made before the clerk in supplementary proceedings, but such statements were not privileged, and were competent to be given in evidence against them (*State v. Hawkins,* 115 N. C., 712), and indeed, the defendants did not ex- (723) cept as to them.

As to the second point: The judge of the criminal court rested his ruling upon the ground that the offense, though a misdemeanor, was one committed by deceit, and as the evidence was uncontradicted that

the discovery thereof was within two years before the beginning of the prosecution, the offense was not barred. In that view of the case, although the evidence was uncontradicted, the matter, in a criminal action, should have been left to the jury (*State v. Riley,* 113 N. C., 648), with an instruction that, if the jury believed the uncontradicted evidence that the offense had been discovered within two years before prosecution begun, the statute of limitation was not a bar. His Honor, however, correctly held as a matter of law that the prosecution was not barred by the lapse of time, and his having given a wrong reason therefor will not vitiate the ruling.

Up to the act of 1891, chapter 205, in this State, we followed the somewhat arbitrary common-law rule as to what crimes were felonies, and what were misdemeanors, and under that conspiracy, and even such grave crimes as perjury and forgery, were misdemeanors. By the Act of 1891, North Carolina adopted the rule, now almost universally prevalent, by which the nature of the punishment determines the classification of offenses, those which may be punished capitally or by imprisonment in the penitentiary are felonies (as to which there is no statute of limitations), and all others are misdemeanors, as to which prosecutions in this State are barred by two years.

The Code, section 1097, provided that misdemeanors created by statute, where no specific punishment was prescribed, should be punished as at common law; and further enacted that as to misdemeanors that were infamous, or done in secrecy and malice, or with deceit
(724) and intent to defraud, the offender might be punished by imprisonment in the county jail or penitentiary. This, by virtue of the subsequent act of 1891, chapter 206, made the classes of misdemeanors thus subjected to punishment in the penitentiary, felonies. The offense charged here, and of which the defendants have been convicted, was one done "with deceit and intent to defraud." It is the very essence and substance of it. The Code, section 1097, having given the courts power to punish it with imprisonment in the penitentiary, the act of 1891 aforesaid, makes it a felony, and the statute of limitations is not a bar. The indictment properly charges the offense to have been committed "feloniously." *State v. Purdie,* 67 N. C., 25; *State v. Bunting,* 119 N. C., 1200.

The judgment of the Superior Court must be reversed, and, as nothing further remains to be done in that court, this judgment will be certified by it to the Eastern District Criminal Court in Edgecombe County, that the sentence imposed by that court may be carried into execution.

Reversed.

CLARK, J. After the above opinion of the Court had been filed, but before it had been certified down, the defendants filed a petition for reargument, assigning the following grounds: First. Because there were other exceptions raised by the defendants on their appeal from the criminal court to the Superior Court which the judge of the latter court did not pass upon. The defendants should have requested the judge to pass upon those exceptions, and if he had failed to do so, or held adversely to the defendants, they should have appealed. *State v. Bost,* at this term. In fact, those exceptions are trivial, and the judge passed upon all that merited his attention, but as the practice in this class of appeals was possibly not understood, we will consider (725) now the only exception which the petition to reargue insists the judge of the Superior Court should have passed upon and held in favor of the defendants, i. e., that the sheriff by attachment, having seized the ledger and counter-book of the defendants, they were put in evidence against them. There certainly was no error in using the defendant's own entries against them. The shoes of a party charged with crime can be taken and fitted to tracks as evidence, and in one case, when a party charged with crime, was made to put his foot into the tracks, the fact that it fitted was held competent. *State v. Graham,* 74 N. C., 646. Nor has it ever been suspected that, if upon a search warrant, stolen goods are found in possession of the prisoner, that fact can not be used against him. Here, the books came legally into possession of another, and the telltale entries were competent against the parties making them in the course of their business.

2. The next exception in the petition is, that at the time of the commission of the offense the statute allowed no appeal to the State from the ruling of the Superior Court judge. But the defendants had no "vested rights" in the remedies and methods of procedure in trials for crime.

They can not be said to have committed this crime, relying upon the fact that there was no appeal given the State in such cases. If they had considered that matter they must have known that the State had as much power to amend section 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the State from these intermediate courts. At any rate, their complaint is of errors in the trial court, and when they appealed to the Superior Court they did so by virtue of an act which provided that the rulings of that court upon their case could be reviewed at the instance of the State in a still higher court. The appeal was certified up to the Superior Court, April 1, 1899, and on July 7, 1899, the appeal was taken to this Court. The statue (726)

regulating appeals from the Eastern District Criminal Court, chapter 471 Laws 1899, was ratified March 6, 1899.

3. The petition further urges that it is a discrimination because the act creating the Western District Criminal Court fails to give the State the right of appeal. We do not see how such omission injures the defendants. The State has control of its own legislation as to the cases in which it will permit appeals in its own behalf in its courts. *Hurtado v. California,* 110 U. S.

4. Lastly, the petition urges that the judge of the criminal court refused a request to find the facts upon a preliminary plea in bar because not made till after three counsel had spoken on the merits. That simply raises the question discussed in the previous opinion as to the allegation that evidence of testimony taken in the supplementary proceedings was used against the defendants. The judge, on this plea, held, that it had not been, and all through the trial, at every turn, rejected all evidence of what transpired in the supplementary proceedings. The former, or quashed indictment, was only introduced in reply to the plea that the present indictment was barred by the statute of limitations.

The former opinion of the court is affirmed, and this will be certified to the Superior Court of Edgecombe County.

Motion denied.

DOUGLAS, J., dissenting. The late hour at which I have received the opinion of the Court on the petition for reargument, and the difficulty of examining two hundred and eighty-two pages of unprinted record, make it impossible for me to do justice to the case in any opinion (727) that I may write; but I am so firmly satisfied that these defendants have not had a fair trial in the criminal court that I must, at least, enter my earnest dissent.

This case was appealed by the defendants to the Superior Court, where they were granted a new trial by Judge Hoke, in the following judgment: "This cause coming on to be heard, on appeal of defendants from a verdict and judgment had against them in the criminal court of said county, the court is of opinion that there was substantial error committed on the trial of the cause against the defendants therein, for that, *among other reasons,* the facts developed on examination of the defendants in proceedings supplemental to execution were, over their objections, used to effect their conviction, both directly in evidence has Dr. Baker and Mr. Henry Gilliam, and indirectly by placing before this jury the evidence of these defendants, brought out on cross-examination before S. S. Nash, referee, in which examination the defendants were asked concerning the same matters developed in said supplementary proceedings. It is true the case on appeal state that the judge held,

and so declared, that statements made by the defendants in said supplementary proceedings were not competent evidence against the defendants on this trial, but it is *perfectly* patent on inspection of the evidence set out that the facts brought out on examination of the defendants in said supplemental proceedings were necessarily used to develop their evidence before Nash, referee, and both in this and in the other particulars directly, was this examination in supplemental proceedings used to effect their conviction contrary to the statute," etc.

The fact that was "perfectly patent" to the able and learned judge who granted the new trial, is equally so to me. I can notice only a few of the errors appearing in the record. It appears that the prosecuting witness, Baker, and his attorney, were present at the examination of the defendants under supplementary proceedings, (728) and conducted the examination, went before the grand jury as witnesses, on the bill of indictment, and were witnesses on the trial. Baker, on cross-examination, was asked the question: "Did you carry with you before the grand jury, when you testified there in this bill of indictment, the evidence taken in the supplementary proceedings?" This question was clearly competent and material as impeaching evidence, and yet it was excluded on objection by the State. In this I think there was substantial error. Again, the prosecutor, Baker, while testifying as a witness, was permitted to introduce what he said was the day-book and ledger of the defendants, to explain the character of the books, to read from them, and to comment on them. Can this be permitted, especially when the witness testified that his first knowledge of the book was received at the supplementary proceedings examination before the clerk? I think this is error. Again, the first bill of indictment, that had been quashed, was introduced in evidence by the State on the general issue, over the objection of the defendants. In this I think there was error. Again, the defendants offered four witnesses to show what was testified to before the grand jury. This was clearly competent and material as tending to show the animus of the witness. I think it should have been admitted under the authority of *State v. Broughton,* 29 N. C., 96, a very instructive opinion by Chief Justice RUFFIN. Again, the State was permitted to introduce the register of a hotel at Kelford to show that H. T. Latham had registered his name as H. T. Thomas. Latham was not on trial, and yet this register was introduced as substantive evidence against the defendants, who had no connection with it whatsoever, on the ground that "there were *prima facie* grounds for believing in the existence of the conspiracy." I do not clearly understand what that means, but can we say that under a general (729) plea of not guilty evidence is admissible upon the sole ground that there are *prima facie* grounds for believing the defendants to be guilty?

If it does not mean this, what does it mean? The conspiracy was the sole offense charged, and can that be *assumed as proved* before verdict? Again, upon the motion to quash, or the plea in abatement, or even upon the trial, why could not the defendants introduce members of the grand jury to show what the witnesses Baker and Gilliam had testified before them? *State v. Broughton, supra.*

Other errors appear to exist, but I have no time for elaboration. That a new trial should be granted as a matter of justice, is clear to me. I do not see why this Court can not pass upon all the exceptions appearing in the record before us. It is practically the record of the criminal court, with the addition of the judgment of the Superior Court, and the exceptions of the State. Every exception of the defendants is before us as fully as before the judge of the Superior Court, and in the same exact words. I do not see the necessity for the adoption of an arbitrary rule that only complicates the system of appeals, adds to the labor and cost of both appellants and appellees, and may, in some cases, as in the present, work a substantial injustice. What good can it accomplish to counter-balance these evils? The Legislature originally provided for appeals directly to this Court, which would have avoided the difficulties now before us; but we held that provision unconstitutional in *Rhyne v. Lipscombe,* 122 N. C., 650. I think that we should now, as far as we have the power, simplify appeals so as to bring all causes to a final determination with as little cost, trouble and delay as is consistent with the proper administration of justice.

Cited: Gold Brick case, 129 N. C., 662; *S. v. Lytle,* 138 N. C., 745.

Affirmed on Writ of Error: Mallett v. State, 181 U. S., 589; 128 N. C., 619, 622.

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(730)

STATE v. CORNELIUS SHINES.

(Decided 23 December, 1899.)

Indictment—Stable and Barn Burning—Circumstantial Evidence.

1. Where the circumstantial evidence connecting the prisoner with the crime composes a chain, each circumstance depends upon the truth of the preceding one, and the chain is no stronger than the weakest link.

2. Ordinarily, the circumstances accumulate, each by itself being of no great force, but, becoming united, they may acquire great strength, like strands when twisted into a cable.

3. While the trial judge submits the evidence to the jury, he does so subject to his power to set aside the verdict against the prisoner, if, in his opinion, not sufficiently supported by the evidence.

INDICTMENT against the prisoner for setting fire to the barn and stable of Dr. R. J. Williams, tried before *Timberlake, J.*, at March Term, 1899, of PENDER Superior Court. The evidence was circumstantial, and at its close, the prisoner requested the court to charge the jury that there were not sufficient facts for them to convict. His Honor declined so to charge, and prisoner excepted. There was a verdict of guilty. Motion for new trial, upon the ground that the evidence was insufficient to justify a verdict of guilty. Motion refused. Defendant excepted. Judgment of imprisonment in the State Prison at hard labor for the term of ten years. Appeal by defendant to Supreme Court.

A compendium of the evidence is contained in the opinion.

L. V. Grady and H. L. Stevens for appellant.
Attorney-General for the State.

CLARK, J. The prisoner was convicted of setting fire to a (731) barn and stables. The only exception is to the refusal of a prayer that there was no evidence to justify submitting the case to the jury. It was in evidence that at daylight next morning, after the burning, tracks were found around the barn and stables and leading off in the direction of the prisoner's house, which, when followed up, came into the road about fifty yards from and opposite his house; that going on to the prisoner's house, his shoes, which were a new pair, were taken and were found to exactly fit the aforesaid tracks around the barn and stable; also that a short time prior thereto the prisoner had had two difficulties with the owner of the barn and stables, about different matters, and became very angry; that he said to one witness shortly before the fire that he was "mad with Dr. Williams (the owner of the barn and stables), and that he would burn his tail," and he also said he "would go down to Dr. Williams' and do him up." Other witnesses testified to the same or similar threats shortly before the fire; also, other witnesses testified to seeing the prisoner's shoes tried in the tracks around the barn and stables, and that they fitted. The prisoner, on cross-examination, said he saw the light of the fire at Dr. Williams' that night, but did not go out of his house, nor give any alarm.

Upon this evidence the judge properly submitted the case to the jury *(State v. Green,* 117 N. C., 695; *State v. Kiger,* 115 N. C., 746), subject to his power to set aside the verdict, if the court did not deem the verdict was altogether sufficiently supported by the evidence, which power the court saw fit not to exercise.

There was certainly evidence from which an inference of guilt might be properly drawn.

There are cases of circumstantial evidence in which each circumstance depends upon the truth of the preceding one, in which case (732) the evidence may be likened to a chain which is no stronger than its weakest link, but usually that simile is inapplicable. Ordinarily, the circumstances accumulate, each one by itself being of no great weight, but like the bundle of twigs in the fable, or the several strands twisted into a rope or cable, becoming, when united, of great strength. *State v. Christmas,* 101 N. C., 749; *State v. Powell,* 94 N. C., 965; *State v. Mitchell,* 89 N. C., 521; *State v. Wilson,* 76 N. C., 120; *State v. Thompson,* 97 N. C., 496. In *State v. Rhodes,* 111 N. C., 647, there was no evidence against the defendant except threats.

No error.

FAIRCLOTH, C. J., dissents.

Cited: S. v. Flemming, 130 N. C., 689.

(733)

STATE v. WILLIAM GENTRY.

(Decided 23 December, 1899.)

Murder—Second Degree—Self-Defense—"Retreating to the Wall."

1. There may be cases, though rare and of dangerous application, where a man in personal conflict may kill his assailant without retreating to the wall.

2. This doctrine, that a man can kill his assailant, though he could with safety retreat, was properly applied in *Dixon's* case (75 N. C., 275), where the man assaulted was in his own dwelling and was murderously assaulted by one he had ordered out.

3. Ordinarily, it is enough to say, if the prisoner could not with safety retreat, he was justifiable in taking human life.

4. Upon appeal from a conviction for a lesser offense than that charged in the bill, a new trial if granted must be upon the full charge in the bill.

STATE *v.* GENTRY.

INDICTMENT, murder, tried before *Stevens, J.,* of the Western District Criminal Court at May Special Term, 1899, of MADISON County.

The prisoner was indicted for the murder of Williard Franklin, and was convicted of murder in the second degree, and from the judgment rendered, appealed to the Superior Court. The appeal came on to be heard at July Term, 1899, of the Superior Court, before *Coble, J.,* who affirmed the judgment, and the prisoner appealed to the Supreme Court. The circumstances attending the homicide, the exceptions to his Honor, Judge Stevens's charge, and to his refusal to charge as requested, are stated in the opinion.

CLARK, J., writes the opinion.
MONTGOMERY, J., writes dissenting opinion.

J. M. Gudger, Jr., for appellant.
Attorney-General for the State.

CLARK, J. The prisoner, convicted in the Criminal Court for (734) Madison County of murder in the second degree, appealed to the Superior Court, in which his assignment of error being overruled, he appeals to this Court. The only exceptions relied on, are that the court did not charge as requested, "that if the jury shall find from the evidence that the deceased assaulted the prisoner with a knife and being himself without fault had reason to apprehend that he was about to suffer death or great bodily harm unless he killed the deceased, then he could stand his ground and kill the deceased, and the killing would be justifiable," and that the court charged in lieu thereof: "Now if you are satisfied from the evidence that the prisoner previously had fights and quarrels with the deceased, but a reconciliation took place, and that they made friends about the card game, that the prisoner and the deceased entered into an engagement to go to Sodom, that the prisoner borrowed or hired a pistol for the purpose of taking it to Sodom, and not for the purpose of arming himself to kill the deceased, that the prisoner followed the deceased from Bud Gentry's house to the place of the homicide in pursuance of the engagement to go to Sodom, and that on approaching and overtaking the deceased, the deceased asked the prisoner, "Damn you, where are you going?" and the prisoner replied, "I don't like to be intruded upon or imposed upon," and if you shall be further satisfied from the evidence that thereupon the deceased wheeled right around and said, "Damn you, I will kill you," and commenced coming towards the prisoner and raised his right hand with an opened knife, with a blade three or four inches long,

and advanced within a step or two of the prisoner and the prisoner fired; and if you shall be further satisfied that at the time the prisoner shot the deceased he shot under the reasonable apprehension that he
(735) was about to lose his life or suffer great or enormous bodily harm, and used no more force than a man of ordinary prudence would have used under similar circumstances, and that the fierceness and suddenness of the attack were such that he could not retreat with safety, he would not be guilty, and it would be your duty to render a verdict of not guilty."

The prayer asked was properly refused, and it is expressly so held in *State v. Matthews,* 78 N. C., at p. 534. It would not have been proper to have charged as asked if the prisoner "had reason to apprehend" he could stand, etc., but he must also actually have apprehended, or as the judge put it in his charge, given in lieu of this prayer, if the prisoner "shot under the reasonable apprehension," etc., then he would not be guilty.

The prisoner's counsel insists that it was error to tell the jury that, "if the fierceness and suddenness of the attack were such that he could not retreat with safety, the prisoner would not be guilty," if he slew the aggressor. There is nothing in this that the prisoner can except to. It is true, "there may be cases, though they are rare and of dangerous application, where a man in personal conflict may kill his assailant without retreating to the wall" (*State v. Kennedy,* 91 N. C., at p. 578), but the court was not asked to charge that this was such a case, and did not charge anything to the contrary. The charge must be construed by the context. The judge was charging the prisoner's view of the occurrence. His recital of facts was of those given in by the prisoner on the stand, an improbable account of the transaction on its face, and contradicted by the overwhelming weight of the evidence, but the judge told the jury that if they believed that was the state of facts, and the prisoner could not with safety retreat (which was the synonym of the statement, "if the deceased was advancing on him with raised blade three or four inches long and within
a step or two of him"), then the prisoner was justifiable in kill-
(736) ing, and should be found not guilty. The jury evidently did not believe that state of facts.

This case differs from *State v. Dixon,* 75 N. C., 275, relied on by prisoner's counsel, in that there the prisoner was in his own dwelling, and had ordered the deceased out, but he returned and murderously assaulted the prisoner, advancing on him with a deadly weapon, when the prisoner shot and killed. The judge instructed the jury to render a verdict of manslaughter. This Court, in reversing the judge, went

on to say, though it was not necessary to the decision, that under such circumstances it was not incumbent upon prisoner to flee. He was in fact already at the wall. He was in his own dwelling. Some general expressions are used, but they must justly be construed with reference to the facts of that case or one very similar. Here, they are totally different. By the prisoner's own evidence there had been fights between him and the deceased, one very recently; he overtook the deceased in the road and, when accosted rudely by him, replied so rudely that the deceased attacked him with a knife. It was upon these circumstances that the judge told the jury, "If the fierceness and suddenness of the attack were such that the prisoner could not retreat with safety, he would not be guilty." As said in *State v. Kennedy, supra,* a much later case than *State v. Dixon,* the doctrine that a man can kill his assailant, though he could with safety retreat, is of "rare and dangerous application." It was applied properly in Dixon's case where the man assaulted was in his own dwelling, and was murderously assaulted by one he had ordered out. It does not apply to the facts and circumstances of this case, where the prisoner in the public road overtakes a man with whom he had recently had a fight, and the assault of the deceased follows a rude reply of the prisoner. In such case it is enough to say, "if the prisoner could not with safety retreat, he was justifiable in taking human life." *State v. Dixon* (737) is also noticed in *State v. Vines,* 93 N. C., 493, which says, that it went off upon the ground that the judge *directed* a verdict. The proposition that a man can slay notwithstanding he could retreat with safety has thus been restricted by the two cases cited, and certainly ought not to be extended beyond the circumstances of *State v. Dixon* or those very similar, and has not been so extended in any case in this Court. In fact it has not been since applied in any case. "Of rare and dangerous application," the doctrine certainly has no application to a fight in the public road, where the jury, in response to a charge, has found that the "suddenness and fierceness of the assault *were not* such that the prisoner could not with safety retreat," for if they were, then under the charge a verdict of not guilty would have been returned.

The weight of evidence, if believed, pointed to murder in the first degree, and it is doubtful at best if a new trial could have beenefited the prisoner. He certainly has no just ground to hope for a more lenient verdict, and under all our authorities, if the case had gone back for a new trial it must have been for the offense charged in the bill. It is upon that charge that an appeal asks that the prisoner have a

trial *de novo*. *State v. Stanton,* 23 N. C., 424, and other cases cited in *State v. Freeman,* 122 N. C., 1012.

The judgment below is affirmed. This will be certified to the Superior Court for Madison County.

No error.

MONTGOMERY, J., dissenting. His Honor instructed the jury (among other things, not excepted to): "If you are satisfied from the evidence that prisoner previously had fights and quarrels with deceased, but a reconciliation took place, and they made friends about the card game, that prisoner and deceased entered into an engagement to go (738) London; that prisoner borrowed or hired a pistol for the purpose of arming himself to kill deceased; that prisoner followed deceased from Bud Gentry's house to the place of the homicide in pursuance of the engagement to go to London, and that on approaching and overtaking deceased, the deceased asked prisoner, 'Damn you, where are you going?' and the prisoner replied, 'You told me you wanted to go to London tonight,' and deceased replied, 'You are a damn lie—I never said it,' and prisoner replied, 'I don't like to be intruded upon, or imposed upon'; and if you should further be satisfied from the evidence that thereupon the deceased wheeled right around and said, 'Damn you, I will kill you,' and commenced coming toward prisoner and raised his right hand with an open knife with a blade three or four inches long, and advanced within a step or two of prisoner, and prisoner fired; and if you should be further satisfied that at the time prisoner shot deceased he shot under a reasonable apprehension that he was about to lose his life or suffer some great or enormous bodily harm, and used no more force than a man of ordinary prudence would have used under similar circumstances, and that the fierceness and suddenness of the attack was such that he could not retreat with safety, he would not be guilty," etc., etc.

The prisoner introduced evidence tending to prove all the facts which were recited in that part of his Honor's charge above quoted. Exception was made by the prisoner's counsel to the closing words of the charge, *"and that the fierceness and suddenness of the attack was such that he could not retreat with safety."*

The only questions then in the case, as I see it, is, whether (if the jury should have found the facts as testified to by the prisoner's witnesses to be true) it was necessary, in order to the prisoner's justification, that he should have attempted a retreat from his assailant.

I think that in law he was not compelled to do so. In the (739) works of several of the writers upon the English common

law, in English adjudicated cases, and in the decisions of our own Court, we have a clear distinction marked out as to the rule which governs the conduct of one who slays his assailant, where the assault is felonious and murderous, and the rule which governs where the assault is not made with felonious and murderous intent; and the distinction, as I read it, is where the assault is not with a felonious or murderous intent the one assaulted must avoid taking the life of his assailant if a way of retreat be open to him; he can not stand his ground and kill his adversary without an attempt to avoid it, though he may give blow for blow in his own defense. But in cases where the assault is felonious and murderous, the assaulted person is not bound to run away. If he is without fault himself, he can stand his ground and kill his adversary. He is not even bound to wait and give his adversary an even showing with him, for, if he is without fault himself, and his adversary is bent on taking his life or doing him some enormous bodily harm with a deadly weapon, and within a distance in which the weapon can be used, the assailed person need not run the risk of losing his life or suffering great bodily harm at the hands of the would-be murderer.

In Foster's Crown Law, p. 273, it is written . . . "the writers on the Crown Law, who I think have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at, yet all agree that there are cases in which a man may, without retreating, oppose force by force even to the death. This, I call justifiable self-defense, the justifiable homicide. In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation or property against one who manifestly intendeth and endeavoreth with violence or surprise (740) to commit a known felony on either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable. The right of self-defense in these cases is founded on the law of nature, and is not, nor can be, suspended by any law of society."

In *State v. Dixon,* 75 N. C., 275, the same doctrine is followed. I can do no better than to quote from that opinion: "If the evidence thus considered established that the prisoner was not in fault, and that the attempt of the deceased was with felonious intent, the authorities establish that it is a case of justifiable self-defense." The general rule is: "That one may oppose another attempting a perpetration of a felony, if need be, to the taking of the felon's life, as in the case of a person attacked by another intending to murder him, who thereupon

kills his assailant. He is justified." 2 Bishop, Cr. Law, sec. 632. A distinction which seems reasonable, and is supported by authority, is taken between assaults with felonious intent and assaults without felonious intent. In the latter class, the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force by force; in the former, where the attack is made with murderous intent, the person attacked is under no obligation to flee; he may stand his ground and kill his adversary if need be." 2 Bishop, *supra,* 633, and cases there cited. And so Mr. East states the law to be: "A man may repel force by force in defense of his person, habitation or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, burglary, robbery and the like, upon either. In these cases he is not obliged to retreat, but may (741) pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defense." 1 East P. C., 271; 2 Bishop, *supra,* sec. 633. The American doctrine is to the same effect: "If the person assaulted, being himself faultless, reasonably apprehends death or great bodily harm to himself unless he kill the assailant, the killing is justifiable." 2 Bishop, *supra,* sec. 644. "The attempt to commit a felony upon the person may be resisted to the death without flying or avoiding combat." *Ibid.,* sec. 652. The very same principle was affirmed in *State v. Matthews,* 78 N. C., 534, where it is said by the Court: "It is said in all the authorities, and can not be doubted, that if a man who is assailed believes and has reason to believe that although his assailant may not intend to take his life, yet he does intend and is about to do him some enormous bodily harm, such as maim, for example, and under this reasonable belief he kills his assailant, it is homicide *se defendendo,* and excusable. It will suffice if the assault is felonious. Foster, 274." In the opinion of the Court in this case, the case of *State v. Dixon, supra,* is undertaken to be distinguished from the case at bar. It is true that the homicide in Dixon's case occurred in the store of the prisoner, and that his residence was attached to the storehouse, but that fact had no bearing upon the decision in that case; it only came out as a matter of proof as to where the homicide occurred. Nowhere in the opinion was the principle of law announced by the Court intended to be applied peculiarly because the homicide occurred on the premises of the prisoner. The principle of law laid down in *State v. Dixon, supra,* was a general principle, intended to apply wherever a homicide might occur, whether at the slayer's house or on the highway or anywhere else.

In the opinion of the Court in this case, the real exceeption (742) taken by the prisoner to the charge of his Honor has been misconceived, in my judgment, and a most important part of the evidence as given by the prisoner as to what occurred just at the time of the homicide has been overlooked. In the opinion of the Court, it is said: "The weight of evidence, if believed, pointed to murder in the first degree, and it is doubtful, at best, if a new trial would have benefited the prisoner. He certainly had no just ground to hope for a more lenient verdict, and under all our authorities if the case had gone back for a new trial it must have been for the offense charged in the bill." I heartily concur in that view of the Court that the weight of evidence was to the effect that the prisoner maliciously, deliberately and premeditatedly murdered the deceased. But this is not the point in the case. His case was prejudiced, according to my view, by an erroneous instruction as to the law, and that ought not to have been. Further, I am afraid that the departure in this case from the rule laid down in *State v. Dixon* and *State v. Matthews, supra,* will result in the conviction of some better man than the prisoner in this case, who, in the defense of his own person without fault, may himself slay an assailant who is attempting to murder him from motives of malice and premeditation.

Cited: S. v. Hunt, 128 N. C., 587; *S. v. Clark,* 134 N. C., 718; *S. v. Lilliston,* 141 N. C., 861, 862; *S. v. Matthews,* 142 N. C., 662; *S. v. Walker,* 145 N. C., 569.

(743)

CASES DISPOSED OF BY PER CURIAM ORDER.

DELOATCH *v.* CUMMER Co., Northampton County. October 10. Affirmed.

TERRY *v.* N. & C. RAILROAD Co., Bertie County. October 10. Affirmed. This case is governed by *Culbreth v. Downing,* 121 N. C., 205, and *Narron v. R. Co.,* 122 N. C., 861.

JOHNSON *v.* N. & C. RAILROAD Co. October 10. Dismissed for failure to bring up and print material parts of record.

STATE *v.* DENTON, from Nash. December 19. Affirmed.

HIGH *v.* PANNILL, from Vance. December 20. Affirmed.

STATE *v.* SEAGROVES, from Wake. December 19. Affirmed.

VASS *v.* MCDONALD, from Wake. October 24. Affirmed.

COLLINS *v.* TEER, from Orange. November 28. Affirmed.

INGLEBRIGHT *v.* INGLEBRIGHT, from Alamance. Plaintiff's appeal docketed and dismissed under Rule 17, October 26.

BERNARD *v.* HEWLETT, from New Hanover. December 20. Reversed.

HERRING *v.* PUGH, from Sampson. Affirmed on authority of *Gattis v. Griffin,* at this term, December 5.

MITCHELL *v.* NOBLE, from Jones. Defendant's appeal docketed and dismissed under Rule 17, November 1.

STATE *v.* FORD, from Richmond. Dismissed December 19, on the ground that there is no bond on appeal or order allowing appeal in *forma pauperis.*

KENTWORTHY *v.* EMMETT, from Cumberland. Affirmed December 5.

BROWN *v.* W. & W. RAILROAD Co. Affirmed November 14.

GEDDIE *v.* BREECE, from Cumberland. Affirmed November 14.

FLAKE *v.* N. C. RAILROAD Co., from Anson. Affirmed No-
(744) vember 14.

KENNEDY *v.* R. & A. A. L. RAILROAD Co., from Moore. Affirmed November 14.

STATE *v.* BURGESS, from Randolph. Affirmed November 21.

CLEMENT *v.* ROSEMAN, from Rowan. Affirmed November 21.

GOODMAN *v.* CLEMENT, from Rowan. Compromised by the parties, October 27.

REEVES *v.* JONES, from Alleghany. Defendant's appeal docketed and dismissed under Rule 17, November 21.

WILSON *v.* ELLIOTT, from Catawba. Affirmed December 19.

CASES DISPOSED OF BY PER CURIAM ORDER.

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Premeditation to be established by competent proof. *State v. Smith*, 615.

MURDER IN SECOND DEGREE:
Since Act 1893, the law presumes malice only from the killing but not premeditation. The certainty requisite to a verdict of guilty is the same for all grades of criminal offenses. Where verdict is murder in second degree, special instructions as to murder in first degree must not be passed on. *State v. Hicks*, 636.

MUTUAL promises are mutual considerations. *Cotton Mills v. Manufacturing Co.*, 329.

NEGLIGENCE, contributory, no defense to wanton injury; eliminates all questions of negligence on both sides. Defendant company responsible for willful injury by its employees, while on duty in its service. *Brendle v. R. R.*, 474.

Charge in complaint must be proved by the greater weight of evidence; certainly is not the rule. *Asbury v. R. R.*, 568.

May consist in some act of omission or commission. *Ib.*

Injury occasioned by one's own negligence, and in spite of warning, not recoverable. *Miller v. Guano Co.*, 323.

Of counsel will not excuse if client has been neglectful. *Norton v. McLaurin*, 185.

NEW TRIAL in State case, if granted, must be upon the full charge in the bill. *State v. Gentry*, 733.

May be allowed by the Superior Court for inadequacy, as well as for excess of damages. *Benton v. Collins*, 83.

Partial new trials may be granted by both Supreme and Superior Courts. *Ibid.*

NONSUIT:

On motion to nonsuit, the evidence of plaintiff in its most favorable light alone to be considered. *Powell v. Railway Co.*, 370.

Contributory negligence not to be considered, being matter of defense. *Ib.*

Terminating an action, precludes the filing of a counterclaim.

Nonsuit may not be taken, when a counterclaim, well pleaded, is already filed. *Well Co. v. Ice Co.*, 80.

Under Act 1897, ch. 109.

The evidence will be construed most favorably for plaintiff. *Cowles v. McNeill*, 385.

NOTE AND MORTGAGE—Owner can sue in his own county on the note if no remedy is asked upon the mortgage on the land situated in another county. *Max v. Harris*, 345.

NOTICE of dissolution of partnership should be given to parties dealing with the firm. *Bynum v. Clark*, 352.

OFFICE, AN, which has not been materially changed by legislation, except as to name, the power and duties remaining the same, is not abolished. *Dalby v. Hancock*, 325.

An officer removing from the county loses his eligibility. *Ib.*

When an office is abolished, the officer is *out;* but when the office is continued under a different name, with additional duties, he is *in. Gattis v. Griffin*, 332.

If property—may be abolished if created by the Legislature, but not transferred from owner. *White v. Hill*, 194.

A public office, to which is attached a salary, is vested interest. *Abbott v. Beddingfield*, 256.

Title to rest on legal right, and not on estoppel. *McCall v. Webb*, 243.

Holder of public office to which salary or fees are attached has a property, a vested right, in it. *Ib.*

OFFICER has right of property in his office by virtue of contract with the State. *Greene v. Owens*, 212.

ORDERS in writing, if relied upon, must be produced or their loss accounted for. *Brafford v. Reed*, 311.

PARTIAL PAYMENTS endorsed on paper containing several notes, effect of. *Brafford v. Reed*, 311.

PARTNERSHIP—Notice of dissolution must be given to persons dealing with it. *Bynum v. Clark*, 352.
Creditors for goods furnished are to be preferred to a mortgagee of one of the firm to secure an individual debt. *Daniel v. Crowell*, 519.
The interest mortgaged is his interest in the surplus after payment of firm debts. *Ib.*
Dissolved by death, the surviving partner is the legal owner of its assets in trust for payment of debts, and then for estate of deceased partner. *Hodgin v. Bank*, 503.
Firm assets deposited in bank are not to be applied by the bank, without his consent to payment of firm debt due the bank. *Ib.*

PARTY brought in by publication of summons, to be allowed liberal opportunity of defense. *Rhodes v. Rhodes*, 191.

POSSESSION, actual part of the land embraced in a deed for twenty-three years is coextensive with the boundaries and perfects the title. *State v. Elks*, 603.
Evidence of defendant's obstructing the survey, claiming to be owner, forbidding entrance upon the land, and claiming wood cut by defendant therein, is evidence for the jury of possession. *Cowles v. McNeill*, 385.

PRACTICE—A nonsuit may be set aside during the term. *Well Co. v. Ice Co.*, 80.
In appeals counsel prepared the case and counter case, and usually serve it on opposing counsel, unless objected to. *Ice Mfg. Co. v. R. R.*, 17.
Partial new trial (on some of the issues) are granted by both the Superior and Supreme Courts. *Benton v. Collins*, 83.
New trials may be granted by the Superior Court for inadequacy, as well as for excess, of damages. *Ib.*
A demurrer for misjoinder of different causes of action should be sustained, but the action should not be dismissed; if not amended, the action should be subdivided. *Gattis v. Kilgo*, 133.
If judgment of dismissal is rendered below when nonsuit was intended, a motion in the cause is the remedy. *Murray v. Southerland*, 175.
Issue as to indebtedness to be passed on by the jury; when the receipt of the money of the plaintiff is admitted in the answer, the burden of proof as to its disposition is shifted on the defendant. *Crews v. Cantwell*, 516.
New trial in State case, if granted, must be on the full charge in the bill. *State v. Gentry*, 733.

PRETENCE—Indictment not necessary to charge intent to defraud any particular person—nor the ownership of the article obtained. *State v. Ridge*, 658.

PROBABLE cause is a question of law—facts for the jury.
Voluntary waiver of preliminary examination is *prima facie* evidence of probable cause. *Jones v. R. R.*, 227.

PROCESS may be served on prisoner in jail. *White v. Underwood*, 25.

PROMISSORY NOTE—A verbal contemporaneous agreement as to mode of payment does not alter or contradict the written contract, is a different contract and is admissible. *Quin v. Sexton*, 447.

Payment by principal on a note before the bar of the statute, operates as a renewal as to himself, these sureties and endorsers; if *made after*, as to himself only. *Garrett v. Reeves*, 529.

Successive payments made within time, operate as renewals. *Ib.*

Act 1827, Code, sec. 50 renders endorsers liable as sureties. *Ib.*

"PRUDENT MAN" rule applicable to females. *Asbury v. R. R.*, 568.

PUBLIC OFFICE, with salary attached, is vested interest, not affected by change of name nor addition of some new duties, nor mere amendment of the act. *Abbott v. Beddingfield*, 256.

PUBLIC ROADS—Working public roads is a duty, not a tax, imposed by law and may be regulated in different ways in different localities. Under Act 1899, ch. 581 (Road Law) evidence is competent that a written notice was left with road hand, without producing it. *State v. Sharp*, 628.

Personal service means service on the work hand personally, not by the overseer personally. *State v. Covington*, 641.

Inability through sickness to perform road duty is a full defense. *Ib.*

PUNITIVE damages being demanded in the complaint, matters in mitigation may be given in evidence, under the general issue. *Benton v. Collins*, 83.

PURCHASER of land under parol contract who has paid the money not to be evicted without full indemnity. *Pass v. Brooks*, 129.

Pendente lite is fixed with notice. *Bird v. Gilliam*, 76.

QUO WARRANTO—Title to office, 256.

Fish Commission. *White v. Hill*, 194.

County Board of School Directors. *Greene v. Owen*, 212.

Solicitor of Criminal Courts—McDowell, Yancey, Forsyth and Burke Counties. *McCall v. Gardner*, 238.

Solicitor of Criminal Court of Buncombe County. *McCall v. Webb*, 243.

Solicitor of Criminal Court of Madison County. *McCall v. Zachary*, 249.

County Board of School Directors, Davidson County. *Ledford v. Greene*, 254.

Corporation Commission. *Abbott v. Beddingfield*, 256.

County Board of School Directors, Granville County. *Dalby v. Hancock*, 325.

County Board of School Directors, Chatham County. *Gattis v. Griffin*, 332.

RAILROAD COMPANY, whose engineer, while on duty, intentionally frightens horses by blowing the whistle and causes them to run away is responsible for damages. *Brendle v. R. R.*, 474.

Contributory negligence no defense to wanton injury, which eliminates all question of negligence on both sides. *Ib.*

Not responsible for medical treatment of trespasser injured by railroad accident. In cases of emergency conductor may engage a physician for passenger or employees of the road. *Adams v. R. R.*, 565.

RAPE—Prosecutrix's evidence may be corroborated by her declarations made shortly after the assault. *State v. Brown*, 606.

RATIFICATION of an act of legislation conclusive of the ratification, but not of compliance with Art. II, sec. 14, of the Constitution. *Smathers v. Commissioners*, 480.

REAL PROPERTY—A suit to determine conflicting claims to land under Act of 1893, ch. 6, may be treated as an action of ejectment when the complaint in effect corresponds. *Hines v. Moye*, 8.

RECEIVERS of rents and profits by appointment of the court constructively in possession; to disturb such possession will be a contempt. *Delozier v. Bird*, 493.

RECORD proper, and not *statement* of the case governs the court in case of discrepancy. *State v. Truesdale*, 696.

REFEREE, facts found by, on competent evidence and confirmed by the court not reviewable. *Holt v. Couch*, 456.

REFERENCE—The court retains jurisdiction and control of cases under reference to review, reverse, modify or set aside. *Brackett v. Gilliam*, 380.

REHEAR, petition to, requisite for guidance of justice under rule 53, Clark's Code, p. 711; when a rehearing has been ordered a manifest error will be corrected. *Hodgin v. Bank*, 503.

Must show error, the original opinion presumed to be correct. *Webb v. Hicks*, 201.

RELEASE:

A release of damages, unless invalidated by fraud, alleged and proved, operates as a satisfaction and precludes recovery. *Wright v. R. R. Co.*, 1.

REMOVAL of cause for trial, order for, appealable at once. *Roberts v. Connor*, 45.

For trial not ordered when the action is upon a note secured by mortgage on land in another county, but no relief is asked upon the mortgage. *Max v. Harris*, 345.

SCHOOL orders not negotiable, and open to defense. *Bank v. Warlick*, 593.

SHELLEY'S case, rule in. *King v. Stokes*, 514.

SHERIFF not to farm out his office. Code, sec. 2084. May employ deputy to assist, but may not delegate his authority. *Cansler v. Penland*, 578.

Illegal transactions, acts *mala in se* and *mala prohibita*, will not be enforced. *Ib.*

Amercement of, is a penalty prescribed by law with no dispensing power in the courts. *Swain v. Phelps*, 43.

SPECIAL instructions, if desired, must be asked for. *Howard v. Turner*, 107.

SPECIFIC PERFORMANCE of contract not to be demanded when plaintiff can not perform his part, but a court of equity will enforce payment where a defective title is made good before decree, if the delay has not materially altered the situation of the parties. *Mincey v. Foster*, 541.

STATE TREASURER to keep separate accounts for each fiscal year. *Arendell v. Worth*, 111.

Not liable to mandamus for refusing to pay warrants improperly drawn. *Ib.*

In entitled to mandamus to require proper warrants. *Ib.*

State prison indebtedness. *Ib.*

Statutes *in pari materia* to be considered and construed together. *Ib.*

STATE WARRANT appended to affidavit and referring to it, incorporates it as fact of the warrant. *State v. Sharp*, 628.

STATUTE OF FRAUDS apart, a deed is good without consideration. *Howard v. Turner*, 107.

While want of consideration is not fraud *per se*, it is circumstance to be considered along with others. *Ib.*

He who alleges fraud, undue influence or intimidation, must prove it. *Ib.*

Of limitations not available as a defense when the action is upon several notes written on same sheet of paper and a number of payments, within date, have been received and endorsed without application to any particular note. *Brafford v. Reed*, 311.

Repelled by partial payment within time as to principal sureties and endorsers—if not within time, the payment is a renewal as to principal only—if successive payments within time of each other are made by principal they operate as renewals by all of them. *Garrett v. Reeves*, 529.

Three years applicable to a parol agreement, but not to contract by deed. *Adams v. Battle*, 152.

Not available as a defense against a female plaintiff, a minor at marriage, and under coverture ever since. Act of 1899, ch. 78, not applicable to existing suit. *Lafferty v. Young*, 296.

STOCKHOLDER suing for reissue of lost certificate of stock, which loss is denied, an issue is raised for the jury. Before the contents of lost paper is passed on, the court first determines whether there is *prima facie* evidence of loss to let in proof of contents—both issues going to the jury. *Hendon v. R. R.*, 124.

STOCK LAWS, constitutional proceeding *in rem*. *Hogan v. Brown*, 251.

SUPERINTENDENT (county) of public schools, how elected. *Ledford v. Greene*, 254.

SURETY is discharged by extension of time without his assent, so is the security given by third party; e. g., a mortgage. *Jenkins v. Daniels*, 161.

But additional security given without stipulation for extension of time, is merely collateral security. *Ib.*

TAX LISTER of another's land in his own name, who allows it to be sold, and becomes the purchaser and takes the sheriff's deed, acquires no title—he simply pays his own taxes. *Griffith v. Silver*, 368.

TAXES of nonresident:

Where the agent of a nonresident takes a general receipt from the sheriff for all taxes demanded, a sale afterwards by the sheriff of omitted property, without notice, passes no title. *Wooten v. White*, 403.

TAXES—*Continued.*
Repayment of invalid tax assessment not recoverable unless demanded in writing within thirty days under State law. *Bristol v. Morganton*, 365.

TENANTS IN COMMON can not claim betterments under the Code, ch. 10. *Holt v. Couch*, 456.
Equity provides for them to effect equality. *Ib.*
Claiming equality of benefits, they must submit to equality of burdens either in the partition of the land, or in the proceeds of sale. *Ib.*

TOWN COMMISSIONERS to publish statement of taxes and expenditures under a penalty. Code, sec. 3816. *Roberts v. Southern Pines*, 172.
Not relieved from penalty for failure by their successors supplying the omission. *Ib.*

TROVER, in action in nature of, title and possession or right of possession necessary. *Russell v. Hill*, 470.
Against wrongdoers, possession is presumptive evidence of title, subject to rebuttal. *Ib.*
Purchaser of growing timber from person in adverse possession, who cuts and removes it, may maintain trover for its conversion by a wrongdoer; the real owner would have to proceed against party in possession for damages to the freehold. *Ib.*
Trespass is an offense against possession; when the prosecutor is in actual possession, title in the defendant will not avail as a defense. *State v. Fender*, 649.

VARIANCE, since The Code, sec. 1183, to be fatal in legal proceedings, must be substantial and material. *State v. Ridge*, 655.

VERBAL AGREEMENT, if *contemporaneous*, will not be heard to contradict or vary the terms of an instrument under seal; if *subsequent*, it is admissible to secure complete justice; e. g., the rate of commissions allowed in a deed of trust may be afterwards reduced by parol agreement. *Adams v. Battle*, 152.

VERDICT may be set aside by trial judge where the damages are grossly inadequate, and his decision is not reviewable.
To fix the pecuniary worth of a man to his family, evidence is competent of his capabilities, habits, character, age, etc. *Burns v. R. R.*, 304.

VERIFICATION of complaint, how made properly.
If properly made, a verdict answer is called for or judgment final is rendered; if not properly made judgment is by default and inquiry, when there is no answer. *Cole v. Boyd*, 499.
Must accord substantially with The Code, sec. 258. *Ib.*

WIDOWS are allowed, by statute, six months in which to dissent from husband's will, and the time is not to be abridged. *Richardson v. Justice*, 409.
Year's allowance valid against general creditors of her husband, but postponed to liens and equities at his death. *Hinkle v. Greene*, 489.
When minors and without guardian, in dissenting from their husbands' wills, may be represented by next friend, duly appointed. *Hollomon v. Hollomon*, 29.

WIDOWS—*Continued.*
Not entitled to the extra allowance for support of infant stepchildren, when provision is made for their support and education out of profits of the estate. *Ib.*

WILLFUL and wanton injury eliminates all questions of negligence on both sides. *Brendle v. R. R.*, 474.
Employer responsible for such injury occasioned by employee in his service and on duty.

WILLS:
In construing wills, the intention is the controlling fact to be ascertained. *Hines v. Mercer*, 71
Since the statute (Code, sec. 2141) lands owned at death of testator will pass, unless a contrary intention shall appear in the will. *Ib.*
General rule of construction of devise; exception. *Ib.*
Objectors to probate, who contest the will, are really caveators, and may so be termed. *Collins v. Collins*, 98.
The probate is a proceeding *in rem* entrusted to the clerk to be speedily adjudicated by him over which objecting persons have no control, there being no parties, strictly speaking. *Ib.*
Prima facie evidence of the genuineness of a will. *Ib.*
Issue, *devisavit vel non*, found in favor of will—order of *procedendo* to the clerk. *Ib.*
Devise to wife during widowhood—construction. *In re Brooks Will*, 136.

WITNESSES to a will, as well as the will itself must be in view of testators when signed by them. *Burney v. Allen*, 314.
Witnesses need not be specially requested by him to sign, if done with his acquiescence. *Ib.*

WRITTEN order for goods, if relied on, must be produced, or loss accounted for. *Brafford v. Reed*, 311.